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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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. This appeal raises questions about the legal analysis and evidentiary burden on claimants alleging adverse impact discrimination under s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). More specifically, this appeal raises questions about how claims of intersectional discrimination affect the adverse impact discrimination analysis and evidentiary burden, in particular where a ground that is not protected under the *Charter* is alleged to intersect with a protected ground.[1] Relatedly, this appeal raises questions about the standard and evidentiary burden for establishing a new analogous ground under s. 15 of the *Charter.*

2. The Respondent on appeal, the decision of the Quebec Court of Appeal, and multiple interveners before this Court seek to distort the analytical approach to step one of the s. 15(1) analysis developed by this Court and set out clearly in *Sharma*. They do so by downplaying the causation requirement and relying instead on the intersectional nature of the Respondent's claim to satisfy the burden of establishing a link between immigration-based eligibility criteria, on the one hand, and the historical and systemic disadvantage of women in the labour market on the other.

3. When applied properly, the first step of the discrimination analysis limits findings of discrimination to differential treatment that is *based on a protected ground,* as opposed to a distinction or reason outside of the scope of s. 15's protections. When applied properly, the causation requirement within the first step ensures that the state is held to account for the effects of its actions, while not requiring it to remedy social inequality that is too remote, or to try to do so completely and all at once.

4. Under the Respondent's articulation of the s. 15 analysis, however, any condition to or obstacle on obtaining a childcare-related benefit necessarily meets the first step. The practical result of the Respondent's position is that any law or policy that affects a sub-group of a protected group will at minimum meet the first step of the analysis, regardless of whether the sub-group is

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[1] In this factum, "protected ground" refers to the grounds enumerated in s. 15(1) (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) and grounds analogous to those enumerated which have been recognized by courts as a prohibited ground within s. 15(1)'s protective scope.

itself characterized by a protected ground. This is problematic because it expands the scope of the *Charter*'s protections, bypassing the legal requirements set out in this Court's jurisprudence for the establishment of a disproportionate impact based on a protected ground, or the establishment of new protected grounds under s. 15.

5. This distortion of the step one analysis is reflected in the dissonance between the Quebec Court of Appeal's decision and remedy. Whereas the Court of Appeal found discrimination only against women refugee claimants, the Court's remedy extends the benefit of subsidized childcare to all refugee claimants with work permits in that province. In the result, the Court of Appeal remedied discrimination it did not find.

6. The more doctrinally sound method would have been to engage with the essential nature of the impugned benefit scheme as one differentiating between applicants based on their immigration status. Instead, the Court of Appeal found adverse impact sex discrimination by a benefit that is unavailable to the claimant solely on the basis of her immigration status.

7. The Attorney General of Ontario intervenes to make two submissions.

8. First, this Court should affirm its decision in *Sharma,* maintain its analytically rigorous approach to step one of the s. 15(1) analysis, and decline the suggestion that a different, less onerous approach is apposite in adverse impact discrimination cases, or in response to intersectional claims of discrimination. An allegation of direct discrimination on the basis of immigration status should not obscure the burden of establishing adverse impact discrimination on the basis of sex.

9. Second and relatedly, this Court should clarify the evidentiary burden on claimants seeking to establish a new analogous ground under s. 15 of the *Charter.* Claimants must provide a sufficient record to explain the new ground and the implications of recognizing it.

PART II – STATEMENT OF ISSUES

10. Ontario makes submissions on two issues:

1. What is the evidentiary burden at the first step of the s. 15(1) analysis when a claimant alleges adverse impact discrimination?

2. What is the evidentiary burden on a claimant seeking to establish a new analogous ground under s. 15?

PART III – STATEMENT OF ARGUMENT

1. This Court should affirm its decision in *Sharma* and maintain the evidentiary burden under the first step of the discrimination analysis in adverse impact cases

11. The purpose of the first step of the s. 15(1) analysis "is to ensure that s. 15(1) of the *Charter* is accessible to those whom it was designed to protect".[2] This Court in *Sharma* laid out a careful, analytical approach to the first step of the discrimination analysis, one that applies equally in cases of direct and adverse impact discrimination.[3]

12. Causation and comparison are central issues at step one, particularly in adverse impact cases. A claimant bears the burden of establishing that the impugned measure *creates or contributes* to a disproportionate impact on the claimant group *based on* the asserted protected ground(s).[4] This requires that a claimant establish a causal link or connection between three different elements of their claim: the impugned state measure, the alleged impact, and the asserted protected ground(s). It is only then that a claim comes within the terms of s. 15 of the *Charter.*

13. The Respondent's submissions, the decision of the Quebec Court of Appeal, and multiple intervener submissions before this Court distort the analytical approach to step one of the

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[2] *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux,* 2018 SCC 17 at para 26 [*Alliance*], citing: *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 33 [*Withler*]; *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30 at para 19 [*Taypotat*]; *Corbiere v Canada (Minister of Indian and Northern Affairs*), [1999] 2 SCR 203 at para 8 [*Corbiere*].
[3] *Fraser v Canada*, 2020 SCC 28 at para 48 [*Fraser*].
[4] *R v Sharma,* 2022 SCC 39 at para 42 [*Sharma*], citing: *Fraser* at para 60; *Taypotat* at para 34; *Alliance* at para 26; *Symes v Canada,* [1993] 4 SCR 695 at pp 764-65 [*Symes*].

discrimination analysis as developed by this Court. They do so by downplaying the causation requirement and relying instead on the intersectional nature of the Respondent's claim to satisfy the burden of establishing a link between immigration-based eligibility criteria and the historical and systemic disadvantage of women in the labour market.

14. While the experience of the claimant group and the intersectional nature of the claim are relevant to both steps of the s. 15(1) analysis, they cannot, in and of themselves, establish a causal link. This Court should maintain its analytically rigorous approach to step one of the s. 15(1) analysis. It should decline the suggestion that a different, less onerous approach is apposite in adverse impact discrimination cases, or in response to intersectional claims of discrimination.

a. The purpose of the two-step analysis

15. This Court has reiterated that "the two steps ask fundamentally different questions".[5] While the first step identifies impacts on claimant groups that have a sufficient nexus to a law or state action, and to a protected ground, the second step asks whether such differential treatment amounts to discrimination.[6]

16. The two-step approach ensures that the burden of proof lays with the claimant alleging discrimination and that government need not bear the onus of justifying disadvantage in society unless it is first found to come within the scope of s. 15's protections.

17. The two-step approach is analytically rigorous and applies equally to direct and adverse discrimination cases.[7] This Court in *Sharma* recognized that uncertainty in the evidentiary burden in adverse impact cases had arisen specifically because courts were collapsing the two steps of the analysis in these cases.[8] The Court held that in adverse impact cases, "establishing the distinction [at step one] will be more difficult".[9] This is necessarily so, because a distinction based on a protected ground is not apparent on the face of the law or state action.

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[5] *Sharma* at para 30.
[6] *Sharma* at para 51.
[7] *Fraser* at para 48.
[8] *Sharma* at para 30.
[9] *Sharma* at para 42, citing *Withler* at para 64.

18. When applied properly, the first step of the analysis limits findings of discrimination to differential treatment that is *based on* a protected ground, as opposed to a distinction or reason outside of the scope of s. 15's protections. Distinctions based on enumerated or analogous grounds are "constant markets of suspect decision making or potential discrimination".[10] While courts can recognize new analogous grounds, the burden of proving discrimination on the basis of a protected ground cannot be bypassed by asserting that the impact is experienced at the intersection of multiple factors or characteristics.

19. The second, and related, purpose of the first step of the s. 15(1) analysis is to limit findings of discrimination to impacts than can, in whole or in part, be attributed to the impugned state measure. The "causation requirement" is rooted in the fundamental constitutional principle articulated in s. 32 of the *Charter* that the *Charter* applies only to activities of government. It ensures that the state is held to account for the effects of its actions, while not requiring it to remedy social inequality that is too remote, or to try to do so completely and all at once. Even within the discrimination analysis, the state is thus permitted some leeway to "balance possible inequalities under the law against other equalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic, or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety".[11]

20. The second step is not concerned with the particularities of causation, with identifying a distinction attributable to the state measure and a prohibited ground – those requirements having been met at step one, step two is concerned with whether the claimant group's disadvantage has been reinforced or exacerbated as a result. As this Court noted in *Dickson,* distinctions based on protected grounds may not be discriminatory: "[w]hether or not the ground is *used in a discriminatory manner* is fact-specific and is answered by the second stage of the s. 15(1) analysis. To understand the distinction's *effect* on the claimant, the court needs to know whether the distinction reinforced, perpetuated, or exacerbated the claimant's existing disadvantage."[12]

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[10] *Ibid*.
[11] *Sharma* at para 65, citing la Forest J. in *McKinney v University of Guelph,* [1990] 3 SCR 229 at p 317; see also *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at pp 163-164 and 175.
[12] *Dickson v Vuntut Gwitchin First Nation,* 2024 SCC 10 at para 190 [italics added] [*Dickson*].

b. Step one must assist courts in discerning whether the state is responsible for the alleged impact, under the terms of the *Charter*

21. The Respondents on this appeal and several interveners advocate for a blurring of the lines between the two steps. They argue, when adverse impact discrimination is alleged, the first step of the s. 15(1) analysis is concerned with the real-world effects of the law on the claimant group, echoing language used by the dissent in *Sharma*.[13] The practical difficulty with this broad characterization of the first step of the analysis is that it does not assist courts in determining whether the state is accountable under the terms of the *Charter* for this "real effect".

22. An overrepresentation of individuals identifying with a protected ground (i.e., women) in a particular group (i.e., refugee claimants with young children not in the labour market due to childcare responsibilities) does not provide an answer to the question of whether the impugned state measure *caused or contributed* to that overrepresentation. As Iacobucci J. for a majority of this Court warned in *Symes,* "[w]e must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision".[14]

23. Women disproportionately bear the burden of childcare in society – this fact is well-canvassed in this Court's jurisprudence.[15] But "leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1)."[16] Comparison between the protected ground and non-group members helps to discern whether a gap is left unaffected. Here, there is no evidence that the Appellant's childcare subsidy, by not extending to refugee claimants, has done anything other than leave untouched the existing "gap" between women and men refugee claimants with respect to the distribution of the burden of childcare.

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[13] Factum of the Respondent, Bijou Cibuabua Kanyinda, at paras 25-27 ["Respondent's Factum"]; *Sharma* (dissenting reasons) at para 196.
[14] *Symes* at pp 764-765.
[15] *Fraser* at paras 103-106; *Symes* at pp 762-63.
[16] *Sharma* at para 40.

24. Indeed, as the Appellant points out, the childcare subsidy aims in part to *reduce* the gap between men and women in Quebec, although not all at once and not entirely.[17] The "gap" created or expanded by the Appellant's eligibility criteria is between individuals on the basis of their immigration status.

25. Comparison is a necessary tool in discerning the basis on which a distinction is made for the purposes of the causation requirement in the step one analysis. The Respondent and several interveners rely on this Court's eschewing of the requirement for a formal or rigid comparator group to argue that the Court must look *only* to the effect on women refugee claimants of being denied access to the benefit. However, this court in *Sharma* reaffirmed that step one "necessarily entails drawing a *comparison* between the claimant group and other groups or the general population".[18] Indeed, since this clarification in *Sharma* lower and appellate courts in Ontario have found comparison to be a particularly helpful and necessary tool in discerning disproportionate impact at step one of the analysis.[19] Here, comparison reveals the nature of the distinction as one on the basis of immigration status, not sex.

26. Several interveners on this appeal argue that causation between the impugned state measure and the alleged disproportionate impact on the basis of sex can be satisfied by reasonable inference. Caution must be exercised in making reasonable inferences in adverse impact discrimination cases. In *Sharma,* this Court was urged to make the reasonable inference that, because Indigenous offenders are disproportionately represented in the criminal justice system, Indigenous offenders are also disproportionately affected, on the basis of race, by a reduction in the availability of conditional sentences. A similar inference is urged here: because women disproportionately bear the burden of childcare, women will be disproportionately impacted by *any* obstacle to subsidized childcare, regardless of the nature of the obstacle. The majority in *Sharma* declined to make a

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[17] Factum of the Appellant, Attorney General of Quebec, at paras 129-131; *Sharma* at paras 64-65 (on "incrementalism"). The Respondent has been eligible for the subsidy since 2021, when her previous status as a refugee claimant changed. Her status as a woman, has not changed.

[18] *Sharma* at para 31 [emphasis in original].

[19] *Ontario (Ministry of Children, Community and Social Services) v D.I.*, 2025 ONSC 658 at para 89; *Metro Taxi Ltd et al v City of Ottawa*, 2024 ONSC 2725 at para 301; *Fair Change v His Majesty the King in Right of Ontario,* 2024 ONSC 1895 at para 35.

similar inference and insisted on evidence of a causal link between the state action and the alleged disproportionate effect on Indigenous offenders.[20]

27. Finally, *Eldridge* does not assist the Respondent as (i) a causal link between state action and the alleged disproportionate impact on the basis of sex is still required at the first step of s. 15(1) and (ii) unlike the present appeal, *Eldridge* involved an accommodation, adverse effects discrimination claim. The adverse effects experienced by deaf persons in *Eldridge* stemmed not from the imposition of a burden not faced by the non-deaf population, but rather from a failure to ensure that deaf persons benefit equally from a service *provided to everyone*. All persons – both the deaf and hearing populations - were entitled to receive the same medical services free of charge. The lack of funding for sign language interpreters rendered deaf persons unable to access those medical services.[21] Thus, a causal link was established between the state's failure to accommodate (provide publicly funded interpreter services), the prohibited ground of disability, and inability to access otherwise available publicly funded medical services. By contrast, here, the adverse effects discrimination claim is not one of accommodation – seeking a government benefit to access a benefit provided by government to all; it is a claim that a benefit *provided to some*, while not drawing a distinction on its face based on sex, disproportionately adversely affects women seeking refugee status, on the basis of their sex.

c. The implications of obscuring the causation requirement

28. In Ontario's submission, the implication of obscuring the causation requirement in adverse impact cases, or assuming a "reasonable inference" without caution, is that any law or state action that is experienced more acutely by a group identifying with a protected characteristic will amount to discrimination. Many policy choices and changes (i.e. reductions or terminations in social benefit programs) are experienced more acutely by vulnerable groups within society, and yet, this Court has made clear that s. 15 does not protect a positive right to remedial legislation or programming.[22]

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[20] *Sharma* at paras 66-83.
[21] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 66-76 [*Eldridge*].
[22] *Sharma* at para 63, citing *Thibaudeau v Canada*, [1995] 2 SCR 627 at para 37; *Eldridge* at para 73; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 41; *Alliance* at para 42.

29. Problematic from a practical perspective and the point of view of legislative sovereignty is that, under the Respondent's conception of the s. 15(1) analysis, *termination or reduction* of any childcare-related benefit would satisfy the first step because it would necessarily disproportionately affect women.[23] Since termination or reduction of a benefit will almost always exacerbate the disadvantage of a protected group, it would also satisfy the second step of s. 15(1) and amount to discrimination.

30. Avoiding this expansion of the scope of s. 15(1) of the *Charter* is precisely why this Court in *Sharma* took pains to clarify that s. 15(1) "does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation"[24]:

> Parliament would be prevented from repealing or amending existing ameliorative policies in many cases, unless courts are persuaded that such changes are justified under s. 1. This would amount to a transfer of sentencing policy-making from Parliament to judges. Such an outcome would be contrary to the separation of powers, at odds with decades of our jurisprudence stressing Parliament's latitude over sentencing within constitutional limits, and must be rejected.

31. The Respondent appears to accept that this is a necessary consequence of her conception of s. 15(1). She argues in her factum that any condition on or obstacle to obtaining a childcare-related benefit meets the first step of s. 15(1).[25]

32. Said differently and taken to the Respondent's submission's logical conclusion, any policy that affects a sub-group of a protected group will at minimum meet the first step of the s. 15(1) analysis, regardless of whether the sub-group is itself characterized by a protected ground and regardless of whether the sub-group experiences a disproportionate impact on the basis of a protected ground.

33. The Respondent seeks to expand the scope of the protections of s. 15, including by bypassing the legal requirements as set out by this Court's jurisprudence for the establishment of

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[23] And yet, this Court has stated that budget and cost justifications themselves are not "pressing and substantial objectives" under s. 1 of the *Charter: Nova Scotia (Workers' Compensation Board) v Martin,* 2003 SCC 54 at para 109.

[24] *Sharma* at para 63.

[25] Respondent's Factum at paras 64, 69.

new protected grounds under s. 15. A provincial residency requirement for subsidized childcare, or income eligibility criteria for subsidized childcare: both would satisfy the first step of the s. 15(1) analysis because they deny a sub-group of women a childcare related benefit. This conception of step one creates free entry to s. 15's protections for to-date unprotected grounds like income and provincial residency.

34. The Respondent's conception of disproportionate impact must be distinguished from this Court's decision in *Brooks.* In *Brooks* this Court confirmed that discrimination on the basis of pregnancy is equivalent to discrimination on the basis of sex.[26] Notably, this Court did not recognize pregnancy as an analogous ground, nor did it need to. It held that discrimination on the basis of sex *encompasses* pregnancy-based discrimination because a distinction on the basis of pregnancy will always amount to a distinction on the basis of sex. While the discrimination alleged was adverse impact discrimination it did not require the Court to implicitly accept a new analogous ground, without meeting the appropriate legal test, before it could make a finding of discrimination.

35. Justice Côté's dissenting reasons in *Fraser* reflect this concern. In *Fraser,* the majority found it unnecessary to decide the appellants' alternative argument of whether the Court should recognize parental/family status as a new analogous ground, choosing instead to resolve the claim solely as sex discrimination.[27] Justice Côté, who would not have found discrimination on the basis of sex, agreed with the majority that caregiver, parental or family status is not a recognized analogous ground, and it would not be appropriate to do so in that case. Justice Côté additionally identified what was problematic about the majority's "attempt to fit the claim under the enumerated ground of sex *simpliciter*": it distorted the evidentiary requirement under step one of the s. 15(1) analysis.[28]

36. Per Côté J.'s dissenting reasons in *Fraser,* and as highlighted in the present appeal, it is essential to begin by examining the nature of the claim before the court. In *Fraser,* it was critical to Côté J. "that the appellants had caregiving responsibilities in relation to children". The claim

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[26] *Brooks v Canada Safeway Ltd.,* [1989] 1 SCR 1219 at pp 1241 – 1249.
[27] *Fraser* at para 115.
[28] *Fraser* (dissenting reasons of Côté J.) at para 239.

was "made on behalf of women with children, and not simply women".[29] Upon acknowledging the nature of the claim, for Côté J. it became of "crucial importance" to its disposition that caregiving status is *not* a recognized analogous ground:[30]

> Thus, at least doctrinally, this case is relatively straightforward. Lengthy reasons are elicited only by virtue of the attempt to fit the claim under the enumerated ground of sex *simpliciter*. However, it is clear that the distinction created by the pension plan manifests itself not as a result of sex alone, but as a result of a combination of sex with caregiver status. If the majority wishes to allow the appeal, then the more doctrinally sound method would be to either recognize intersecting grounds as the appellants urge, or recognize a new analogous ground. Without doing so, however, this Court has only attempted to square a circle. And, as a result, doctrinal uncertainty seeps into this Court's s. 15(1) jurisprudence and obscures, rather than illuminates, the way forward. [31]

37. Justice Côté's reasons elaborate on this "doctrinal uncertainty" – uncertainty that was picked up by a majority of this Court in its decision two years later in *Sharma.* Justice Côté explains how, in simply assuming that disproportionate impact on some members of a protected group (a sub-group) is enough to satisfy step one of the s. 15(1) analysis, we "dispos[e] of any requirement of causation":

> [T]he only remaining way to support the conclusion that the pension plan discriminates against women … is to dispose of any requirement of causation, nexus, or tether between the impugned provisions and their effect, and look only to the statistical disparity in results (i.e. women are disproportionately affected). Indeed, my colleague Abella J. takes this doctrinal step and seemingly reduces the step one analysis to a mere search for disproportionate impact evidenced by statistical disparity...[32]

> Disproportionate impact alone cannot be sufficient to meet step one of the s. 15(1) analysis. In other words, simply pointing to the fact that the majority of job-sharers are presently women with children cannot in itself be sufficient to say that step one has been met. Otherwise, for example, a law that regulates the top one percent of income earners in Canada would proceed past the step one analysis simply by virtue of the fact that the top one percent of income earners in Canada are majority male. Analogously, a law regulating the nursing profession would proceed past the step one analysis simply by virtue of the fact

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[29] *Fraser* (dissenting reasons of Côté J.) at para 237.
[30] *Fraser* (dissenting reasons of Côté J.) at para 238.
[31] *Fraser* (dissenting reasons of Côté J.) at para 239 [footnotes omitted].
[32] *Fraser* (dissenting reasons of Côté J.) at para 243 [underline added, citations and footnotes omitted].

> that the nursing profession is majority female. Surely, the aforementioned examples are not instances of *prima facie* discrimination, yet they exemplify how, if disproportionate impact alone were sufficient, step one would become a mere rubber stamp in cases of adverse effect discrimination, rather than a step at which "the claimant will have more work to do", belying the sage guidance from *Withler*: para. 64. Worse yet, if statistical disparities alone were sufficient, the s. 15(1) analysis would, in effect, be replaced with a green light to s. 1, where the burden is reversed and placed on the government.[33]

38. On the present appeal the Respondent's claim is asserted on behalf of women refugee claimants, and not simply women – nobody has asserted a claim on behalf of women who are not refugee claimants. The Respondent is not "denied a benefit that others are granted…by reason of a personal characteristic that falls within the enumerated grounds of s. 15(1)".[34] The impugned measure creates a distinction on the basis of refugee status, not sex *simpliciter.*[35]

d. Intersectionality is not a substitute for the causation requirement

39. As the Respondent and several interveners point out, laws and state actions can make distinctions, and be discriminatory, on the basis of multiple protected grounds.[36] Alternatively, laws and state actions can make distinctions, and be discriminatory, on the basis of a protected ground that is intersecting with grounds that are not protected or are not yet protected under s. 15(1). However, neither of these types of claims should distort this Court's analytical approach to s. 15(1) of the *Charter,* nor lessen a claimant's burden under the first step of the analysis. Evidence of an impact on the basis of a ground or characteristic that is not protected under the *Charter* is not evidence of an adverse impact on the basis of a protected ground.

40. When this Court dispensed with the former requirement under s. 15(1) to identify a "mirror comparator group", it recognized that "allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many interwoven grounds of

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[33] *Fraser* (dissenting reasons of Côté J.) at para 244 [underlined added, footnote omitted].
[34] *Withler* at para 63.
[35] *Fraser* (dissenting reasons of Côté J.) at para 242.
[36] Respondent's Factum at paras 35-41; *Fraser* at para 77: "The purpose of the inquiry is to keep s. 15(1) focussed on the protection of groups that have experienced exclusionary disadvantage based on group characteristics, **as well as the protection of those "who are members of more than one socially disadvantaged group in society"**."

discrimination".[37] It is now "unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination".[38] Dispensing with the mirror comparator group, however, does not dispense with or lessen the causation requirement relative to each ground where the claimant seeks a legal finding of discrimination on each ground.

41. An allegation of *direct* discrimination on the basis of immigration status should not obscure the burden of establishing *adverse impact* discrimination on the basis of sex. Alleging multiple grounds of discrimination cannot permit claimants to bypass the requirements of establishing a new analogous ground where one of the alleged grounds has not yet been recognized. In *Sauvé,* in response to the argument that denying prison inmates the right to vote in federal elections constituted adverse impact discrimination against Indigenous people, the only four justices of this Court to address this issue found that "any analysis of adverse impact or effect discrimination [on the basis of race] seems **parasitic** on finding that prisoner status constitutes an analogous ground".[39]

42. Ontario's intervention in this appeal is not made to argue that intersectional identities and discrimination cannot be recognized within the established legal framework under s. 15(1). Rather, Ontario's submission is that intersectional claims of discrimination must be considered as additive or conjunctive. In other words, if a claimant seeks a finding that a law or government measure is discriminatory on the basis of two protected grounds, they will bear the burden of establishing that the impugned measure causes or contributes to a disproportionate impact on the basis of both of those grounds.

43. In *Falkiner v Ontario,* the Ontario Court of Appeal demonstrated this additive approach to an intersectional discrimination allegation (under the *Law* framework). The Court of Appeal explained why the impugned distinction (the definition of "spouse" in Ontario's *Family Benefits Act*) subjected the claimant group (single women on social assistance) to differential treatment on the basis of sex, marital status, and receipt of social assistance. In a way that was prescient of this

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[37] *Withler* at para 58.
[38] *Withler* at para 63.
[39] *Sauvé v Canada (Chief Electoral Officer),* 2002 SCC 68 at para 202 [emphasis added] [*Sauvé*].

Court's eventual disposal of formal "mirror comparator groups" nine years later, the Court of Appeal rejected the idea that any single comparator group could capture the alleged differential treatment. Instead, it separately considered the impact of the impugned definition of "spouse" on single men on social assistance, married people on social assistance, *and* single persons not on social assistance, in order to determine whether *each* alleged distinction was made out.[40] This conjunctive approach did not prevent the Court from recognizing the claimant group's complex identity, but did require it conduct an analysis concerning each alleged ground of distinction.

44. Furthermore, the second step of the s. 15(1) analysis, in its focus on the adverse effects on the claimant or claimant group, is primed to account for effects experienced at the intersection of multiple identities. There is nothing in the step two analysis that requires limiting the Respondent's experience of the effects of the impugned eligibility criteria to her identity as either a woman or a refugee claimant. Indeed, it is unclear how that would be possible. Since a claimant reaching step two has already established at step one that the terms of s. 15(1) of the *Charter* are engaged, the Court is freed up at the second step to elucidate the full extent of the impact on the claimant or claimant group and deduce whether this amounts to discrimination.

45. For example, for four justices of this Court in *C.P.,* Abella J. examined the intersectional disadvantage and vulnerability experienced by criminalized youth, who are frequently also members of racialized minorities as recognized in this Court's prior caselaw. She recognized this "double vulnerability" under the second step of the s. 15(1) analysis before concluding that the claimant's disadvantage was perpetuated by the denial of the benefit of an automatic right to appeal to this Court.[41] She was able to recognize, under step two, that the claimant's experience of the impugned law was not limited to their experience as a youth – this did not require her to have first

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[40] *Falkiner v Ontario,* 2002 CanLII 44902 (ON CA) at paras 70-81. The Court of Appeal separately considered the question of whether "receipt of social assistance" should be recognized as an analogous ground: paras 84-93.

[41] *R v C.P.,* 2021 SCC 19 at paras 88-90. The majority of the Court on the s. 15(1) found that, in light of the entire scheme or context of the *Youth Criminal Justice Act,* there was no denial of a benefit.

found under step one that the claimant had also made out a disproportionate impact on the basis of race.

e. A distortion of the step one analysis is reflected in the disconnect between the Court of Appeal's remedy and finding of discrimination

46. Finally, the imprecise remedy ordered by the Court of Appeal in this case is reflective of a distortion of the burden at step one of the analysis in the face of an intersectional claim of both adverse and direct discrimination. The Court of Appeal read into the impugned regulation eligibility for *all* refugee claimants with work permits in Quebec. The contrast between this remedy, on the one hand, and the Court's finding of discrimination, on the other hand, is striking. Whereas the Court found discrimination *only* against women refugee claimants, the Court's remedy extends the benefit to all refugee claimants with work permits in the province.

47. In the result, the Court of Appeal remedied discrimination it did not find. The dissonance between the scope of the Court of Appeal's remedy and the scope of its legal conclusion is reflective of an imprecise discrimination analysis. The more "doctrinally sound method" would have been to engage with the essential nature of the benefit scheme as one differentiating between benefit applicants based on their immigration status. Instead, the Court of Appeal found adverse impact sex discrimination by a benefit that is unavailable to the claimant *solely* on the basis of her immigration status.

2. This Court should clarify the evidentiary burden on a claimant seeking to establish a new analogous ground under s. 15

48. This appeal presents the opportunity for this Court to clarify the evidentiary burden on claimants seeking to establish a new analogous ground under s. 15 of the *Charter.* Claimants must provide a sufficient record to explain the new ground and the implications of recognizing it.

49. *Corbiere* provides the current governing principles for identifying an analogous ground from this Court, recently reaffirmed in *Dickson*. To identify a ground of distinction as analogous, courts look for grounds that are like those enumerated in s. 15. What is common between the enumerated and analogous grounds is the "immutability" of personal characteristics, including those that are "constructively immutable", like religion or citizenship. Contrary to the Respondent's argument, this Court has provided nuance to the terms "immutability" and

"constructive immutability" to allow for flexibility of application.[42] An immutable personal characteristic is "changeable only at unacceptable cost to personal identity" and that "government has no legitimate interest in expecting us to change [them in order] to receive equal treatment under the law".[43] These factors have assisted courts in addressing proposed new analogous grounds in different contexts.[44]

50. The recognition of a new analogous ground is a significant decision with far-reaching consequences. As this Court confirmed in *Fraser,* it does not accept a new analogous ground as a "one-off". Rather, "it is either a sustainable legal principle that this Court should accept it or it is not. It should not get a trial run subject to periodic review."[45] Once recognized, an analogous ground is a "constant marker of potential legislative discrimination" in all cases.[46] In this case, recognizing immigration status as an analogous ground means that the many distinctions at law and in policy on the basis of immigration status are inherently suspicious for the purposes of s. 15.

51. It is necessary for claimants seeking to establish a new analogous ground to provide a sufficient record to explain the new ground and the implications of recognizing it. As discussed above, in *Fraser*, this Court refused to recognize caregiving, parental, or family status as an analogous ground in large part because there were insufficient submissions and an insufficient

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[42] Respondent's Factum at paras 92-93.
[43] *Corbiere* at para 13; *Dickson* at para 193; See also *Platnick v Bent*, 2018 ONCA 687 at para 166, aff'd, 2020 SCC 23; *R v Banks*, 2007 ONCA 19 at para 100 [*R v Banks*].
[44] For example, immigration status is a legal condition that can be changed but it is not within an individual's control – there are therefore arguments that it is both immutable and changeable. Despite this, the Ontario Court of Appeal and other Canadian courts have rejected immigration status as an analogous ground in recognition that it can change over time and as the government has a legitimate interest in regulating it: *Irshad (Litigation Guardian of) v Ontario (Minister of Health)*, 2001 CanLII 24155 (ON CA) at paras 135–143, leave to appeal to SCC refused, [2001] SCCA No 218; *Toussaint v Canada (Attorney General)*, 2011 FCA 213 at para 99, leave to appeal to SCC refused, [2011] SCCA No 412; *Almadhoun v Canada*, 2018 FCA 112 at para 28; *Yao v The King*, 2024 TCC 19 at paras 182–188.
[45] *Fraser* at para 115.
[46] *Corbiere* at para 10.

evidentiary record supporting the proposed ground and the consequences of recognizing it. This Court also did not have the benefit of any reasons from the appellate court below on the issue.[47]

52. Per *Fraser* and *Corbiere*, a new analogous ground is not illuminated merely by the presentation of evidence of disadvantage to individuals identifying with the proposed ground. Something more is required to make the analogy to the enumerated grounds under s. 15. In *R v Banks,* the Ontario Court of Appeal refused to recognize a new analogous ground of "beggars" or extreme poverty and held that it is not enough to rely on general assertions that people falling in the proposed ground face hardship and are disadvantaged.[48] Courts have come to a similar conclusion when asked to recognize grounds like criminal history as analogous: evidence of economic and labour market disadvantage faced by those with criminal histories is an insufficient basis on which to decide that criminal history should be an analogous ground under s. 15.[49] As this Court has repeatedly recognized that the *Charter* does not protect economic or property rights, it is logical that something more than membership in a group that shares economic or labour market disadvantage is required to recognize a new protected ground under s. 15.[50]

53. As in *Fraser,* the Court on the present appeal has limited submissions and evidence "about the definition or possible scope of" immigration status as an analogous ground, including submissions and evidence addressing "critical questions about the implications" of adopting immigration status as an analogous ground.[51] This Court does not have the benefit of the Quebec

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[47] *Fraser* at para 117. See also *Thibault v Ontario*, 2025 ONSC 647 (Div Ct) [*Thibault*] at paras 62-71; *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767 at paras 86–91; *Weatherley v Canada (Attorney General)*, 2021 FCA 158 at para 19.

[48] *R v Banks* at paras 98-104; see also *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17 at paras 42–43, leave to appeal to SCC refused, [2009] SCCA No 33124, in which the Nova Scotia Court of Appeal declined to recognize poverty as an analogous ground; *Sauvé* at para 202.

[49] *Thibault* at paras 66-70; see also *R v Banks* at para 101.

[50] *Egan v Canada,* [1995] 2 SCR 513 at p 544 (per L'Heureux-Dubé J.); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 SCR 1123 at p 1179; *Tanase v College of Dental Hygienists of Ontario*, 2021 ONCA 482 at para 40; *Mussani v College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (ON CA) at para 39; *Clitheroe v Hydro One Inc*, 2009 CanLII 33029 (ON SC) at paras 73–77, aff'd, 2010 ONCA 458, leave to appeal to SCC refused, [2010] SCCA No 316; *Vysek v Nova Gas International Ltd*, 2002 ABCA 112 at para 13; *Masse v Ontario Ministry of Community and Social Services)*, 1996 CanLII 12491 at paras 72-73 (Div Ct).

[51] *Fraser* at paras 119 and 123.

Court of Appeal's findings or conclusions on this issue. The Respondent does not precisely define the ground of "immigration status" (e.g., whether it includes citizenship; whether it includes every possible status an individual may hold vis-à-vis the immigration system, or just refugee claimant status). The Respondent does not cite to a single piece of evidence within her submissions before this Court on immigration status constituting an analogous ground. The recognition of an analogous ground requires evidence addressing the consequences or wider implications of recognizing the new ground.

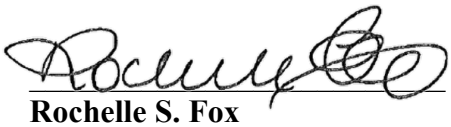
PART IV – SUBMISSIONS ON COSTS

54. Ontario does not seek costs and asks that no order as to costs be made against it.

PART V – ORDER

55. Ontario takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of April 2025.



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PART VI – TABLE OF AUTHORITIES

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