SUPREME COURT OF CANADA

(On appeal from a judgment of the Court of Appeal of Quebec)

File No. 41210

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

Appellant
(appellant / incidental respondent)

– and –

BIJOU CIBUABUA KANYINDA

Respondent
(respondent / incidental appellant)

– and –

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

Respondent
(impleaded party / incidental appellant)

– and –

ATTORNEY GENERAL OF ALBERTA

ATTORNEY GENERAL OF ONTARIO

ATTORNEY GENERAL OF BRITISH COLUMBIA

ATTORNEY GENERAL OF CANADA

Interveners

FACTUM OF THE RESPONDENT

BIJOU CIBUABUA KANYINDA

(Rule 42 of the Rules of the Supreme Court of Canada)

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MEMORANDUM OF THE RESPONDENT BIJOU CIBUABUA KANYINDA

PART I – STATEMENT OF POSITION AND FACTS

1. The Quebec government put in place in 1997 a subsidized childcare program aimed, among other things, at increasing the participation of women in the labor market, knowing that they bear a disproportionate share of the responsibilities related to the care and upbringing of children.

2. Although it had previously considered that asylum seekers holding a work permit had access to subsidized childcare services, the government reversed its position in 2018. From that point onward, these persons—and more particularly women—found only closed doors when seeking a place for their children with subsidized childcare services.

3. The impossibility of accessing subsidized childcare services has severe detrimental effects on persons seeking asylum, as it hinders their access to the labor market, as well as their integration, language training, and other aspects of their lives. As recognized by the Court of Appeal, the exclusion of persons seeking asylum resulting from section 3 of the Reduced Contribution Regulation[1] ("the RCR") has a disproportionate effect on women—and more particularly on the subgroup of women seeking asylum—and constitutes discrimination due to an adverse effect based on sex that unjustifiably infringes s. 15(1) of the Canadian Charter of Rights and Freedoms ("the Charter"). This exclusion also constitutes direct discrimination against one of the most vulnerable groups in society, asylum seekers, on the basis of the analogous grounds of immigration status and citizenship, which likewise results in an unjustified infringement of s. 15(1).

4. As the Court has repeatedly recognized, "once the State does grant a benefit, it is obliged to do so without discrimination[2]." The Court specified that "in many cases[3]," governments would have to extend "the scope of a benefit so that a previously excluded group of persons can enjoy it[4]." Clearly, we are faced with just such a case here.

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1 RLRQ, c. S-4.1.1, r. 1.

2 Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624 ["Eldridge"], para. 73.

3 Ibid.

4 Ibid.

LE CONTEXTE

a) The situation of the respondent at the time of filing the application for leave to appeal

5. The respondent arrived in Quebec on October 9, 2018. She is the mother of three children, who, when the proceeding was filed, were respectively two, four, and five years old. Upon her arrival in Quebec, the respondent made a claim for asylum and obtained a work permit.

6. The respondent contacted several daycare centers to find a place for her children, but was refused access. Several of these daycare centers indicated that they could not provide subsidized childcare services to an individual with asylum seeker status.

7. The respondent does not have the means to cover the costs of unsubsidized childcare services. Let us add that people who are claiming asylum are not eligible for the advance payments of the tax credit for childcare expenses[5]

, which establishes the prohibitive nature of unsubsidized childcare services for these individuals. Furthermore, the respondent has no family in Quebec. Generally, people in the respondent's situation have few, if any, informal childcare options (for example: care by grandparents)[6].

8. In the absence of access to subsidized childcare services, the respondent is unable to work, even though she holds a work permit that authorizes her to do so.

9. Because of the length of the process for obtaining refugee status, the respondent faces the prospect of a long period without access to subsidized childcare services. In effect, this prevents her from working and deprives her of the special measures provided by the subsidized childcare services scheme to support children with special needs, which is the case for two of the respondent's children.

10. In January 2021, the respondent obtained refugee status.

b) The legal and regulatory framework of subsidized childcare services and the ministry's about-face regarding the eligibility of asylum seekers

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5 Law on taxation, RLRQ, c. I-3, art. 1029.8.80.2; Examination for discovery of Bijou Cibuabua Kanyinda, pp. 56-57, 66-67, Appellant's Record (hereinafter "A.R."), vol. XI, pp. 124-125 and 127.

6 Jill Hanley, "The labour implications of the exclusion of refugee claimants from Quebec's subsidized childcare program" ["Hanley"], expert report, paras. 20, 33, 38, 45, A.R., vol. II, pp. 74, 80, 82, 84; Gillian Morantz, Cécile Rousseau, Anna Banerji, Carolina Martin, Jody Heymann, "Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care" ["Morantz"], pp. 319, 321, 323, A.R., vol. IX, pp. 54, 56, 58.

11. Article 2 of the Educational Childcare Services Act[7] ("the ECSA") sets out "the right" of "every child" "to receive personalized, high-quality educational childcare services from birth until[8]" they enter the school system, "taking into account the availability, organization and resources of educational childcare service providers" and "in compliance with the rules set out by the [ECSA] concerning access to educational childcare services for children[9]." Article 2 also provides that the minister has the obligation to ensure that the supply of childcare services meets demand[10]. The ECSA[11] and the RCR adopted pursuant to it establish a framework governing the granting of subsidies to childcare services and the reduced contribution required from a parent to obtain subsidized childcare services.

12. Article 3 of the RCR, at the heart of this case, enumerates the categories of parents residing in Quebec who are eligible to pay the reduced contribution and thus to receive subsidized childcare services. Those eligible are: Canadian citizens (para. 1), permanent residents (para. 2), holders of a work permit who stay in Quebec primarily in order to work there (para. 3), foreign students who receive a scholarship (para. 4), persons recognized as refugees or persons in need of protection (para. 5), persons to whom the Minister of Citizenship and Immigration has granted protection under the Immigration and Refugee Protection Act[12] ("the IRPA") (para. 6), persons who hold a temporary resident permit despite an inadmissibility or contravention of the IRPA (para. 7) and persons authorized to submit an application for permanent residence in Canada under the IRPA or the Immigration and Refugee Protection Regulations[13] (para. 8).

13. The Ministère de la Famille had previously considered that asylum-seeking parents holding a work permit were eligible for the reduced contribution[14].

14. In April 2018, the ministry reversed its position and stated that asylum seekers holding a work permit are not eligible to pay the reduced contribution[15].

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7 RLRQ, c. S-4.1.1.

8 LSGEE, art. 2, al. 1.

9 Ibid., art. 2, al. 2.

10 Ibid., art. 2, al. 3.

11 Ibid., chapitre VII (art. 82 à 101).

12 Loi sur l'immigration et la protection des réfugiés, LC 2001, c. 27, art. 24(1) ["LIPR"].

13 DORS/2002-227.

14 Courriel du 27 août 2015 du ministère de la Famille, pièce P-2, D.A., vol. X, pp. 122-123.

15 Lettre du 10 avril 2018 du ministère de la Famille aux gestionnaires des garderies subventionnées, pièce P-1, D.A., vol. X, p. 121.

15. By way of contrast, it should be noted that individuals claiming asylum have the right to free preschool education and primary and secondary schooling, as well as literacy courses[16]

c) Judicial Background

16. On May 31, 2019, the Respondent filed an application for judicial review alleging that section 3 of the RCR: (a) does not render asylum seekers ineligible for the reduced contribution or, failing that; (b) is null and void, as it was adopted without valid legislative authority or because it is discriminatory under administrative law; (c) is unconstitutional, as it unjustifiably infringes the right to equality guaranteed by section 15 of the Charter (on the basis of the grounds of sex, immigration status, and citizenship) and by section 10 of the Charter of human rights and freedoms ("the Quebec Charter"), it results in cruel and unusual treatment under section 12 of the Charter and constitutes an infringement of the right to human dignity guaranteed by section 4 of the Quebec Charter.

17. The Superior Court granted the Respondent's application on the basis of the absence of valid legislative authority allowing for the adoption of section 3 of the RCR and dismissed the other aspects of the application.

18. The Court of Appeal allowed the principal appeal by the Attorney General concerning the absence of valid legislative authority and allowed the Respondent's cross-appeal concerning section 15 of the Charter on the ground of sex.

19. The Court of Appeal concluded that the exclusion in section 3 of the RCR of parents claiming asylum constitutes discrimination resulting from an adverse effect based on sex that infringes section 15 of the Charter. In light of this conclusion, it did not rule on the other two grounds of discrimination invoked by the Respondent. The Court found that the infringement of section 15 is not justified under section 1 of the Charter and that the appropriate constitutional remedy is a broad interpretation. The Court of Appeal therefore declared that section 3(3) of the RCR "must henceforth be read as rendering eligible for the reduced contribution any parent who resides in Quebec for the purpose of making an asylum claim while holding a work permit."[17]

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16 Quebec, Ministry of Education, Budgetary Rules of Operation for the years 2024-2025 to 2026-2027, Preschool education and primary and secondary education, School service centres and school boards, July 2024 – 2024-2025 school year, p. 295, paras. 11-12.

17 Court of Appeal judgment, para. 9, D.A., vol. I, p. 17.

PART II – POSITION OF THE RESPONDENT REGARDING THE ISSUES RAISED BY THE APPELLANT

20. The respondent takes the following position regarding the issues raised by the appellant:

1. Section 3 of the RCR infringes the right to equality protected by subsection 15(1) of the Charter
2. The infringement of subsection 15(1) of the Charter is not justified under section 1 thereof
3. The appropriate constitutional remedy is a broad interpretation

PART III – STATEMENT OF ARGUMENTS

1. SECTION 3 OF THE RCR INFRINGES THE RIGHT TO EQUALITY PROTECTED BY SUBSECTION 15(1) OF THE CHARTER

21. The right to equality guaranteed by subsection 15(1) of the Charter "reflects a deep commitment to promoting equality and preventing discrimination against disadvantaged groups."[18]

22. The modern test for establishing a breach of subsection 15(1) is set out in two steps: it must be shown that the challenged measure "(a) creates, on its face or in its effect, a distinction based on an enumerated or analogous ground; (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[19]

23. Section 3 of the RCR creates a discriminatory distinction by reason of a prejudicial effect based on sex, due to its disproportionate impact on women, and more particularly on the subgroup of women seeking asylum. It also establishes a direct discriminatory distinction based on immigration status (or asylum seeker status) as well as on citizenship. There is discrimination whether these grounds are considered in isolation or collectively, from an intersectional perspective.

1.1 SECTION 3 OF THE RCR CREATES A DISTINCTION BASED ON SEX

a) The analysis under subsection 15(1) focuses on the concrete effects of the measure

18 Fraser v. Canada (Attorney General), 2020 SCC 28 ["Fraser"], para. 27. See also: Eldridge, supra note 2, para. 54.

19 Dickson v. Vuntut Gwitchin First Nation, 2024 SCC 10 ["Dickson"], para. 188.

24. Subsection 15(1) of the Charter prohibits both direct discrimination and indirect discrimination—also called discrimination resulting from an adverse effect.[20] This latter form of discrimination, at issue here with regard to the ground of sex, arises when a provision "on its face neutral has a disproportionate impact on members of groups benefiting from protection against discrimination based on an enumerated or analogous ground."[21]

25. In such a case, the analysis of the distinction at the first step of the subsection 15(1) test consists of asking whether the challenged measure "created a disproportionate effect on the claimant group for a protected ground or contributed to that effect[22]" (italics in the original).

26. In the context of the analysis, "the primary consideration must be the law's effect on the claimants or the affected groups,"[23] as this Court has consistently emphasized.[24]

27. It is therefore a matter of examining, to use some of the expressions employed by the Court over the course of its jurisprudence, "the actual effect of the legislative measure on [the] situation"[25] of the group, the "practical consequences of the law,"[26] the "tangible effects that laws have on individuals and groups,"[27] "the significant concrete repercussions that the challenged law has on the claimant and the protected group or groups to which they belong in their real situation, which includes historical or current social, political and legal disadvantages"[28] (underlining added).

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20 Fraser, supra note 18, paras. 28–82.

21 Ibid., para. 30.

22 R. v. Sharma, 2022 SCC 39 ["Sharma"], para. 31.

23 Ontario (Attorney General) v. G, 2020 SCC 38 ["Ontario v. G"], para. 45. See also Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 ["Law"], para. 25; Eldridge, supra note 2, para. 62; Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 ["Andrews"], p. 165.

24 Ontario v. G, supra note 23, paras. 43–47; Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17 ["Alliance"], para. 28; Centrale des syndicats du Québec v. Quebec (Attorney General), 2018 SCC 18 ["Centrale"], paras. 29, 35; Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30 ["Taypotat"], para. 18; Quebec (Attorney General) v. A, 2013 SCC 5 ["Quebec v. A"], paras. 324–333; Withler v. Canada (Attorney General), 2011 SCC 12 ["Withler"], para. 39; Eldridge, supra note 2, paras. 64–66.

25 Fraser, supra note 18, para. 42; Withler, supra note 24, para. 43.

26 Fraser, supra note 18, para. 58; Sharma, supra note 22, para. 49.

27 Ontario v. G, supra note 23, para. 44.

28 Ibid., para. 43.

Another ruling of the Court indicates that the analysis may include, in addition to the "immediate effect"[29] of the measure, the "other repercussions"[30] that result from it (emphasis added).

b) Subsection 15(1) prohibits discrimination against sub-groups linked to a prohibited ground

28. Subsection 15(1) of the Charter prohibits discrimination even when a measure only affects a portion of a group associated with a prohibited ground or, in other words, if it affects a sub-group associated with that ground.[31] The case law of this Court has also specified that “even if only a few members of an enumerated or analogous group are discriminated against because of their membership in that group, the distinction made and its prejudicial effect may nonetheless constitute discrimination."[32]

29. The Court emphasized that, without this fundamental principle, the right to equality would be deprived of most of its substance, given that “rarely is a discriminatory measure so plainly expressed that it applies identically to all members of the targeted group."[33]

30. By way of example, the fact that a measure targets only pregnant women,[34] or has a disproportionate effect solely on women who have children[35] or single mothers[36] does not at all preclude recognizing that it creates a distinction based on sex. Likewise, the fact that a measure affects only persons with hearing impairments[37] or workers injured on the job who suffer from chronic pain[38] has also not prevented recognizing a distinction based on disability.

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29 Vriend v. Alberta, [1998] 1 SCR 493 [“Vriend”], para. 99.

30 Ibid.

31 Fraser, supra note 18, paras. 72-75; Centrale, supra note 24, para. 28; Québec v. A, supra note 24, paras. 354-355; Nova Scotia (Workers’ Compensation Board) v. Martin, 2003 SCC 54 [“Martin”], paras. 76-80.

32 Québec v. A, supra note 24, para. 355.

33 Janzen v. Platy Enterprises Ltd., [1989] 1 SCR 1252, p. 1289.

34 Brooks v. Canada Safeway Ltd., [1989] 1 SCR 1219.

35 Fraser, supra note 18.

36 Falkiner v. Ontario (Ministry of Community and Social Services), 2002 CanLII 44902 (ON CA) [“Falkiner”], para. 78.

37 Eldridge, supra note 2.

38 Martin, supra note 31.

31. Thus, a person or group filing a claim based on subsection 15(1) "can focus its evidence on the person or on the subgroup targeted by the different grounds"[39] in question.

32. In the case of *Symes*,[40] even though Justice Iacobucci, for the majority, found that the evidence had not been sufficient to establish a distinction in respect of the "particular subgroup of women"[41] to which the appellant belonged, namely "that of married women entrepreneurs,"[42] he emphasized that "a different subgroup of women, which would present different evidence concerning [the contested provision], could indeed succeed in showing the prejudicial effects required by subsection 15(1)," giving the potential example of the subgroup of single mothers.[43]

33. In some cases, the subgroup can arise from the intersection of more than one prohibited ground—for example, racialized women (sex and race) or, as is the case here, women claiming asylum (sex and immigration or refugee claimant status, or sex and citizenship).

34. It is nonetheless crucial not to confuse this specific case with the general principle whereby discrimination targeting a subgroup linked to a prohibited ground constitutes discrimination prohibited by subsection 15(1). In other words, it is by no means necessary to demonstrate more than one prohibited ground in order to apply the general principle whereby "partial" discrimination or discrimination targeting a subgroup is prohibited.

c) Intersectionality can help reveal discriminatory effects experienced by persons belonging to multiple disadvantaged groups

35. Let us return, however, to the specific case of the subgroup whose definition is tied to the intersection of several prohibited grounds, since it applies here. In Fraser, the Court mentions this scenario, endorsing the idea that certain women in particular subgroups can "be affected differently"[44] by discrimination "or have different experiences in that regard"[45] and citing the example of a discriminatory measure based on sex that would target only Black women.

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39 Law, supra note 23, para. 37. See also: Symes v. Canada, [1993] 4 SCR 695 ["Symes"], pp. 765-766.

40 Symes, supra note 39.

41 Ibid., p. 765.

42 Ibid., p. 766.

43 Ibid.

44 Fraser, supra note 18, para. 74.

45 Ibid.

36. Intersectionality can be described as a theoretical tool resting on the idea that identity cannot be dissected into mutually exclusive categories, both from a lived perspective and from a legal analysis viewpoint.[46]

37. In the Law decision, this Court recognized that a discrimination claim could rest "on more than one ground"[47] or on an "interaction"[48] among multiple grounds.

38. In Withler, the Court took the concept further by recognizing that it may be "necessary to apply several converging factors which, taken in isolation, might not allow one to gauge the full extent of the consequences of denying the benefit or imposing the burden at issue[…]"[49]. In the same vein, the Court wrote in Ontario v. G that "belonging to multiple groups […] may create unique discriminatory effects that are not experienced by any group considered in isolation."[50]

39. The Court of Appeal for Ontario has already applied an intersectional approach.[51] Human rights tribunals have likewise done so.[52]

40. In the Fraser decision, the Court indicated that it is possible to undertake "a robust intersectional analysis"[53] within a single ground (in this case, sex), without having to establish a distinction based on another ground.[54] In the same vein, Professor Sheppard writes: "Incorporating an understanding of intra-categorical gender diversity rightfully challenges the

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46 Ben Smith, "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective," (2016) 16 The Equal Rights Review 73, p. 76, Respondent Bijou Cibuabua Kanyinda's Compendium of Sources (hereinafter "R.S.I."), tab 14.

47 Law, supra note 23, para. 37.

48 Ibid., paras. 91–94.

49 Withler, supra note 24, para. 58.

50 Ontario v. G, supra note 23, para. 47.

51 Falkiner, supra note 36, paras. 71–72, 93.

52 Baylis-Flannery v. DeWilde (Tri Community Physiotherapy), 2003 HRTO 28, paras. 143–146; Radek v. Henderson Development (Canada) and Securiguard Services (No. 3), 2005 BCHRT 302 ("Radek"), paras. 463–468; Turner v. Canada (Attorney General), 2012 FCA 159, paras. 31–33, 48–49; Turner v. Canada Border Services Agency, 2014 CHRT 10, paras. 13–15, 31, 244–245; Brar and others v. B.C. Veterinary Medical Association and Osborne, 2015 BCHRT 151, paras. 762, 824–827, 837–840; Young Worker v. Heirloom and another, 2023 BCHRT 137, paras. 48–51.

53 Fraser, supra note 18, para. 116.

54 One could also consider Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358 ("Benner") as involving an intersection of sex and citizenship (see para. 85: "[…] the sex of his or her Canadian parent […]").

Rigid and bifurcated male -female comparator analysis. Rather, the key legal question becomes : does this law or policy impact women, in all of their diversity, in harmful ways?"[55]

41. In this case, an intersectional approach promotes taking into account the respondent's membership and that of persons in the same situation in more than one disadvantaged group (women; asylum seekers), as well as the intersection of these identities in the analysis of the discriminatory effect of section 3 of the RCR, thereby avoiding confining it within formalistic comparison silos. Let us recall that this Court has on numerous occasions expressed its rejection of such formalistic approaches to the right to equality.[56]

d) The required evidence

42. In the Fraser and Sharma decisions, the Supreme Court laid down certain guidelines regarding the evidence required to establish that a provision has a disproportionate effect[57], which we will synthesize in the following paragraphs and supplement with some additional references.

43. Generally speaking, "[n]o particular form of evidence is required."[58]

44. Two main types of evidence may be helpful in making this demonstration, namely evidence about the situation of the group of applicants and evidence about the consequences of the law.[59]

45. Ideally, elements of evidence from both categories would be presented, but this is not an absolute requirement, because "[b]oth statistical disparity evidence and evidence of disadvantage to the group as a whole can demonstrate a disproportionate effect, but neither is mandatory and their significance will vary with the case."[60] In the *Law* decision, the Court noted that "it will often happen"[61] (emphasis added) that a court may rely on judicial notice of certain facts (or all of them) and on logical inferences to arrive at a finding of a breach of s. 15(1).

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55 Collen Sheppard, "Grounds-Based Distinctions: Contested Starting Points in Equality Law", (2024) 35 Canadian Journal of Women and the Law 1, p. 25, R.S.I., tab 11.

56 Ontario c. G, supra note 23, paras. 44-47.

57 Fraser, supra note 18, paras. 55-67; Sharma, supra note 22, para. 49.

58 Sharma, supra note 22, para. 49.

59 Fraser, supra note 18, para. 56; Sharma, supra note 22, para. 49.

60 Fraser, supra note 18, para. 67.

61 Law, supra note 23, para. 77.

46. It is sufficient to demonstrate that the challenged measure contributed to the disproportionate effect; the measure need not be the sole or the main cause of that disproportionate effect.[62] The link between the challenged measure and the disproportionate effect can sometimes be obvious and require no proof.[63]

47. "[T]o concretely fulfill the promise of s. 15(1), […] it should not be unduly difficult for the claimant to discharge their burden of proof [64]." The claimant must show more than a "mere 'accumulation of intuitions,'"[65] but must not be imposed "a heavy evidentiary burden."[66]

48. Certain matters can be under-documented and there are not necessarily statistics on certain issues.[67] Courts must remain "mindful of evidentiary obstacles as well as those related to knowledge asymmetry (in relation to the State) faced by many claimants."[68]

49. Finally, the first step of the analysis is not "an initial substantive filtering stage nor a hefty obstacle aimed at dismissing certain claims for technical reasons."[69] It "consists […] in ensuring that the persons whom this provision is intended to protect can gain access to it"[70] and "should only bar claims alleging a distinction that the 'Charter [did] not intend to prohibit' because such claims are not based on enumerated or analogous grounds."[71]

e) The formalist approach proposed by the Appellant disregards the consideration of the concrete effects of the exclusion

50. The Appellant states in its factum that the analysis "must always focus on access to the benefit provided by the law."[72] In reality, however, the Appellant conducts an analysis that stops at the provision in

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62 Sharma, supra note 22, para. 49; Office canadien de commercialisation des oeufs v. Richardson, [1998] 3 S.C.R. 157, para. 89.

63 Fraser, supra note 18, para. 61; Sharma, supra note 22, para. 49.

64 Sharma, supra note 22, para. 49.

65 Fraser, supra note 18, para. 60.

66 Taypotat, supra note 24, para. 34.

67 Fraser, supra note 18, para. 57; Sharma, supra note 22, para. 49.

68 Ibid. See also Radek, supra note 52, paras. 509-511.

69 Alliance, supra note 24, para. 26. See also: Ontario v. G, supra note 23, para. 41; Taypotat, supra note 24, para. 19.

70 Ibid.

71 Ibid.

72 Appellant's arguments, paras. 47, 54-55, Appellant's Factum (hereinafter "A.F."), pp. 9 and 11.

cause (here, section 3 of the RCR) and removes any consideration of the repercussions, tangible effects, and practical consequences of the provision on the individuals and groups concerned in their actual situation, which includes their pre-existing disadvantage. This position stems from the formalistic approach calling into question a "mechanical and sterile classification process that will rely exclusively on the contested legislative text,[73] which the Court rejected in the Fraser decision. It also deprives of its essence the very principle of discrimination resulting from an adverse effect.

51. At paragraph 66 of his factum, the appellant writes that "[b]oth women and men are […] eligible for payment of the reduced contribution." At paragraph 67, he reiterates exactly the same idea by noting that all asylum seekers are "in the same situation," whether men or women. At paragraph 68, the appellant once again reuses the same approach: section 3 covers all asylum seekers, so both men and women are deprived of the benefit. In each of these paragraphs, the appellant, while emphasizing the obvious fact that section 3 of the RCR is prima facie neutral with respect to sex, merely dismisses direct sex-based discrimination and does not even begin to consider discrimination based on adverse effect.

52. Paragraph 71 is extremely revealing of the complete disconnect between the appellant's approach and the fundamental principles under which the analysis pursuant to subsection 15(1) must be focused on the effects.

53. First, the question he poses there—whether "section 3 of the RCR deprives women more than men of access to the reduced contribution"—is very reductive and distorts the criterion applicable at the first stage, removing consideration of the tangible effects and practical consequences of the measure. Since the applicable criterion "consists in asking whether the [challenged measure] created a disproportionate effect on the claimant group for a protected ground or contributed to that effect,"[74] the real question is whether the exclusion provided in section 3 of the RCR creates a disproportionate effect on the claimant group or contributed to that effect on the basis of the protected ground of sex. This opens an inquiry into the concrete impact of the exclusion provided in section 3 of the RCR to see whether it has a sex-based disproportionate effect—an inquiry the reductive question posed by the appellant excludes, whereas the criterion developed by the case law, focused on the tangible effects and practical consequences of the challenged measure, rather makes it a central concern.

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73 Fraser, supra note 18, para. 134.

74 Sharma, supra note 22, para. 31.

54. By way of example, in the Eldridge case, the Attorney General, in an argument of the same nature as that made by the appellant in the present case, argued that the inequality represented by the cost of interpretation services for people with hearing impairment existed independently of the benefit granted by the State, since that inequality existed prior to the establishment of the universal health insurance system.[75] The Court rejected this argument and examined the consequences of denying sign language interpretation services to determine whether there was a discriminatory distinction.[76] It thus noted the potential dangers resulting from poor communication (misdiagnosis, failure to follow medical treatment) and the possibility that physicians might be unable to treat a person with hearing impairment in accordance with their professional obligations.

55. Still at paragraph 71 of his factum, the appellant states that the evidence regarding the disadvantage experienced by women in accessing the labor market and the link between that disadvantage and whether or not they have access to affordable childcare would be "irrelevant for addressing the question posed by the first step." In doing so, the appellant deems "irrelevant" at the first step evidence that nevertheless relates both to the group's situation (the pre-existing disadvantage of women, and more specifically of women seeking asylum) and the consequences of the law (the positive or negative impact, as the case may be, on access to the labor market resulting from having access to affordable childcare). This is, in fact, eminently useful evidence for showing the measure’s disproportionate effect on the group.

56. At paragraph 73, the appellant suggests that the Fraser decision establishes the principle that evidence regarding disadvantage can only serve to reinforce evidence of statistical disparity, which in turn would represent some sort of unavoidable requirement. However, Fraser says exactly the opposite.[77] Moreover, in the present case, the respondent submitted evidence relating to the two main categories identified in Fraser, although neither is mandatory, namely evidence about the situation of the group of claimants (addressing the existing disadvantage of women, and more specifically of women seeking asylum) and evidence about the consequences of the law (demonstrating that when the obstacle to the ability to work is the lack of access to affordable childcare, it is invariably women among asylum seekers who experience it).

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75 Eldridge, supra note 2, para. 68.

76 Ibid., para. 69-72.

77 Fraser, supra note 18, para. 55-67.

57. Moreover, it is simply false to claim, as the appellant does, that the Court of Appeal's conclusion was "based solely on evidence of a historical disadvantage"[78]

of women and asylum seekers. Although that remains, in any event, an important dimension aimed at one of the main categories of evidence identified in the Fraser and Sharma decisions, namely the situation of the group of claimants, the Court of Appeal's conclusion and the evidence presented by the respondent went well beyond the mere pre-existing disadvantage of women and asylum seekers; it also concerned the consequences of the disputed measure.[79]

58. The appellant asserts that any eligibility condition under section 3 of the RCR would have a disproportionate effect on women[80] if one could demonstrate a distinction based on sex solely on the basis of the historical disadvantage experienced by women. As explained above, one must first dismiss the appellant's premise because it is inaccurate, since the evidence in this case was in no way limited to that historical disadvantage.

59. It is also worth emphasizing that the persistence of the historical disadvantage experienced by women regarding access to the labor market in hypothetical scenarios where one considers other eligibility conditions illustrates the relevance of an intersectional approach to the right to equality: it is thus normal that the dimension of sex should at least be part of the portrait in each case, since the disadvantage experienced by women regarding access to the labor market resulting from the fact that they "assume a disproportionate share of the burden of childcare"[81] is indeed a reality that exists in all circumstances. This does not mean, however, that there will be a discriminatory distinction based on sex – and a fortiori an unjustified discriminatory distinction – in these hypothetical scenarios, since the multiple variables that can come into play at each stage of the analysis are simply not the same as in this case, where specific evidence was submitted to support the existence of a discriminatory distinction concerning the particular subgroup of asylum-seeking women.

f) The lack of access to subsidized childcare has a disproportionate effect on asylum-seeking women

78 Appellant's Argument, para. 75, M.A., p. 16.

79 Moreover, let us note that the heading preceding paragraphs 77 and onward in the appellant's factum is inaccurate, since the evidence addressed therein concerns both the situation of the group of claimants and the consequences of the disputed measure, and not only the first category.

80 Appellant's Argument, para. 76, M.A., p. 16.

81 Fraser, supra note 18, para. 103.

60. In addition to the facts related to her personal situation,[82] the respondent produced two expert opinions. The expert opinion of Dr. Jill Hanley, entitled The labour implications of the exclusion of refugee claimants from Quebec's subsidized childcare program,[83] examines the disproportionate effect of denying access to subsidized childcare services to women – and more particularly to women seeking asylum.

61. This expert opinion involves an analysis and synthesis of a substantial body of scientific literature, which was also filed in the record, as well as a compilation and analysis of empirical research findings conducted in Quebec. The two main surveys employed are one led by Dr. Hanley of 325 persons who claimed asylum in Quebec in 2017–2018[84] as well as research based on a series of 75 interviews with families who claimed asylum in Quebec, led by Dr. Gillian Morantz.[85]

62. Dr. Hanley first points out that research and scientific literature specifically concerning the effects of excluding asylum seekers from subsidized childcare services in Quebec are quite limited, notably due to the novelty of the minister's reinterpretation of section 3 of the RCR.[86] She does note, however, that relevant perspectives can be gleaned from the extensive Canadian and American scientific literature on the effects of not having access to affordable childcare services, adding that empirical data focusing more specifically on the question of access to childcare for asylum seekers in Quebec is beginning to emerge.

63. It is crucial to take note of these limitations regarding the scientific and statistical documentation available in this case. The principles formulated by this Court, according to which the courts must be mindful of evidentiary obstacles and take into consideration the under-documentation of certain phenomena,[87] must not remain purely formal statements and then be abandoned at the point of analysis.

64. Let us first emphasize that the disproportionate effect on women of the lack of access to affordable childcare services could be established solely on the basis of realities already recognized by the case law and the inferences that logically flow from them. This Court has already recognized "that

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82 Modified application for judicial review, D.A., vol. II, pp. 30-57; Examination on discovery of Bijou Cibuabua Kanyinda, D.A. vol. XI, pp. 112-130.

83 Hanley, supra note 6.

84 Ibid., paras. 40, 43-58, D.A., vol. II, pp. 82-83, 83-87.

85 Morantz, supra note 6.

86 Hanley, supra note 6, para. 19, D.A., vol. II, p. 74.

87 Supra, paras. 47-48.

Women face disadvantages in the workplace because of household responsibilities they largely assume on their own[88] and that "women bear a disproportionate share of the childcare burden in Canada.[89] Given this proven disproportion, restricting access to childcare will necessarily have a disproportionate impact on women. These conclusions are, however, further substantiated in more detail by the evidence analyzed in Dr. Hanley's expert report.

65. In line with the aforementioned observations of this Court, Dr. Hanley emphasizes that women disproportionately assume the obligations related to childcare and child rearing, noting among other things that women in heterosexual couples are substantially more likely to decide that the mother will stay at home to care for the children if the cost or availability of childcare poses an obstacle to employment.[90]

66. Dr. Hanley observes that there is a high degree of scientific consensus establishing that "access to affordable childcare increases women's (i.e., mothers') participation in the labour force and, conversely, that high costs of childcare discourage women's employment.[91] We should also note that the Appellant himself acknowledges the relationship between the two.[92]

67. Dr. Hanley also notes that the wage disparities that still affect women to their disadvantage can mean that access to employment does little to improve women's financial situation, and may even worsen it, in the absence of subsidized childcare.[93]

68. These conclusions are all supported by multiple scientific publications. The Appellant has not submitted any expert opinion or other evidence that would contradict these conclusions.

69. We again emphasize that contrary to what the Appellant claims, this evidence does not concern only the historical disadvantage of women. This evidence also establishes, with the support of a substantial scientific literature, a direct relationship between access to affordable childcare and access to the labour market, confirmed from both a positive and a negative perspective. This evidence is therefore also useful for examining the consequences of the contested measure, since it allows us to conclude that blocking access to subsidized childcare—like the fact

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88 Fraser, supra note 18, para. 103-104.

89 Ibid.

90 Hanley, supra note 6, para. 25, D.A., vol. II, pp. 77-78.

91 Ibid., para. 24, D.A., vol. II, p. 77.

92 Argumentation de l'appelant, para. 129, M.A., p. 29.

93 Hanley, supra note 6, para. 27, D.A., vol. II, p. 78.

Article 3 of the RCR will eliminate one of the main mechanisms of access to affordable childcare and will thus have a disproportionately negative effect on women.

70. This evidence would be enough to clearly establish that the absence of access to subsidized childcare—here taking the form of eligibility for the reduced contribution governed by Article 3 of the RCR—has a disproportionate effect on women. But the evidence introduced goes even further, establishing more specifically the disproportionate effect suffered by the subgroup of women seeking asylum.

71. Indeed, the survey conducted by Dr. Hanley and her team with 325 asylum seekers revealed that, within the group of individuals seeking asylum who have a preschool-aged child for whom the unaffordability of childcare explains why they are not working, all of them were women.[94] The unaffordability of childcare was therefore not a factor of unemployment for any man in that group.

72. The appellant attempts to counter this striking evidence of disproportion between women and men by arguing that certain intermediate figures or other information are not specified in the report.[95]

73. However, this does not change anything at all regarding the fact that the final result leaves no ambiguity as to the relevant question: among asylum seekers with preschool-aged children, lack of access to childcare because of its prohibitive cost poses a work-access problem for women, and not for men.

74. This is not an ambiguous case: it could hardly be more obvious that lack of access to affordable childcare disproportionately affects women seeking asylum compared to men.

75. Furthermore, contrary to what the appellant asserts,[96] the expert report—which, let us recall, was providing preliminary findings of a still-ongoing study[97]—indicates that the sample of respondents reflects the profile of the general population of asylum seekers in Quebec at that time, regarding almost all demographic factors.[98] Let us add that the appellant has never attempted to question Dr. Hanley and has not submitted any expert evidence, that

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94 Hanley, supra note 6, para. 44, D.A., vol. II, p. 83.

95 Argumentation de l'appelant, para. 80-88, M.A., pp. 17-19.

96 Ibid., para. 79, M.A., p. 17.

97 Hanley, supra note 6, footnote 63, D.A., vol. II, p. 83.

98 Ibid., supra note 6, para. 40, D.A., vol. II, pp. 82-83.

whether on the substantive question of the effect on women of the exclusion provided for in section 3 of the RCR or on methodological considerations.

76. The table reproduced in paragraph 46 of Dr. Hanley's expert report also shows, for certain categories, including women, that the employment rate is much lower than that of the overall group (31% for women vs. 48.6% for the overall group) and that the proportion of people who are not seeking employment is much higher than in the overall group (41.1% for women vs. 28% for the overall group). These gaps, although very significant, would have been even greater had there been an overlap of the category of women with that of parents of children under the age of 6 and if direct comparisons had been made with men only rather than with the overall group.

77. Furthermore, the study conducted by Dr. Gillian Morantz and her colleagues among asylum seekers also noted that the effects of the exclusion from subsidized childcare services had a greater impact on mothers than on fathers.[99]

78. In summary, the evidence clearly shows that the absence of access to affordable childcare services disproportionately affects women, and more specifically asylum-seeking women. The denial of access to subsidized childcare services resulting from section 3 of the RCR therefore has a disproportionate effect based on sex. The first step of the section 15 test is thus met.

1.2 Section 3 of the RCR creates a distinction based on immigration status or on asylum seeker status

79. The appellant acknowledges that section 3 of the RCR creates a distinction based on immigration status,[100] but denies that this constitutes an analogous ground of discrimination. Therefore, this section will be entirely devoted to demonstrating that immigration status—or asylum seeker status—is an analogous ground of discrimination covered by subsection 15(1) of the Charter.

80. The case law from the lower courts is divided.

81. The Ontario Court of Appeal recognized immigration status as an analogous ground in Church of Scientology[101]

. It does so by relating it to the analogous ground of citizenship recognized

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Morantz, supra note 6, pp. 322-323, D.A., vol. IX, pp. 57-58.

Argumentation of the appellant, para. 94, M.A., p. 20.

R. v. Church of Scientology of Toronto, 1997 CanLII 16226 (ON CA), pp. 41-42.

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In the Andrews decision. There is nothing surprising about this, since the disadvantage and vulnerability of persons with a non-citizen status highlighted in Andrews are just as present with respect to persons who, for example, hold refugee claimant status—in fact, they are significantly amplified in the latter case. The Federal Court has also recognized immigration status as an analogous ground in the Jaballah[102] case, and the Superior Court of Ontario decided in Fraser[103] that it was not manifest ("plain and obvious") that immigration status could not be an analogous ground under subsection 15(1) of the Charter.

82. Other decisions,[104] which were also criticized,[105] reached the opposite conclusion. These decisions are all based on the idea that immigration status is not an immutable characteristic. Let us note in passing that if one applied the syllogism found in paragraph 136 of the Irshad decision and which the appellant has reproduced in its factum[106] (immigration status can change; therefore it is not immutable; therefore it is not an analogous ground) to other recognized grounds (citizenship, religion, disability [when temporary], age, sexual orientation, etc.), they would not meet the criterion used.

83. The respondent is of the view that, on both sides, the jurisprudence of the lower courts is unsatisfactory in that it has merely carried out an examination that was sometimes superficial and sometimes downright erroneous of the issue, and in addition has incorrectly applied this Court's case law on analogous grounds. The respondent advocates a principled approach aimed at enabling a coherent articulation of the law that takes into account the principles established in this Court's case law as a whole.

a) The jurisprudence of this Court embraces a multifactorial approach to identifying analogous grounds

84. The Andrews decision laid down the first guidelines in the matter of identifying grounds analogous to those enumerated in subsection 15(1). Drawing on American jurisprudence, Justice McIntyre noted that non-citizens "constitute a good example […] of a 'minority'

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102 Jaballah (Re) (F.C.), 2006 FC 115.

103 Fraser v. Canada (Attorney General), 2005 CanLII 47783 (ON SC).

104 Argumentation of the appellant, footnote 95, M.A., pp. 20-21.

105 Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada," (2017) 54(3) Alberta Law Review 649, R.S.I., tab 1; Donald Galloway, "Immigration, Xenophobia and Equality Rights," (2019) 42(1) Dalhousie Law Journal 17, R.S.I., tab 5.

106 Argumentation of the appellant, para. 104, M.A., p. 23.

"discrete and isolated" covered by the protection of s. 15.[107] He also emphasizes that the enumerated and analogous grounds must "be given a broad and liberal interpretation so as to reflect the fact that these are constitutional provisions"[108] aimed at "the "constant protection" of equality rights."[109]

85. Justice Wilson adds to the criterion of a "discrete and isolated minority" the fact of being a member of "a group lacking political power,"[110] which makes individuals "likely to see their interests neglected."[111]She specifies that consideration must be given to "the place occupied by the group in the social, political and legal contexts of our society."[112] Finally, since "the range of discrete and isolated minorities has changed and will continue to change"[113] and given the constitutional status of s. 15(1), flexibility is required in order to allow for the recognition of new protected groups.

86. In Turpin, Justice Wilson identifies indicia that may be "stereotypes, historical disadvantages, or vulnerability to political or social prejudice."[114]

87. In Egan,[115] Justice Cory writes that "the historic disadvantage or the situation of a group as a discrete and isolated minority,"[116] as well as "stereotypes"[117] or "political or social prejudice,"[118] can denote an analogous ground. Further on, he notes that homosexual persons have suffered "serious social, political and economic disadvantages."[119] The above-mentioned elements are "indicia,"[120] the approach not being to establish a criterion with "preconditions"[121] to be formally met.

88. In the Miron case, Justice McLachlin, as she then was, after endorsing the indicia established in Andrews, Turpin and Egan, clarifies that they are indeed indicia—of a

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107 Andrews, supra note 23, p. 183.

108 Ibid., p. 175.

109 Ibid.

110 Ibid., p. 152.

111 Ibid.

112 Ibid.

113 Ibid.

114 R. c. Turpin, [1989] 1 RCS 1296, p. 1333.

115 Egan c. Canada, [1995] 2 RCS 513.

116 Ibid., p. 599.

117 Ibid.

118 Ibid.

119 Ibid., p. 602.

120 Ibid., p. 599.

121 Ibid.

"analytical method"[122] to identify analogous grounds – and not mandatory criteria. She explicitly states that the indicator of immutability is not present in all cases, noting the example of religion and citizenship. By way of illustration, Justice McLachlin refers to the case of a status attached to an individual that may eventually be changed, but that "often escapes the individual's control."[123] particularly because it depends on an uncertain sanction by the State and is subject to the influence of external constraints (the law, financial, religious, or social constraints). Citizenship is an example of this, she writes. Justice L'Heureux-Dubé, who is part of the majority in Miron, although she adopts a somewhat different approach with respect to s. 15(1), nevertheless embraces the factors noted by Justice McLachlin.[124]

89. In Corbiere,[125] Justices McLachlin and Bastarache, for the majority, focus their observations on immutability, whether real or, to use the English term employed, difficult to translate into French, "constructive."

90. However, they in no way repudiate the case law prior to Corbiere regarding analogous grounds, namely the decisions in Andrews, Turpin, Egan, and Miron. On the contrary, the majority explicitly reaffirms the validity and relevance of the "factors [...] that case law has attached to the enumerated and analogous grounds".[126] They merely propose a new conceptualization in which immutability, in its strict or broad sense, would in some way serve as a broad "conceptual umbrella."

91. Before examining the case law subsequent to Corbiere, which demonstrates the ongoing usefulness of the factors identified in Andrews, Turpin, Egan, and Miron, it must be emphasized that the conceptualization under the broad umbrella of immutability carried out in Corbiere was

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122 Miron v. Trudel, [1995] 2 SCR 418 ["Miron"], para. 149.

123 Ibid., para. 153.

124 Ibid., para. 91-103.

125 Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 ["Corbiere"].

126 Ibid., para. 13.

the subject of sustained critiques and comments in academic literature,[127] which, moreover, were alluded to by this Court in Fraser.[128]

92. While the recognition of immigration status as an analogous ground is compatible with the jurisprudence in its current state, we endorse the very widely held recommendation in the literature regarding the need to reframe the conceptual framework for analyzing analogous grounds set out in Corbiere, so that it better reflects the multifactorial approach that emerges from the Court's entire jurisprudence and is more in keeping with the fundamental standard of substantive equality that underpins s. 15(1).[129] Experience has shown that the application of formalistic categorical criteria or thresholds presenting a high level of abstraction does not serve the standard of substantive equality guaranteed by s. 15(1)[130] – one might here recall the dignity criterion set out in Law, the perpetuation of prejudice and the application of stereotypes when they are applied as mandatory criteria rather than as indicators of discrimination, and the obligation to rely on comparator groups that precisely match the group of claimants, aside from the personal characteristics invoked as a ground of discrimination. All these criteria were eventually abandoned, at least as sine qua non conditions.

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127 Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines", (2013) 50(3) Osgoode Hall Law Journal 637 ["Dixon"], R.S.I., tab 2; Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter", (2013) 2(2) Canadian Journal of Poverty Law 1 ["Eisen (2013)"], R.S.I., tab 3; Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach", (2013) 10 Journal of Law & Equality 37 ["Sealy-Harrington"], R.S.I., tab 10; Jennifer Koshan, "Inequality and Identity at Work", (2015) 38(2) Dalhousie Law Journal 473, p. 499, R.S.I., tab 6; Jessica Eisen, "Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory", (2017) 42(2) Queen's Law Journal 41 ["Eisen (2017)"], R.S.I., tab 4; Terry Skolnik, "Homelessness and Unconstitutional Discrimination", (2019) 15 Journal of Law & Equality 69 ["Skolnik (2019)"], R.S.I., tab 12; Tiran Rahimian, "Parental Undocumented Status as an Analogous Ground of Discrimination", (2020) 16(1) Journal of Law & Equality 93 ["Rahimian"], R.S.I., tab 8; Flint Patterson, "To Affirm Difference or To Deny Distinction? The Competing Canons of Equality Law", (2024) 15(1) Western Journal of Legal Studies 25 ["Patterson"], R.S.I., tab 7; Terry Skolnik, "Expanding Equality", (2024) 47(1) Dalhousie Law Journal 1 ["Skolnik (2024)"], R.S.I., tab 13.

128 Fraser, supra note 18, para. 121.

129 Rahimian, supra note 127, pp. 111-112, R.S.I., tab 8.

130 Eisen (2017), supra note 127, p. 97, R.S.I., tab 4; Patterson, supra note 127, p. 45, R.S.I., tab 7.

93. Without making a comprehensive inventory, let us note some of the problems identified in relation to the conceptual framework of immutability set out in the Corbiere decision: immutability is a poor indicator of the relevance for the State[131] to make a distinction on a given ground[132]; given that a fundamental objective of the right to equality is to "prevent discrimination against disadvantaged groups,"[133] it is preferable to focus directly on the historical disadvantage of a given group to analyze any potential discriminatory distinctions[134]; the enumerated grounds are in fact characterized by considerable heterogeneity, so that a single criterion is ill-suited for identifying analogous grounds, as analogies may be made on substantially different bases, whereas a multifactor approach offers greater flexibility[135]; the notion of grounds that "the government cannot legitimately expect us to change in order to have the right to equal treatment guaranteed by law"[136] set out in Corbiere is sometimes understood as meaning that it is impossible to recognize an analogous ground when the State has a legitimate interest in improving the situation of a disadvantaged group, such that the disadvantage becomes an obstacle to the protection of s. 15(1) rather than a ground supporting its application[137]; the immutability criterion obscures phenomena of exclusion and domination rather than highlighting them[138]; the criterion of the characteristic "modifiable only at an unacceptable cost from the perspective of personal identity"[139] has the effect of requiring the presence of a characteristic or affiliation deemed positive or desirable—thereby excluding a whole set of personal characteristics or affiliations that these individuals might wish to relinquish precisely in order to escape a situation of disadvantage—ultimately resulting in the sidelining of the most vulnerable groups;[140] the immutability criterion is liable to

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131 Let us nonetheless note that case law now establishes that the State's relevance in making a distinction does not lessen discrimination: Fraser, supra note 18, para. 79.

132 Dixon, supra note 127, p. 650, R.S.I., tab 2.

133 Fraser, supra note 18, para. 27.

134 Dixon, supra note 127, p. 651, R.S.I., tab 2; Patterson, supra note 127, p. 45, R.S.I., tab 7.

135 Dixon, supra note 127, pp. 640, 656-665, R.S.I., tab 2; Sealy-Harrington, supra note 127, p. 62, R.S.I., tab 10; Patterson, supra note 127, p. 44, R.S.I., tab 7.

136 Corbiere, supra note 125, para. 13.

137 Eisen (2013), supra note 127, pp. 21-22, R.S.I., tab 3.

138 Ibid., pp. 24-25, R.S.I., tab 3.

139 Corbiere, supra note 125, para. 13.

140 Eisen (2013), supra note 127, p. 26, R.S.I., tab 3; Rahimian, supra note 127, p. 116, R.S.I., tab 8; Sealy-Harrington, supra note 127, pp. 60-61, R.S.I., tab 10; Skolnik (2019), supra note 127, pp. 88-89, R.S.I., onglet 12; Skolnik (2024), supra note 127, p. 17, R.S.I., onglet 13.

an obstacle to certain claims based on the intersection of personal characteristics each of which, taken alone, might not be immutable, so that these claims would be rejected due to the structure of the analysis rather than the severity of the discrimination that people experience;[141] generally speaking, immutability aligns poorly with intersectional analysis, whose relevance has been recognized by the Court, whereas a multifactor approach facilitates it;[142] the idea that disadvantage can be adequately conceptualized as arising from immutability is difficult to support.[143]

94. By specifying that immutability is not a categorical criterion and by embracing the multifactor approach to analogous grounds that runs through this Court's jurisprudence without confining it within the conceptual umbrella of immutability, the problems noted above would be avoided, the overall coherence of the jurisprudence would be strengthened, and an obstacle to achieving the standard of substantive equality would be removed.

95. An examination of post-Corbiere jurisprudence shows that the Court and other courts[144] have in fact continued to focus closely on a range of factors when reviewing claims based on analogous grounds and have not treated the immutability criterion as meaning that the mere possibility of a change of status, of a choice, defeats the recognition of an analogous ground, unlike what the Appellant and certain lower courts have done with respect to immigration status.

96. In the Lavoie decision, Justices McLachlin and L'Heureux-Dubé, dissenting as to the result (section 1), but not under subsection 15(1), note that the possibility of obtaining citizenship or, more broadly, the existence of a potential choice, does not preclude finding that an analogous ground is recognized and that a measure is discriminatory.[145] This reasoning is perfectly transposable to the case of asylum seekers. In the same general spirit, this Court's jurisprudence has recalled

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141 Sealy-Harrington, supra note 127, p. 63, R.S.I., onglet 10.

142 Sealy-Harrington, supra note 127, pp. 62-64, R.S.I., onglet 10; Patterson, supra note 127, p. 47, R.S.I., onglet 7.

143 Eisen (2017), supra note 127, pp. 83-84, R.S.I., onglet 4.

144 Falkiner, supra note 36, para. 84-92; Lavoie c. Canada, 2002 CSC 23 ["Lavoie"], para. 45; R.O. c. Ministre de l'Emploi et de la Solidarité sociale, 2021 QCCA 1185, para. 66-67; R.L. c. Ministère du Travail, de l'Emploi et de la Solidarité sociale, 2021 QCCS 3784, para. 140-152.

145 Lavoie, supra note 144, para. 5.

on multiple occasions "that a difference in treatment could be discriminatory even if it is based on choices made by the individual or the group affected."[146]

97. In the analysis of the "non-resident status in an autonomous Indigenous community" conducted by Justices Kasirer and Jamal in the recent Dickson decision, the disadvantages and difficulties faced by persons living outside their community, as well as their belonging to a discrete and isolated minority, play an important role.[147]

b) The immigration status (or asylum seeker status) is an analogous ground

98. The persons who apply for asylum are possibly the most archetypal category one could imagine of the persons that analogous grounds are meant to cover. The Court's observations in Andrews regarding non-citizens apply equally – if not more so – to asylum seekers: these persons belong to a discrete and isolated minority, they are relatively lacking in political power, their interests risk being compromised by government decisions, and they are part of a group that has been historically disadvantaged. This should come as no surprise, as they are non-citizens (as in Andrews), whose vulnerability is nevertheless even greater.

99. Certain aspects of this reality – which moreover fall within the Court's judicial notice – are summarized by the authors Morantz et al. (with the support of the scientific literature) in these terms:

"In addition to pre-migratory traumas, many refugee claimants face significant post-migratory challenges: poverty, discrimination, social isolation, language barriers, difficulty accessing work, limited healthcare and precarious immigration status […]"

"While waiting for their refugee hearings, refugee claimants in Canada are eligible for minimal social assistance and are usually permitted to work and attend school. However, they encounter many barriers to employment: language barriers, discrimination and their temporary status […]."

"Refugee claimants with young children may also face the additional barrier of child care. Because refugee claimants usually arrive without a social support system, it may be difficult for them to access informal child care […]. Many experience social isolation and prolonged separation from family; their claim must be approved before they can apply for family reunification […]"[148]

[References from scientific literature omitted.]

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146 Fraser, supra note 18, para. 86. See also Skolnik (2019), supra note 127, p. 85, R.S.I., tab 12.

147 Dickson, supra note 19, para. 194-198.

148 Morantz, supra note 6, p. 319, D.A., vol. IX, p. 54.

100. The fact that immigration status belongs to analogous grounds is also demonstrated in a particularly eloquent way when one refers to the notion of control, in particular by applying the teachings of Justice McLachlin (as she then was) in Miron. Let us recall that the Justice there mentioned the idea of a status that may potentially be changed, but that often escapes the individual's control, notably because it depends on an uncertain sanction by the State and is influenced by external constraints.[149] This is a description that very faithfully reflects the essence of immigration status.

101. Following these principles, one can describe immigration status as having to be considered immutable, since individuals exercise only limited control over this status, the possible modification of which depends on the State150. Justice La Forest, in Andrews, was already describing citizenship as immutable in the sense that "it does not lie within the control of the individual."[151] Indeed, while an asylum or citizenship application is being processed, immutability is even real (actual immutability), since no change is possible.[152]

102. On this last point, let us note that it is not unusual to consider immutability as applying to a defined period of time: besides the example of citizenship identified above, we may note, for instance, the case of temporary disability. The Court thus noted that "if, by definition, a temporary disability is not immutable in the sense of not being able to change, it clearly constitutes a characteristic whose duration cannot be changed and which is totally independent of the will of the person who suffers from it."[153]

103. Moreover, the status of asylum seeker is analogous to temporary disability in another respect: in both cases, it is a characteristic or a status that people will often hope to rid themselves of—while awaiting an event over which they have little control, namely recovery or the State's granting of refugee status—because it imposes substantial obstacles and disadvantages upon them.

104. Failing to recognize this analogous ground would mean that the State would be authorized to discriminate, even in the most extreme ways, against one of the most vulnerable groups in society without having to offer the slightest justification.

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149 Supra para. 88.

150 Sealy-Harrington, supra note 127, p. 55, R.S.I., tab 10.

151 Andrews, supra note 23, p. 195.

152 Lavoie, supra note 144, paras. 5 and 52; Andrews, supra note 23, p. 195.

153 Granovsky v. Canada (Minister of Employment and Immigration), 2000 SCC 28, para. 53.

105. For all these reasons, immigration status is a clear case of an analogous ground of discrimination. Although our submissions focus on the specific case of asylum seekers (hence the subsidiary request to recognize this status, should the Court find it more appropriate), the respondent notes that courts generally tend to identify analogous grounds based on broader categories that can be broken down symmetrically (see the example of citizenship, akin for instance to the enumerated ground of sex) or that do not invariably include only those persons at the extreme end of vulnerability (see the example of receiving social assistance.[154]

106. In light of the appellant's recognition of a distinction based on immigration status, the criterion for the first step is met: section 3 of the RCR creates a distinction based on the analogous ground of immigration status (or of asylum seeker status).

1.3 Section 3 of the RCR creates a distinction based on citizenship

107. The appellant argues that section 3 of the RCR does not create a distinction based on citizenship because section 3 of the RCR does not disadvantage all non-citizens and excludes citizens who do not reside in Quebec.

108. Regarding this latter point, let us note that the existence of an eligibility condition that may exclude certain individuals (those who do not reside in Quebec) does not mean that there cannot also be an exclusion that creates a distinction based on citizenship. By way of illustration, if section 3 of the RCR provided that persons with disabilities were not eligible for the reduced contribution, that would not mean that discrimination based on disability does not exist on the grounds that there also is an exclusion for non-residents of Quebec. The same holds true for citizenship.

109. Furthermore, the fact that section 3 of the RCR does not exclude all non-citizens does not mean that there can be no discrimination based on citizenship. Indeed, as we explained above[155] the case law of this Court clearly establishes that a measure can be discriminatory even if it targets only part of a group.

110. Section 3 of the RCR excludes from eligibility for the reduced contribution all members of the sub-group of non-citizen asylum seekers, solely on the basis of their membership in that group. The fact of not holding citizenship, far from being a distant, indirect or arbitrary consideration

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154 Falkiner, supra note 36, para. 92.

155 Supra, para. 28-34.

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in the distinction made by Article 3, has for the members of the subgroup in question "a direct connection with their inability to benefit equally from services provided by the government,"[156] as was precisely the case, for example, with the subgroup of individuals with hearing impairments in the Eldridge case or with workplace accident victims suffering from chronic pain in the Martin case.

111. In the Haseeb[157] case, the Ontario Court of Appeal dismissed an argument of exactly the same nature. Although it was a case under Ontario's human rights legislation, the Court of Appeal analyzed the issue by relying on principles and rulings concerning section 15(1) of the Charter or cited in that case law.[158] The Court concluded that the fact that the employer's policy did not target all non-citizens—because it provided an exception for permanent residents—did not mean it was not discrimination based on citizenship.[159]

112. It should also be noted that the appellant's comments regarding the legislature's power to adopt conditions of entry into and residence in Canada[160] are irrelevant to the question of discrimination. Indeed, in the Lavoie decision, the Court established very clearly that this ability of the State to make distinctions concerning entry and residence in Canada—by reason of section 6 of the Charter—does not otherwise grant it the right to discriminate on the basis of citizenship for any other matter.[161] The Court further emphasizes that "non-citizens are just as essential members of Canadian society and deserve the same consideration and respect."[162] The same comments also apply with respect to the ground of immigration status. Moreover, the Court further writes in Lavoie that "[t]he freedom of choice of work and employment are fundamental aspects"[163] of Canadian society and that "[d]iscrimination in these areas may result in excluding immigrants from the social fabric of Canada, and exacerbate an existing disadvantage in the Canadian labor market."[164]

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156 Eldridge, supra note 2, para. 76.

157 Imperial Oil Limited v. Haseeb, 2023 ONCA 364.

158 Ibid., paras. 67–68, 156.

159 Ibid., paras. 149–158.

160 Appellant's Argument, paras. 99–103, M.A., pp. 22–23.

161 Lavoie, supra note 144, para. 44.

162 Ibid.

163 Ibid., para. 52.

164 Ibid.

1.4 Section 3 of the RCR imposes a burden or denies a benefit in a manner that reinforces, perpetuates, or exacerbates disadvantage

a) The second step of the test is satisfied

113. The second stage of the subsection 15(1) test concerns the discriminatory nature of the distinction based on one or more prohibited grounds. In Andrews, Justice McIntyre explains, in a definition that remains fully relevant to this day, that a distinction is discriminatory if it "has the effect of imposing on that individual or that group burdens, obligations or disadvantages not imposed on others or of preventing or restricting access to opportunities, benefits and advantages offered to other members of society[165] (emphasis added). The judge adds that "[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed[166] (emphasis added).

114. In Law, the Court indicated that "the preexistence of a disadvantage, vulnerability, or stereotypes or prejudices suffered"[167] by a group was likely "the most conclusive factor for establishing that a difference in treatment imposed by a legislative provision is truly discriminatory."[168] The Court explains that, given the group's preexisting vulnerability, "an additional difference in treatment will contribute to the perpetuation or accentuation of their unfair social characterization and will have a more serious effect on them."[169] Consequently, although a historically advantaged group could also demonstrate the discriminatory nature of a measure targeting them, "a member of a historically more disadvantaged group in Canadian society will likely have less difficulty proving discrimination."[170]

115. In the present case, it is clear that by denying asylum seekers the benefit of the reduced contribution, and therefore access to subsidized childcare services, section 3 of the

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165 Andrews, supra note 23, p. 174; Law, supra note 23, para. 26; Withler, supra note 24, para. 29.

166 Ibid., pp. 174-175. The original English version is used because the translation of "solely" used in the French version misrepresents the meaning.

167 Law, supra note 23, para. 63.

168 Ibid. See also: Ontario v. G, supra note 23, para. 47.

169 Ibid.

170 Law, supra note 23, para. 68.

RCR reinforces and perpetuates the historical disadvantage experienced by women, and more particularly by women seeking asylum.

116. The historical disadvantage experienced by women has already been described above. Women disproportionately assume obligations relating to child care and child rearing/[171] This situation leads to lower participation in the labor market compared to men.[172] Women also bear the brunt of persistent wage disparities based on sex.[173] By denying women the benefit of the reduced contribution and thus access to subsidized childcare services, section 3 of the RCR reinforces and perpetuates their historical disadvantage.

117. People who are seeking asylum constitute a historically disadvantaged group facing very significant difficulties upon their arrival in the country, as reported above. The study carried out by Dr. Morantz clearly summarizes their state of great vulnerability.[174]

118. In light of the scientific literature and of the survey she led, Dr. Hanley draws the following conclusions regarding various effects of excluding asylum seekers from subsidized childcare services:

> We can be very confident that the exclusion of refugee claimants – a highly racialized population – from Quebec's subsidized childcare program results in the following effects:
>
> A. Many parents – particularly mothers, and even more so single mothers – of young children are unable to access the labour market in the absence of affordable childcare.
>
> B. Parents denied access to the labour market find themselves dependent on Last Resort Financial Assistance, at high cost both for the state and in terms of parents' financial and social wellbeing.
>
> C. Other parents enter the work force while either paying an unreasonably high proportion of their income on childcare (introducing other budgetary problems) or relying on informal, unregulated childcare (introducing instability into their job tenure).
>
> D. Refugee claimants who are unable to work while their children are preschool age (the claims process takes years to complete) face lifelong employment effects related to deskilling, earning potential and career trajectories that will follow many of them into their lives as Permanent Residents and, eventually, Canadian citizens.

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171 Supra, para. 64-65.

172 Supra, para. 64-66, 71, 76.

173 Supra, para. 67.

174 Supra, para. 99.

E. Denial of subsidized childcare to refugee claimants creates social exclusion. Refugee claimants may feel unable to contribute socially while experiencing reinforced dependence on social assistance and many parents feel acutely that their children are be ing denied opportunities for development and social connection.[175]

119. The evidence also contains testimonies that describe the profound negative consequences experienced by women who have claimed asylum in connection with their inability to work due to their ineligibility for subsidized childcare. One of the women interviewed, for example, recounts her distress and sense of uselessness ("[...] I feel useless. I can't work. [...] I want to pay taxes. Let me give back to the society. I'm tired of sitting at home").[176] They also address the injustice for their children that results from their exclusion ("My daughter is born in Canada. She does not have the same rights as Canadians because of the status of her mother. She does not have the right to go to daycare").[177]

120. Dr. Hanley also reports that the exclusion from subsidized childcare services and the resulting inability to work generate, among women refugee claimants, a feeling of isolation[178] and can lead to prejudices associated with dependency on government financial assistance.[179] The article by Drs. Morantz et al. also noted higher depression rates among immigrant and refugee mothers who did not have support for childcare.[180] Dr. Hanley also catalogs the barriers faced by women refugee claimants excluded from subsidized childcare services in terms of French-language instruction and social integration.[181] She notes that the inability to work among the individuals in question can give rise to a phenomenon of deskilling as well as lifelong financial losses (loss of earning capacity, negative impact in terms of job opportunities, lower savings, lower contributions to social benefit plans [notably in matters of maternity, illness, and retirement]).[182] The inability to access childcare for their children is also likely to prevent the individuals in question from pursuing studies or vocational training while their children are very young, which is also associated with lifelong financial losses.

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175 Hanley, supra note 6, para. 58, D.A., vol. II, p. 87.

176 Ibid., para. 50, D.A., vol. II, pp. 84-85.

177 Morantz, supra note 6, p. 322, D.A., vol. IX, p. 57.

178 Hanley, supra note 6, para. 53, D.A., vol. II, p. 86.

179 Ibid., para. 54, D.A., vol. II, p. 86.

180 Morantz, supra note 6, p. 323, D.A., vol. IX, p. 58.

181 Hanley, supra note 6, paras. 55 to 57, D.A., vol. II, p. 86.

182 Ibid., paras. 35-36, D.A., vol. II, pp. 80-81.

121. In sum, the expert report by Dr. Hanley and the sources supporting it, as well as the study led by Dr. Morantz, eloquently show that denying access to subsidized childcare services perpetuates, reinforces, and exacerbates the disadvantage experienced by women and asylum seekers. In the case of women seeking asylum, the denial of the advantage offered to other members of society by section 3 of the RCR has a particularly prejudicial negative effect given their particular vulnerability resulting from the intersection of the disadvantages associated with both groups.

122. Finally, the appellant introduced no evidence to counter this evidence of the respondent.

123. Section 3 of the RCR thus imposes a burden or denies an advantage in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage experienced by the groups in question, whether on the basis of sex or of immigration status (or of asylum seeker status) or of citizenship. Section 3 of the RCR therefore infringes subsection 15(1) of the Charter.

b) The appellant does not refute that the second step of the test is satisfied

124. The appellant's arguments relating to the second step by no means refute the demonstration that section 3 of the RCR imposes a burden or denies an advantage in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage of the groups in question.

125. The appellant claims that the Court of Appeal allegedly confused the two steps of the analysis.[183] Let us recall in this regard that the Fraser and Sharma rulings make the following observations: there are no watertight divisions between the two steps; the two steps are distinct but can overlap, the important point being to answer the distinct questions posed by each of the steps; the same evidence can be used to answer the questions raised by both steps.[184] The Court has often stressed that the analysis of discrimination must not be confined to a fixed formula[185] or a "rigid model,"[186] but rather should be applied with "flexibility."[187]

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183. Appellant's arguments, paras. 126-127, M.A., pp. 28-29.

184. Fraser, supra note 18, para. 82; Sharma, supra note 22, paras. 30 and 194. See also: Withler, supra note 24, para. 64; Law, supra note 23, para. 85; Luamba v. Attorney General of Quebec, 2022 QCCS 3866, para. 824 (upheld on appeal: Attorney General of Quebec v. Luamba, 2024 QCCA 1387; application for leave to appeal to the Supreme Court of Canada, file no. 41605).

185. Andrews, supra note 23, p. 168.

186. Quebec v. A, supra note 24, para. 331.

187. Andrews, supra note 23, p. 153; Ontario v. G, supra note 23, para. 47.

126. In cases of discrimination resulting from an adverse effect – unlike cases of direct discrimination – a significant part of the analysis aimed at demonstrating the disproportionate effect, at the first stage, will often focus on the disadvantage of the group in question.[188] The present case is no exception, even though the evidence also relates to the consequences of the challenged measure. Moreover, disadvantage also plays an important role at the second stage, as that stage concerns whether the measure reinforces, perpetuates, or exacerbates the disadvantage. Furthermore, in cases of discrimination resulting from an adverse effect, taking into account the consequences of the challenged measure in order to establish the disproportionate effect at the first stage may also directly echo at the second stage, when it comes time to determine whether the challenged measure reinforces, perpetuates, or exacerbates the disadvantage.

127. It is thus entirely normal, in the present case, for the second-stage analysis to rely on evidence used at the first stage, and even for conclusions drawn at the first stage to help answer the second-stage question. When we combine the pre-existing disadvantage of women—particularly women seeking asylum—with the harmful consequences for them of being excluded from subsidized childcare services, we are able both to establish the disproportionate effect of section 3 of the RCR on women (and more specifically on women seeking asylum) and to note that this exclusion worsens their pre-existing disadvantage (or, in the words of the second stage, reinforces, perpetuates, or exacerbates it). Thus, the conclusion that section 3 of the RCR reinforces, perpetuates, and exacerbates the disadvantage experienced by women seeking asylum—which the Court of Appeal reached, thereby indeed addressing the second-stage question—is in a sense immediately apparent after the analysis undertaken at the first stage.

128. At paragraphs 130 to 132 of its factum, the appellant argues that, since the LSGEE and the RCR improve the situation of women, section 3 cannot be discriminatory. In the same vein, it contends that the judgment of the Court of Appeal would hinder the State's ability to act gradually when legislating to remedy disadvantages.

129. With respect, these arguments have been rejected on multiple occasions by the Court. In Eldridge, the Court recalled that "once the state actually grants a benefit, it is obliged to do so without discrimination"[189] and added that "[i]n many cases"[190]

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188 Supra, para. 27, 45, 50.

189 Eldridge, supra note 2, para. 73.

190 Ibid.

governments will have to expand "the scope of applying a benefit so as to grant it to a category of persons who were previously excluded."[191]

130. In the Centrale decision, the Court wrote in the same vein that the obligation imposed on the State by para. 15(1) to ensure "that all measures it effectively takes have no discriminatory effect" (italics in the original) in no way hinders its capacity "to take a gradual approach to tackling systemic inequalities."[192] Finally, the Court has repeatedly underlined that "[p]rovisions bringing about an improvement, but remaining restrictive in nature, which exclude members of a historically disadvantaged group will almost always be deemed discriminatory."[193] This is precisely the case here.

131. In paragraph 133 of his factum, the Appellant misrepresents the content of the cited expert report and completely removes this particular piece of data from its context, which in no way invalidates all the other evidence contained in Dr. Hanley's expert report, whether it be her own survey of asylum seekers or the other sources put forward. First, contrary to what the Appellant claims, the cited paragraph of Dr. Hanley's expert report (para. 32) does not state that access to subsidized daycare services "has little impact" on their integration into the labor market, but rather that the relationship is weaker ("less strong") than for certain other groups, yet nonetheless positive ("positive nonetheless"). Next, let us note that the observation applies to recent immigrants, rather than asylum seekers, from an American population. Furthermore, Dr. Hanley explains in the same paragraph certain factors that lead some populations not to enter the labor market despite having some access to childcare services: the choice to stay at home in certain communities; obstacles related to obtaining housing, education, or integration into the community; and preferences related to the form of childcare. The Kesler study cited itself explains that the immigrants in question face additional obstacles on top of those posed by the availability of childcare services, which partly explains why an improvement in that respect does not resolve all of the difficulties.

132. The Appellant also argues that the adverse effects would be attributable to federal laws and the processing delays of asylum claims, such that section 3 of the RCR would not be the

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191 Ibid.

192 Alliance, supra note 24, para. 42. See also Fraser, supra note 18, paras. 132-133; Centrale, supra note 24, para. 35.

193 Law, supra note 23, para. 72; Vriend, supra note 29, paras. 94-104.

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source of the discrimination.[194] Yet, this argument disregards the fact that if section 3 of the RCR did not exclude asylum seekers, the detrimental effects in question would not exist. Moreover, this Court has rejected this type of argument, noting that the distinctions "which result from the interaction of one law with other laws or circumstances are taken into account in the analysis of substantive equality."[195] Thus, regarding the issue of processing times, the situation must be analyzed according to actual circumstances rather than a hypothetical situation that could or should exist. Furthermore, even under the assumption that the processing time might be short—which is nowhere near the situation in the present case—it should be noted that this Court specified that the second step of the test under subsection 15(1) does not impose "any preliminary severity requirement."[196]

2. THE INFRINGEMENT OF SUBSECTION 15(1) OF THE CHARTER IS NOT JUSTIFIED UNDER SECTION ONE THEREOF

133. This Court has already noted that since "section 15 is designed to protect socially, politically, and legally disadvantaged groups in our society, the responsibility placed on the government to justify the type of discrimination experienced by these groups is rightly a heavy one."[197] The appellant does not meet this burden in this case.

2.1 The pressing and substantial objective

134. This Court has repeatedly stressed that the objective to be considered at the first stage of the Oakes test "is that of the impugned measure, and not, more generally, that of the provision."[198] However, the appellant has failed to identify the objective of the impugned measure, namely the exclusion of persons seeking asylum from the categories eligible for the reduced contribution, and instead stated a general objective allegedly pursued by section 3 of the RCR, namely "to provide financial assistance to persons who have a sufficient link with Quebec."[199]

135. Moreover, the fact that for several years persons seeking asylum who held a work permit were explicitly considered eligible for the

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194 Argumentation de l’appelant, para. 134-135, M.A., p. 31.

195 Ontario c. G, supra note 23, para. 51.

196 Ontario c. G, supra note 23, para. 64.

197 Andrews, supra note 23, p. 154. Voir aussi : Skolnik (2024), supra note 127, p. 9, R.S.I., onglet 13.

198 Frank c. Canada (Procureur général), 2019 CSC 1 ["Frank"], para. 46.

199 Argumentation de l’appelant, para. 139, M.A., p. 32.

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reduced contribution[200] shows that the objective specifically linked to the impugned measure (thus, the objective of excluding asylum seekers) cannot be regarded as urgent and real.

2.2 The Rational Connection

136. The Appellant must then demonstrate a rational connection between the impugned measure and the urgent and real objective. In the present case, "[t]he relevant question is whether the discrimination[201] has a rational connection with the legislative objectives." This requires demonstrating "that the measure is neither 'arbitrary, nor unfair, nor based on irrational considerations'"[202] and "that the restriction has a causal connection with the objective sought."[203] In this case, as recognized by the Court of Appeal, the Attorney General has not shown a rational connection between the exclusion of asylum seekers and the stated objective, namely to grant financial assistance to persons who have a "sufficient connection with Quebec."

137. Indeed, several of the categories set out in section 3 are by nature categories of people staying in Quebec only on a temporary basis, whereas people seeking asylum, by contrast, aim to settle in the country. This is notably the case of a person who stays temporarily in Quebec to work under a fixed-term work permit (paragraph 3), a foreign student holding a Quebec acceptance certificate[204] (paragraph 4), and the holder of a temporary residence permit issued under section 24 of the IRPA (paragraph 7).

138. This latter situation is particularly striking: the permit set out in section 24 of the IRPA is granted in exceptional circumstances to allow a foreign national to be in Canada despite an inadmissibility or a failure to comply with the IRPA, is obviously temporary, and is moreover revocable at any time.

139. The State cannot simultaneously claim that excluding those seeking asylum is justified because they do not have a sufficient connection with Quebec, while at the same time making several categories of people who are necessarily in Quebec only temporarily eligible, including even persons prohibited from entering the territory or having contravened the IRPA, whose temporary residence permit is revocable at any time.

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200 Email of August 27, 2015 from the Ministère de la Famille, exhibit P-2, D.A., vol. X, pp. 122-123.

201 Benner, supra note 54, para. 95.

202 Frank, supra note 198, para. 59.

203 Ibid.

204 See sections 2-3 of the Regulation respecting immigration to Quebec, RLRQ, c. I-0.2.1, r. 3.

2.3 Minimal Impairment

140. To satisfy the minimal impairment criterion, the government must demonstrate that "the measure in question restricts the right as little as reasonably possible for the purpose of achieving the legislative objective"[205] which implies that the measure is "carefully tailored" so that the infringement of rights does not exceed what is reasonably necessary.[206] The appellant has not demonstrated that the exclusion of persons seeking asylum constitutes a minimal impairment of their right.

141. In the event that the rational connection criterion is deemed to be met, the objective of ensuring a "sufficient link with Quebec" could be achieved by far less impairing means than the complete exclusion of persons seeking asylum from subsidized childcare services. Let us recall once again that the appellant's position requires that this sufficient link be considered to be currently satisfied in the case of persons staying temporarily in Quebec or who hold a temporary residence permit that can be revoked at any time despite inadmissibility or a violation of the IRPA.

142. In fact, the requirement set out at the beginning of section 3 of the RCR to reside in Quebec allows the general objective of section 3 of ensuring a sufficient link between the parent and Quebec to be achieved without causing discrimination and its profound prejudicial effects. Insofar as being in Quebec on a temporary basis is fully compatible with the presence of a sufficient link—which is necessarily the case according to the appellant's position—the rejection of an asylum claim, which will ultimately result in a removal order, will put an end to residence in Quebec. Much like a person temporarily in Quebec whose permit would expire, or the holder of a temporary residence permit issued under section 24 of the IRPA whose permit would be revoked, the link would then no longer be sufficient.

143. As for the appellant's assertion that the exclusion of persons seeking asylum is "conditional,"[207] it has no basis. Persons seeking asylum will never have access to subsidized childcare services for as long as they hold that status. It is precisely the granting of another status—refugee or person in need of protection—that will make them eligible.

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205 Frank, supra note 198, para. 66.

206 Ibid.

207 Argumentation of the appellant, para. 2, 154, M.A., pp. 1, 36.

2.4 Balancing the beneficial effects and the prejudicial effects

144. At this final stage of the proportionality analysis, one must "weigh the infringement of the applicant's rights against the benefits to society of the challenged measure, by asking whether 'the benefits flowing from the limitation [to the applicant's rights] are proportionate to the prejudicial effects.'"[208]

145. The prejudicial effects resulting from excluding persons seeking asylum are profound, serious, and numerous, not only for these persons and their children, but also for society in general: inability to work, which harms the excluded persons but also society; financial losses with a lifelong impact; reliance on last-resort assistance (which places persons in a state of severe financial precariousness, exposes them to prejudice, and generates costs for the State); inability to pursue studies or vocational training; de-skilling; obstacles to French-language instruction and social integration; isolation; distress and depression; a sense of uselessness and of being discounted by society; negative impacts on children's development;[209] denial of access to support services for children with special needs.

146. The appellant neither raises nor demonstrates any beneficial effect for society from excluding persons seeking asylum from eligibility for subsidized childcare services. He has presented no evidence showing the beneficial effects of the specific impugned measure.[210] For example, there is not the slightest evidence in the record that "the sustainability of services offered by the State"[211] would be compromised by making persons seeking asylum eligible for the reduced contribution. Moreover, the fact that other services governed by other laws or rules do not exclude persons seeking asylum[212] is not a beneficial effect resulting from the impugned measure.

147. Consequently, the appellant does not meet the proportionality of effects test.

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208 R. v. Ndhlovu, 2022 SCC 38 ["Ndhlovu"], para. 130.

209 Expert report by Dr. Sanja Stojanovic, pp. 6-8, D.A., vol. II, pp. 97-99; Observatoire des tout-petits, "Nouveau Portrait de l'Observatoire des tout-petits: des situations préoccupantes et des iniquités persistent," 19 November 2019, D.A., vol. X, pp. 96-98.

210 Ndhlovu, supra note 208, para. 134.

211 Appellant's Argument, para. 157, M.A., p. 36.

212 Ibid., para. 158, M.A., p. 37.

3. THE APPROPRIATE CONSTITUTIONAL REMEDY IS A BROAD INTERPRETATION

148. As in many cases of legislation whose scope is too restrictive (underinclusive) due to an infringement of a right protected by the Charter,[213] the most appropriate remedy in the present case is the method of broad interpretation (reading in).[214]

149. A broad interpretation would further the government's objective of providing affordable and high-quality educational childcare services and would be less of an encroachment on this objective than the complete invalidation of section 3 of the RCR. Invalidation would be a much more disruptive judicial intervention here, as it would destroy all the other parameters established by the government and remove any limit on eligibility for the reduced contribution (consider, for example, the case of tourists.[215] Indeed, contrary to what the appellant claims,[216] invalidating section 3 of the RCR would not eliminate the existence of a reduced contribution, its amount, or the fact that a parent can and must pay it in order to access subsidized childcare services (see sections 82, 84 and 85 of the LSGEE and sections 5 and 6 of the RCR), but would instead remove the need to meet eligibility conditions. Moreover, suspending a declaration of invalidity would perpetuate the violation of the constitutional rights of those seeking asylum while invalidity itself is not the appropriate remedy in the first place, and no exceptional circumstances or extremely stringent criteria to suspend a declaration of invalidity have been demonstrated.[217]

150. The extent to which the scope of section 3 must be expanded can be determined with "sufficient precision"[218] here: it is simply a matter of remedying the unconstitutional exclusion of the category at issue, namely asylum seekers, by including them.

151. The remedy ordered by the Court of Appeal is not a broad interpretation of section 3(3), but rather a broad interpretation of section 3 that adds the category excluded in a discriminatory manner, namely asylum seekers. The inclusion in the remedy of the requirement

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213 Vriend, supra note 29, paras. 144-179; Miron, supra note 122, paras. 176-181; Kent W. Roach, Constitutional Remedies in Canada, 2nd ed., Toronto (ON), Thomson Reuters, 2024, para. 14:35, R.S.I., tab 9.

214 Schachter v. Canada, [1992] 2 S.C.R. 679, pp. 695-696, 700-702, 707 and 711-715 ("Schachter"); Vriend, supra note 29, paras. 150, 153, 155 and 160-171.

215 Vriend, supra note 29, para. 150.

216 Appellant's argument, para. 168, M.A., p. 39.

217 Ontario v. G, supra note 23, para. 117; R. v. Albashir, 2021 SCC 48, para. 1.

218 Vriend, supra note 29, para. 155.

The requirement to hold a work permit, which appeared in the conclusion requested by the Respondent, is explained by the nature of the discriminatory effects, which largely arise from obstacles regarding access to the labor market, by a desire to return to the situation that prevailed before 2018 (when the ministry imposed the requirement of a work permit for asylum seekers), and by the concern to limit the constitutional remedy as much as possible. However, if the government believes that the requirement of a work permit is not necessary for asylum seekers, it is entirely free to amend section 3 of the RCR so as to include them without imposing this requirement, or, if need be, to make other changes that do not result in an unconstitutional discriminatory effect.

152. The group to be added in this instance is "numerically smaller than the initial group of beneficiaries,"[219] which also demonstrates the appropriateness of the remedy. Moreover, the exclusion of asylum seekers does not have "an importance so central with respect to the objectives pursued by the legislature"[220] and is not "so essential to the scheme of the legislation that the legislature would not have adopted it [sic]"[221] without it. A broad interpretation does not change the very nature of the subsidized childcare system.

PART IV – COSTS

154. In view of the nature of the dispute, the parties involved, the significant imbalance in their respective resources, and the fact that the Respondent raises a constitutional question that far exceeds the parties' interests, the Respondent requests that costs be awarded to her, regardless of the outcome of the case.[222]

PART V – ORDER SOUGHT

155. For the reasons set out above, the Respondent asks the Court to dismiss the appeal.

PART VI – SENSITIVE NATURE OF THE PROCEEDING?

156. The record contains no order, prohibition, or restriction provided for in Rule 42(2)(f) of the Rules of the Supreme Court of Canada.

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219 Vriend, supra note 29, para. 163; Schachter, supra note 214, p. 712.

220 Vriend, supra note 29, para. 167.

221 Ibid.

222 Ouellet (Syndic de), 2004 CSC 64, para. 17-18; 2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool), [1996] 3 RCS 919, para. 72; Thibaudeau c. Canada, [1995] 2 RCS 627, p. 736.

Montreal, March 10, 2025

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PART VII – TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

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