S.C.C. File No. 41210

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

B E T W E E N :

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

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

Respondents

- and -

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

Interveners

(style of cause continued on next page)

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

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PART I — OVERVIEW

1. The Canadian Association of Refugee Lawyers ("**CARL**") intervenes to make three main submissions on the methodology that courts should apply under s. 1 of the *Charter*.

2. *First*, when the state seeks to justify a law that limits a *Charter* right, such as the right to equality under s. 15(1) of the *Charter*, the state bears the burden of showing that the law's objective is pressing and substantial. To meet that burden, the state must first identify the true objective of the limit, and only then show that this true objective is pressing and substantial. It cannot redefine the objective or search for a better objective that, if true, would pass constitutional muster. Moreover, if the state fails to identify the true objective of the limit or to show that this true objective is pressing and substantial, the court must conclude—without further analysis—that the limit is not justified under s. 1. Without a pressing and substantial objective, the law is not justified.

3. *Second*, the stated objective raised by the Attorney General of Québec—to provide financial assistance only to people with a "sufficient connection" to Québec—lacks credibility and precision. On credibility, the text of the legislation itself belies the stated objective. The eligibility provisions *include* temporary foreign workers who, by their very definition, do *not* seek to establish permanent residence in Canada. Yet the eligibility provisions *exclude* refugee claimants with work permits who, by their very definition, *do* seek to establish permanent residence in Canada. This discrepancy suggests that the true objective of the limit may not be to provide financial assistance only to those "with a sufficient connection to Quebec", but rather to penalize asylum seekers based solely on their status. Further, even if the stated objective reflected the true objective, it lacks the necessary precision and is essentially a description of the *means*, not the *end*.

4. *Third*, an objective that is inconsistent with Canada's binding international human rights obligations is presumptively not a pressing and substantial objective under s. 1 of the *Charter*. The *Charter* is presumed to provide at least as much protection as that afforded by international human rights documents ratified by Canada. Further, this Court has often considered international law in assessing whether the objective of a law limiting *Charter* rights is pressing and substantial under s. 1. Here, the objective's exclusion of refugee claimants from access to government-subsidized educational childcare services in Québec is inconsistent with the text and purpose of the 1951 *Convention Relating to the Status of Refugees* (the "***Convention***"). Given this inconsistency, the stated objective presumptively cannot be pressing and substantial under s. 1 of the *Charter*.

PART II — STATEMENT OF QUESTION IN ISSUE

5. CARL intervenes to provide submissions on the methodology that courts should apply under s. 1 of the *Charter*, and more particularly on how courts should determine whether the state has met its burden to demonstrate a pressing and substantial objective under s. 1 of the *Charter*.

PART III — STATEMENT OF ARGUMENT

A. A law's objective cannot be redefined to pass constitutional muster

6. To meet its burden under the first step of the *Oakes* test,[1] the state must *first* identify the objective of the limit in accordance with the true legislative intent, and *second* demonstrate that this true objective is pressing and substantial.[2] If the state fails to identify the true objective of the limit or to show that this true objective is pressing and substantial, the court must conclude that the limit is not justified under s. 1.

7. Those two steps must not be conflated or reversed. The state cannot start by identifying an objective that it believes is pressing and substantial and then work backwards to shoehorn that objective into an existing enactment. Rather, the state must start by identifying the true objective of the limit at the time of its enactment. As a corollary, the state cannot raise a novel objective whenever it suits, and courts "must not try to identify new objectives flowing from an updated interpretation of the provision".[3] In addition, the state's contention regarding the objective of the limit must generally be supported by evidence.[4] In other words, the state generally cannot assert an objective in the air without a sufficient basis in the evidence.

8. If the state's purported objective is not accurate, the court should not attempt to redefine it or search for an objective that would pass constitutional muster. Rather, the court should stop its analysis and conclude that the state has failed to meet its burden under s. 1. Ruling otherwise would be inconsistent with this Court's jurisprudence,[5] including the well-established principle that the

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[1] *R. v. Oakes*, [1986] 1 S.C.R. 103 [***Oakes***], at 138-139; *Frank v. Canada (Attorney General)*, 2019 SCC 1 [***Frank***], at para. 39.

[2] See e.g. this Court's most recent articulations of the *Oakes* test: *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, 2025 SCC 6, at paras. 91, 94; *Ontario (Attorney General) v. Working Families Coalition (Canada) Inc.*, 2025 SCC 5, at para. 61.

[3] *Frank* at para. 58, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 335; *R. v. Butler*, [1992] 1 SCR 452, at 494; *R. v. Zundel*, [1992] 2 S.C.R. 731 [***Zundel***], at 761.

[4] *Hislop v Canada (Attorney General)*, 2007 SCC 10 [***Hislop***], at para. 49. See also para. 53.

[5] See e.g. *Fraser v Canada (Attorney General)*, 2020 SCC 28, at paras. 125-130 [***Fraser***]; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 [***Conseil scolaire***], at paras. 153-154, 163; *Hislop*, at paras. 50-53; *Vriend v. Alberta*, [1998] 1 SCR 493 [***Vriend***], at para. 115.

state bears the burden under s. 1. In any event, if the stated objective does not correspond to the true objective, it necessarily follows that the government will not meet its burden at the next steps of the *Oakes* test, because the other steps all depend on the identified objective.

9. This Court has declined on previous occasions to accept the stated objective identified by the government in cases involving s. 15(1), without attempting to redefine it. For instance:

- In *Vriend*, the Attorney General of Alberta provided submissions on the objective of the statute as a whole, but did not offer submissions on the objective of the limit itself.[6] The Court ruled that the state had "failed to discharge [its] evidentiary burden" under s. 1.

- In *Hislop*, the Attorney General of Canada argued that the pressing and substantial objective of limiting eligibility for survivors of same-sex conjugal relationships for *Canada Pension Plan* ("**CPP**") survivorship pensions was matching the benefits conferred under the CPP with obligations imposed on same-sex partners under other legislation. This Court rejected that purported objective, highlighting an "absence of evidence justifying the matching argument" and the inconsistency of the stated objective with the moment at which survivors of same-sex conjugal relationships did become eligible under the CPP.[7]

- In *Fraser*, this Court rejected the objectives raised by the Attorney General of Canada for preventing job-sharing RCMP members from accessing full-time pension credit and, relying on the evidence, ruled that such exclusion was "entirely detached from the purposes of both the job-sharing scheme and the buy-back provisions, which were intended to ameliorate the position of female RCMP members who take leave to care for their children."[8]

10. Allowing the state or the courts to redefine the state's objective—either at trial or on appeal—would cause unfairness and prejudice the rights of affected persons, including their right to a fair procedure. For example, attempting to redefine the state's objective prevents *Charter* rights holders from leading evidence at trial on whether the redefined objective is pressing and substantial. Moreover, since the subsequent steps of the *Oakes* test refer to the objective of the limit, attempts to redefine the objective prevent the parties from making submissions on the other steps in the *Oakes* analysis. When selecting the evidence that they will file, the parties must be able to rely on the true objective—deduced from evidence on the legislative intent—and not on shifting objectives raised by the state or by the courts either at trial or on appeal.

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[6] *Vriend*, at para. 113.
[7] *Hislop*, at paras. 51-54.
[8] *Fraser*, at para. 126.

B. The government's stated objective lacks credibility and precision

11. As this Court stated in *Frank*, "the integrity of the justification analysis requires that the legislative objective be properly stated".[9] This Court has also repeatedly affirmed the critical importance of articulating the limit's purpose at an appropriate level of generality.[10] The statement of purpose should generally be both precise and succinct.[11]

12. The Attorney General of Québec argued in the court below that the pressing and substantial objective of the *Charter* limit in question is to "provide financial assistance to people who have a sufficient connection to Québec".[12] Put the opposite way, the Attorney General argued that the pressing and substantial objective of the limit is to *exclude* people who *lack* a "sufficient connection" to Québec from eligibility for financial assistance for educational daycare services. The Court of Appeal observed that this stated objective is "based on very general considerations", but nevertheless concluded that this stated objective is pressing and substantial based on "the flexibility that must prevail at this stage" of the s. 1 analysis.[13]

13. The Court of Appeal's approach takes "flexibility" too far and Québec's stated objective is problematic—and not pressing and substantial—for at least two reasons.

14. *First*, the stated objective is not credible. There are good reasons to question whether the *stated* objective of the limit reflects the *true* objective of the limit. Where, as here, there is no formal statement of purpose in the legislation itself, the objective of the limit may be inferred from evidence of legislative intent, including the text of the legislation and the framework as a whole. Here, the Attorney General's stated objective of providing financial assistance only to people who have a "sufficient connection" to Québec cannot be reconciled with either the text of the legislation or the statutory framework.

15. As the Court of Appeal pointed out,[14] many categories of individuals who *do* receive benefits under the *Reduced Contribution Regulation* (the "***Regulation***")[15] have a connection to Quebec that is no stronger than—and is often weaker than—refugee claimants' connection,

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[9] *Frank*, at para. 46.
[10] See e.g. *R. v. Moriarity*, 2015 SCC 55 [***Moriarity***], at para. 28.
[11] *Moriarity*, at para. 29.
[12] QCCA Reasons, at para. 105.
[13] QCCA Reasons, at para. 106.
[14] QCCA Reasons, at para. 111.
[15] CQLR c S-4.1.1, r. 1.

including work-permit holders,[16] foreign students[17] and holders of temporary resident permits.[18]

16. For example, the eligibility provisions *include* temporary foreign workers (s. 3(3) of the *Regulation*) who, by their very definition, do *not* seek to establish permanent residence in Canada. Indeed, the *Immigration and Refugee Protection Regulations* (the "***IRPR***")[19] define a temporary foreign worker as someone who "will leave Canada by the end of the period authorized for their stay."[20] Yet the eligibility provisions *exclude* refugee claimants with work permits who, by their very definition, *do* seek to establish permanent residence in Canada.[21] This discrepancy suggests that the true objective of the limit may not be to provide financial assistance only to those "with a sufficient connection to Quebec", but rather to penalize refugee claimants based on their status.

17. The Attorney General of Québec argues that the single thread connecting all the categories of non-citizens eligible for subsidized care under the *Regulation* is that they—unlike refugee claimants—have been "selected" to come to Québec.[22] Not so. To illustrate, s. 3(3) confers eligibility if "the parent is staying in Québec primarily for work purposes and holds a work permit issued under the *Immigration and Refugee Protection Act* or is exempted from holding such a permit under that Act". There is a long list of scenarios where someone is lawfully staying in Québec primarily for work purposes, but either (1) has received a work permit *without* selection via a Labour Market Impact Assessment ("**LMIA**"); or (2) has *not* received a work permit at all.

18. With respect to LMIAs, ss. 204 to 208 of the *Immigration and Refugee Protection Regulations* describe circumstances where a work permit may be issued to a worker who does *not* undergo an LMIA. For example, these provisions cover foreign nationals who intend to perform work under an international agreement (e.g., CUSMA, CETA, GATS), foreign nationals who

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[16] Section 3(3).
[17] Section 3(4).
[18] Section 3(7).
[19] SOR/2002-227.
[20] *IRPR*, s. 200(1)(b). Similarly, s. 6 of the *Québec Immigration Act*, CQLR c I-0.2.1 ("***Quebec Immigration Act***") includes both the "temporary foreign worker class" and "international student class" under the "classes of foreign nationals wishing to stay temporarily in Québec".
[21] Refugee claimants qualify for work permits under s. 206 of the *IRPR*. Section 200(2) of the *IRPR* expressly exempts refugee claimants from the requirement to demonstrate that they "will leave Canada by the end of the period authorized for their stay" since their status as refugee claimants necessarily implies that they intend to reside in Canada permanently.
[22] Factum of the Appellant, at paras. 146–48.

intend to perform work that would create or maintain reciprocal employment of Canadians in other countries, and foreign nationals who intend to perform work of a religious or charitable nature.

19. With respect to work permits, s. 186 of the *Immigration and Refugee Protection Regulations* describes 26 categories of foreign nationals who may work in Canada without a work permit. For example, these provisions cover foreign nationals who come to Canada – including Québec – as performing artists, athletes, journalists, clergymen, and armed service personnel.

20. None of these foreign nationals are individually "selected" to come to Québec, and many have weaker connections to Québec than refugee claimants who, by definition, are seeking to establish permanent residence in the province. Yet all are eligible for receive subsidized educational childcare services under the *Regulation*. Accordingly, the Attorney General's new theory that eligibility turns on the concept of "selection" is untenable on the face of the *Regulation*.

21. Finally, the Attorney General of Québec offers no credible evidence—or any evidence at all (*e.g.*, *Hansard*)—to support this new theory. It is simply asserted in the air.

22. *Second*, even if the stated objective reflected the true objective, it lacks the necessary precision and is essentially a description of the *means*, not the *end*. The stated objective of a limit must not be "essentially a description of the means the legislature has chosen to achieve its purpose".[23] This Court has warned against such a narrow articulation of the objective, "which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific". Courts must instead prefer a formulation of the objective that reflects the aim of the law. An "objective" for the purposes of s. 1 is a "goal or a purpose to be achieved."[24]

23. The difference between the means and the objective is best exemplified by *Frank v. Canada (Attorney General)*, in which the impugned provisions, like in the present appeal, distinguished between those who had a sufficient connection with the territory and those who did not. The Court was asked to determine whether denying Canadian citizens who have resided abroad for five years or more the right to vote in a federal election could be justified under s. 1. The Court determined that "[t]he language of the impugned provisions reflects an intention to establish a connection between non-resident electors and Canada", *but* it added that this, in turn, advanced the objective of "maintaining the fairness of the electoral system to resident electors."[25]

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[23] *R. v. K.R.J.*, 2016 SCC 31, at para. 63; *Frank*, at para. 46.
[24] *Vriend*, at para. 114.
[25] *Frank*, at para. 57 [emphasis added].

24. Similarly, in the present appeal, it is not enough for the state to claim that the objective of the *Charter* limit is to require a "sufficient connection" between benefit claimants and Québec. Rather, the state must articulate *what was the objective* of requiring such "sufficient connection"—or, put another way, *what was the objective* of excluding refugee claimants. This more rigorous approach may reveal that the state's true objective is not pressing and substantial. For instance, if the real objective is simply to limit public expenditures—or, worse, to punish refugee claimants or discourage them from coming to Canada in the first place—the objective would not qualify as pressing and substantial according to this Court's case law.[26]

25. Allowing the state to justify *Charter* limits by reference to a vague objective of requiring a "sufficient connection" to Québec may lead to systemic and widespread violations of the *Charter* rights of refugee claimants. This is particularly true if a "sufficient connection" is given the meaning that the Attorney General of Québec appears to seek to give it, under which only those deemed desirable by the government are "sufficiently connected" to Québec and may benefit from *Charter* protection against discrimination.

26. It is well established that refugee claimants are *Charter* rights holders even before they are formally recognized as refugees.[27] Accepting an objective as vague as "sufficient connection with Quebec"—which is not specific to certain individuals, to certain circumstances or certain rights—would allow governments to deny *Charter* protection to a whole class of *Charter*-rights holders, essentially rewriting the Constitution.[28]

C. An objective that is inconsistent with Canada's binding international human rights obligations is presumptively not a pressing and substantial objective under s. 1

27. If this Court concludes that the stated objective of the *Charter* limit accurately represents the true purpose of the *Charter* limit and is sufficiently precise to warrant further analysis, the Court must consider whether this objective is pressing and substantial. The pressing and substantial standard is high "to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection".[29]

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[26] *Conseil scolaire*, at para. 152-154. See e.g. *Yao v. The King*, 2024 TCC 19, at para. 234.
[27] *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, at para. 35.
[28] Section 15(1) of the *Charter* reads "Every individual…".
[29] *Oakes*, at 138.

28. This Court has often considered international law in assessing whether the objective of a law limiting *Charter* rights is pressing and substantial under s. 1.[30] This is because the *Charter* is presumed to provide at least as much protection as that afforded by international human rights documents ratified by Canada.[31] This presumption of conformity "operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights".[32] The Court has not only found support in international law to conclude that there *is* a pressing and substantial objective, but also referenced international human rights conventions in ruling that there is *no* pressing and substantial objective.[33]

29. Here, the state's objective—whether defined as providing financial assistance only to people who have a "sufficient connection" to Québec or as excluding refugee claimants from eligibility for benefits—is inconsistent with the 1951 *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (the "***Convention***"). The *Convention*, along with the 1967 *Protocol Relating to the Status of Refugees*, Can. T.S. 1969 No. 29, have been ratified by Canada.[34]

30. The application of certain rights under the *Convention* extends to refugees even prior to a formal determination of *Convention* refugee status,[35] because a person is a refugee within the meaning of the *Convention* "as soon as he fulfils the criteria contained in the definition".[36] For instance, the rights set out in Articles 3 (non-discrimination), 7(1) (same treatment as aliens generally), 13 (movable and immovable property), 16(1) (access to courts), 20 (rationing), 22 (public education), 29 (fiscal charges), and 33 (non-*refoulement*) are among the *Convention* rights

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[30] See, e.g., *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1056-57; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 750-755; *Ross v. New Brunswick School Board No. 15*, [1996] 1 S.C.R. 825, at para. 98; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 50; *Lavoie v. Canada*, 2002 SCC 23, at paras. 56-58; *R. v. Hape*, 2007 SCC 26, at para. 55.

[31] *Quebec (Attorney General) v. 9147 0732 Québec inc.*, 2020 SCC 32 [***9147 0732 Québec inc.***], at para. 31; *Divito v. Canada*, 2013 SCC 47, at para. 23.

[32] *9147 0732 Québec inc.*, at para. 34, citing *Kazemi Estate v. Iran*, 2014 SCC 62, at para. 150.

[33] See e.g. *Zundel*, at 764.

[34] *Németh v. Canada (Justice)*, 2010 SCC 56, at para. 17 [***Németh***].

[35] James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2021), at 178–81 and footnote 40 (regarding article 22, addressed below); United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (re-edited, Geneva, January 1992), at para. 28.

[36] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (re-edited, Geneva, January 1992), at para. 28. See also *Németh*, at para. 50.

that apply to persons claiming refugee status as soon as they are subject to a state's jurisdiction.[37]

31. Of particular relevance in this appeal is the right to equality of refugees, which is one of the overarching aims of the *Convention*. The *Convention* prohibits contracting states from discriminating among and between refugees when applying *Convention* provisions[38] and, except where the *Convention* contains more favourable provisions, requires contracting states to "accord to refugees the same treatment as is accorded to aliens generally".[39]

32. In respect of a very limited number of rights, however, the *Convention* goes further to require contracting states to accord to refugees —and refugee claimants[40]— "the same treatment as is accorded to nationals". For the purpose of this appeal, the most relevant of these limited rights under the *Convention* is Article 22(1) which states: "The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education".[41]

33. The educational childcare services offered through the *Regulation* are captured by Article 22(1). Firstly, the services are "education". The *Regulation* was adopted under the *Educational Childcare Act*, CQLR c S-4.1.1, which expressly states that, to qualify for subsidies, "the **educational** childcare provider must provide a child with […] **educational** childcare for a continuous period of a maximum of 10 hours per day". [42] Secondly, although the educational childcare under the *Regulation* is provided through public subsidies to private actors, the *travaux préparatoires* of the *Convention* explain that Article 22 applies to "education provided by public authorities and to *any education subsidized in whole or in part by public funds* and to scholarships derived therefrom".[43] Lastly, the phrase "elementary education" includes early childhood education. In contemporary parlance, "elementary education" refers to the middle years of a child's education. But in the English version of international instruments from the 1940s-1960s, the phrase "elementary education" was used to refer to the early years of a child's education[44] – what is now

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[37] James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2021), at 181 and footnote 40.
[38] The *Convention*, Article 3.
[39] The *Convention*, Article 7(1).
[40] See the authorities cited above at footnote 35.
[41] The *Convention*, Article 22(1).
[42] *Regulation*, s. 6(1).
[43] Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires analysed with a Commentary by Dr. Paul Weis* (United Nations High Commissioner for Refugees, 1990), at Article 22 [emphasis added].
[44] See, for example, Article 26 of the *Universal Declaration of Human Rights*, UN General Assembly, Resolution 217A (III), A/RES/217(III) (December 10, 1948); Article 49 of the *Charter of the Organisation of American States* (1967), C.T.S. 1990/23.

referred to as "primary education". This is reflected in the French version of Article 22(1) of the *Convention* which refers to "l'enseignement primaire". It was only in the 1960s that the English version of international instruments adopted the phrase "primary education" to refer to the same concept.[45] As such, "elementary education" in Article 22(1) refers to the early years of a child's education and would include educational childcare under the *Regulation*.[46]

34. Based on the above, denying refugee claimants access to government-subsidized childcare services in Québec because they supposedly lack a "sufficient connection to Québec" is in violation of Canada's international human rights obligations under Article 22(1) of the *Convention.* As such, it presumptively cannot be a "pressing and substantial" objective under s.1 of the *Charter*.

35. In concluding that the purported objective of providing financial assistance to people who have a "sufficient connection" to Québec is pressing and substantial, the Court of Appeal failed to incorporate into its analysis Canada's binding obligations under the *Convention.* As outlined above, excluding refugee claimants from access to subsidized childcare services and the underlying objective of that exclusion are inconsistent with the aims of the Convention and the obligations it imposes on contracting states, including Canada. The objective therefore presumptively cannot be a pressing and substantial objective under s. 1 of the *Charter*.

PART IV — SUBMISSIONS CONCERNING COSTS

36. As a public interest intervener, CARL asks that no costs be awarded to or against it.

PART V — ORDER SOUGHT

37. CARL takes no position on the disposition of the appeal.

PART VI — SUBMISSIONS ON PUBLICATION

38. Nil.

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[45] See, for example, Article 13 of *International Covenant on Economic, Social and Cultural Rights* (1966), C.T.S. 1976/46; Article 28 of the *Convention on the Rights of the Child* (1989), C.T.S. 1992/3; Article 24 of the *Convention on the Rights of Persons with Disabilities* (2006), C.T.S. 2010/8.

[46] In the alternative, educational childcare maybe be "education other than elementary education" under Article 22(2) of the *Convention*, in respect of which refugees shall be afforded treatment "not less favourable than that accorded to aliens generally in the same circumstances" in respect of "the remission of fees and charges".

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

Connor Bildfell, Simon Bouthillier, and Katherine Griffin

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