**File no. 41210**

# SUPREME COURT OF CANADA

**(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUEBEC)**

BETWEEN :

**ATTORNEY GENERAL OF QUEBEC**

**APPLICANT**

(appellant / incidental respondent)

- And -

**CIBUABUA KANYINDA JEWEL**

**RESPONDENT**

(respondent / incidental appellant)

- And -

**HUMAN RIGHTS COMMISSION AND YOUTH RIGHTS**

**RESPONDENT**

(incidental appellant)

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## RESPONDENT'S RESPONSE

**BIJOU CIBUABUA KANYINDA (rule 27 of the *Rules of the Supreme Court of Canada)***

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## RESPONDENT'S MEMORIAL

## PART I – STATEMENT OF THE RESPONDENT'S POSITION AND FACTS

1. The courts, including this Court[1], have long recognized that women take responsibility disproportionately the obligations relating to the custody and care of children. They have also noted the disadvantages suffered by women in the labour market due to this inequality in the assumption of family obligations[2].

2. The subsidized childcare program introduced in Quebec in 1997 aimed to others to increase women's participation in the labour market; the scientific literature agrees that the programme has achieved this objective[3].

3. In order for their children to attend a subsidized daycare service, parents must belong to one of the categories established in section 3 of *the Reduced Contribution Regulation*[4] (hereinafter, "the *RCR ")* adopted under the *Educational Child Care Services Act*[5] (hereinafter, "the *LSGEE ").*

4. While it previously considered that asylum-seeking parents with a permit working were eligible for payment of the reduced contribution and therefore had access to the subsidized child care services, the government did an about-face in 2018.

5. Therefore, people – and more particularly women – like the respondent having applied for asylum and obtained a work permit who were looking for a place for their children with subsidized childcare services have come up against closed doors.

6. The respondent challenged Article 3 of the *RCR.* One of the bases of its appeal was that this Article, by excluding people seeking asylum, has a disproportionate negative impact on women, so that it constitutes discrimination based on sex as a result of an effect harmful.

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1 *Fraser* v. *Canada (Attorney General),* 2020 SCC 28 [" Fraser "], paras. 98-104.

2 *Ibid.*

3 Dr. Jill Hanley, *The labour implications of the exclusion of refugee claimants from Quebec's subsidized childcare program* **["Hanley"],** para. 22, 24, **Factum of Respondent Bijou Cibuabua Kanyinda (hereinafter "IM"), pp. 32-34.**

4 *Regulation respecting reduced contributions,* RLRQ c S-4.1.1, r. 1.

5 *Act respecting educational childcare services,* RLRQ c S-4.1.1.

7. In its appeal, the respondent filed what the Court of Appeal described as "convincing scientific evidence" [6] to demonstrate the disproportionate effect on women seeking asylum from the exclusion resulting from Article 3 of the *RCR.* Thus, the expert report of the Dr. Jill Hanley, supported by an impressive scientific literature, establishes the negative effect disproportionate impact on women, and particularly women seeking asylum, linked to the deprivation of access to subsidized childcare services. In addition to the scientific literature analyzed, Dr. Hanley conducted a survey of 325 people who had applied for asylum in Quebec . 7 She also benefited from a study conducted by a group of researchers who had also conducted interviews in Quebec with members of families applying for asylum . 8

8. For example, among the asylum seekers interviewed by Dr. Hanley claiming that they were unemployed *because* they were unable to pay for child care, *all were women9 .*

9. The Court of Appeal, applying the principles established by this Court concerning Article 15 of the *Canadian Charter of Rights and Freedoms* (hereinafter, the " Canadian *Charter "* or "the *Charter "),* concluded that section 3 of the *RCR* was unconstitutional because of discrimination based on sex due to a resulting detrimental effect.

**THE CONTEXT**

**(a) The situation of the respondent at the time of filing the appeal application**

10. The respondent arrived in Quebec in October 2018. She is the mother of three children, who, at at the time of filing the appeal, were 5 years old, 4 years old and 2 years old. She had no family in Canada at the time.

11. Upon her arrival in Quebec, the respondent submitted an asylum application and obtained a work permit.

12. The respondent made approaches to several daycare centers in order to find a place for their children, but is denied access. Several daycares cite as refusal that they cannot provide subsidized childcare services to a person with status of asylum seeker.

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6 Judgment of the Court of Appeal, para. 89, **Application for Leave to Appeal (hereinafter "DAA"), p. 49.**

7 Hanley, *supra* note 3, para. 40, **MI, p. 39.**

8 Gillian Morantz, Cécile Rousseau, Anna Banerji, Carolina Martin and Jody Heymann, *Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care,* Child and Family Social Work 2013, 18, **MI, p. 48-58.**

9 Hanley, *supra* note 3, para. 44, **MI, p. 40.**

13. The respondent does not have the means to cover the costs of unsubsidized child care services10 .

14. It should be noted in passing that persons seeking asylum are not eligible for advance payments of the tax credit for childcare expenses11, which exacerbates the prohibitive nature of the unsubsidized services for these people.

15. In the absence of access to subsidized childcare services, the respondent is not able to work, although she has a work permit authorizing her to do so.

16. Due to the length of the process for obtaining refugee status, the respondent then facing the prospect of a long period without access to subsidized child care services. This effectively prevents her from working and deprives her of the special measures provided for in the social security system subsidized child care services to support children with special needs, which is the case of two of the respondent's children.

17. In January 2021, the respondent was granted refugee status.

**(b) The legal and regulatory framework and the position of the ministry**

18. Section 2 of the *LSGEE* states “the right” of “every child” “to receive services from quality personalized educational care from birth to »[12] that it integrates the school network. This right is exercised “taking into account the availability, organization and resources of educational child care service providers” and “in compliance with the rules provided for by the *[LSGEE]* relating to access to educational child care services” 13. Article 2 also provides that the Minister has the obligation to ensure that the supply of child care services meets demand14 .

19. The *LSGEE* and the *RCR* adopted under it establish a framework governing the granting of child care subsidies and the reduced contribution required from a parent to obtain subsidized child care services.

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10 The conclusions emanating from the respondent's expert evidence take into account custody arrangements other than subsidized services, which are quite illusory for persons in the respondent's situation. In any event, the Attorney General has not provided any evidence on the concrete factual situation of the asylum-seeking parents with respect to the services he describes in paragraph 11 of his submission, **DAA, p. 63.**

11 *Taxation Act,* CQLR c I-3, art. 1029.8.80.2.

12 *LSGEE,* art. 2, al. 1.

13 *LSGEE,* art. 2, al. 2.

14 *LSGEE,* art. 2, al. 3.

20. Article 3 of the *RCR,* at the heart of this file, lists the categories of persons who are eligible for payment of the reduced contribution and therefore for subsidized childcare services:

> **3.** A parent who resides in Quebec and meets one of the following conditions is eligible for payment of the reduced contribution:
>
> 1° he is a Canadian citizen;
>
> 2° he is a permanent resident within the meaning of the Immigration and Refugee Protection Act (LC 2001, c. 27);
>
> 3° he is staying in Quebec primarily to work and he holds a work permit issued in accordance with the Immigration and Refugee Protection Act or is exempt from the requirement to hold such a permit under that Act;
>
> 4° he is a foreign student, holder of a certificate of acceptance issued under the Act respecting immigration to Quebec (chapter I-0.2.1) and recipient of a scholarship from the Government of Quebec in application of the policy relating to foreign students in colleges and universities of Quebec;
>
> 5° he is recognized, by the competent Canadian court, as a refugee or person in need of protection within the meaning of the Immigration and Refugee Protection Act and he holds a selection certificate issued under section 3.1 of the Quebec Immigration Act;
>
> 6° the Minister of Citizenship and Immigration has granted him protection under the Immigration and Refugee Protection Act and he holds the selection certificate referred to in paragraph 5;
>
> 7° he holds a temporary residence permit issued under section 24 of the Immigration and Refugee Protection Act with a view to the possible granting of permanent residence and the selection certificate referred to in paragraph 5;
>
> 8° he is authorized to submit to Canada an application for permanent residence under the Immigration and Refugee Protection Act or the Immigration and Refugee Protection Regulations (SOR/02-227) and he holds the selection certificate referred to in paragraph 5.

21. Previously, many subsidised childcare services took in children of asylum-seeking parents. The Ministry of the Family itself considered that:

> […] the parent who resides in Quebec and who holds a work permit issued in accordance with the legislation and regulations on immigration and refugee protection is eligible for the reduced contribution.15

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15 Exhibit P-2, **MI, p. 60.**

22. In April 2018, the Ministry reversed its position and stated that asylum seekers holding a work permit were not eligible for payment of the reduced contribution16 .

23. On May 31, 2019, the respondent filed an application for judicial review, in three parts: a) an interpretative and declaratory part seeking to have it recognized that a person asylum seekers who are staying in Quebec and hold a work permit are eligible for payment of the reduced contribution under the existing provisions of the *LSGEE* and the *RCR; ( b)* a administrative law section alleging that Article 3 of the *RCR* is null and void, because it was adopted without valid legislative authorization or because it is discriminatory within the meaning of administrative law; (c) a constitutional aspect alleging that the exclusion of persons seeking asylum, staying in Quebec and holders of a work permit is unconstitutional because it seriously infringes unjustified infringement of the right to equality guaranteed by section 15 of the *Canadian Charter* and by section 10 of the *Charter of Human Rights and Freedoms* (hereinafter, “the Quebec Charter”), that it constitutes a cruel and unusual treatment within the meaning of section 12 of the *Canadian Charter* and that it constitutes a violation of the right to human dignity guaranteed by section 4 of the Quebec Charter.

24. The prohibited grounds of discrimination alleged in the application with respect to the section based on section 15 of the *Canadian Charter* are sex (discrimination by prejudicial effect) as well as immigration status and citizenship (direct discrimination).

25. The trial judge upholds the respondent's application on the basis of the absence of a valid legislative authorization allowing the adoption of Article 3 of the *RCR* and rejects the others application components.

26. The Attorney General appeals the Superior Court's decision regarding the absence of valid legislative authorization, while the respondent is bringing an incidental appeal against the part of the judgment rejecting the conclusions sought as to the fact that Article 3 of the *RCR* infringes Article 15 of the *Canadian Charter* without this infringement being justified under section 1. The Commission of Human Rights and Youth Rights, which intervened at first instance, files also an incidental appeal concerning the interpretation of Article 3 of the *RCR* and the character discriminatory nature of this provision under the Quebec Charter.

16 Exhibit P-1, **MI, p. 59.**

27. The Court of Appeal allows the Attorney General's principal appeal concerning the absence valid legislative authorization and allows the incidental appeal of the respondent concerning article 15 of the *Canadian Charter* with respect to the ground of sex.

28. The Court of Appeal concludes that the exclusion in Article 3 of the *RCR* of parents seeking asylum constitutes discrimination by reason of a detrimental effect based on sex which affects to section 15 of the *Canadian Charter.* In view of this conclusion, it does not rule on the two other grounds of discrimination invoked by the respondent. The Court concludes that the infringement of Article 15 is not justified under section 1 of the *Charter* and that constitutional redress appropriate is the broad interpretation. The Court of Appeal thus states that section 3(3) of the *RCR* "must henceforth be read as making eligible for payment of the reduced contribution the parent who resides in Quebec for the purposes of an asylum application while holding a work permit" [17].

**THE RESPONDENT'S POSITION ON THE ADVISABILITY OF GRANTING THE APPEAL**

29. The Attorney General claims in his application for leave to appeal that the judgment of the Court appeal "suggests that subsection 15(1) of the Canadian Charter provides a general guarantee of equality and requires the State to correct all inequalities [...]" [18].

30. In reality, the Attorney General is thereby attempting to resurrect the argument to the same effect that was rejected in the *Alliance* judgment[19]

31. If there has been some uncertainty in the case-law of this Court as to the possibility that Article 15 of the *Charter* could give rise to a positive obligation for the State to create new regimes or benefits, it has always been extremely clear that excluding discriminate against certain categories of people from access to certain benefits and existing advantages infringe Article 15 of the *Charter :*

> This Court has repeatedly held that, once the state actually grants a benefit, it is obliged to do so without discrimination; see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission),* [1991] 2 SCR 22, *Haig v. Canada (Chief Electoral Officer),* [1993] 2 SCR 995, at pp. 1041-42, *Native Women's Assn. of Canada v. Canada,* [1994] 3 SCR 627, at p. 655, and *Miron,* supra. In many cases, governments will have to take

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17 Judgment of the Court of Appeal, para. 9, **DAA, p. 20.**

18 Applicant's Brief, para. 31, **DAA, p. 68.**

19 *Quebec (Attorney General)* v. *Alliance of Professional and Technical Staff in Health and Social Services,* 2018 SCC 17, para. 42 *[Alliance].*

concrete measures, for example by extending the scope of a benefit to include a category of persons previously excluded; see *Miron, Tétreault-Gadoury,* and *Schachter v. Canada,* [1992] 2 RCS 679. […]20

32. It is not the Court of Appeal which proposes a vision of section 15 of the *Charter* which is not not in line with the jurisprudence of this Court, but rather the Attorney General. While the The case-law of this Court has consistently recalled that the analysis under Article 15 focuses on the *effects* of the contested measure21, on its "concrete repercussions" 22, the prosecutor general completely evacuates these from the analysis, thus emptying of its substance the fundamental norm of real equality which is at the heart of the guarantee of article 1523 .

33. This case is a classic case of discrimination by adverse effect.

34. This Court has had the opportunity to consider on many occasions the framework for analysis of Article 15 of the *Charter* in recent years, particularly in the specific case of the discrimination by reason of a detrimental effect. For example, only since the *Alliance* judgment in 2018, which is sometimes considered to present the contemporary formulation of the test of Article 15, this Court studied and applied this provision of the *Charter* in the *Fraser24* cases , *Ontario* v. G25 , *R.* v. *CP26* , *Sharma27* and *Dickson28*.

35. The judgments of this Court in *Fraser* and *Sharma,* in particular, examine at length and broadly the framework of analysis and the principles applicable to discrimination as a result of an effect prejudicial. Most recently, in the *Dickson decision,* these two decisions were applied by the judges of this Court.

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20 *Eldridge* v. *British Columbia (Attorney General),* [1997] 3 SCR 624 [“ Eldridge ”], para. 73; see also: *Alliance, supra* note 19, para. 42; *Vriend* v. *Alberta,* [1998] 1 SCR 493, para. 63-64; *Fraser, supra* note 1, para. 132-133.

21 *Fraser, supra* note 1, para. 42; *Withler* v. *Canada (Attorney General),* 2011 SCC 12 [“ Withler ”], para. 39.

22 *Ontario (Attorney General)* v. G, 2020 SCC 38 [“ Ontario **v. *G ”],*** para. 43.

23 *Fraser, supra* note 1, para. 42.

24 *Fraser, supra* note 1.

25 *Ontario* v. G, *supra* note 22.

26 *R.* v. *CP,* 2021 SCC 19.

27 *R.* v. *Sharma,* 2022 SCC 39 [« Sharma »].

28 *Dickson* v. *Vuntut Gwitchin First Nation,* 2024 SCC 10.

36. As noted by the Attorney General, this Court did not grant leave to appeal in the *Stadler* case[29] decided by the Manitoba Court of Appeal nor did it repudiated this decision in the judgments it subsequently rendered, namely the five cases decided since 2020 cited above. Note that contrary to what the Attorney General claims, the The Court of Appeal did not conclude in *Stadler* that the contested rule was discriminatory in because of its disproportionate impact on people with disabilities "simply because that persons with disabilities often experience difficult economic situations" [30], but well after having noted that this rule reinforced the historical disadvantage suffered by these persons[31]. The same thing is true in this case: the Court of Appeal does not conclude that discriminatory nature of Article 3 of the *RCR* simply on the basis of a finding of disadvantage historically suffered by women and more particularly women seeking asylum, but also after finding that the provision "reinforces, perpetuates and accentuates the disadvantage suffered by these last, as women, in the labor market" [32].

37. It should be noted in passing that, contrary to what the Attorney General suggests[33], *Sharma* has not in no way set aside consideration of the situation of the applicants – here, the situation of women, and more particularly women seeking asylum – which exists independently of the law. This exercise remains inherent in the entire approach of Article 15, as *Sharma* expressly indicates[34].

38. What *Sharma* is rather specifying is that a link must be established between the impugned provision and the discriminatory effect, by showing that the law created or contributed to the disproportionate effect on the group in question. This is precisely what the Court of Appeal considered: in fact, the exclusion resulting from Article 3 of the *RCR* creates or contributes to disproportionate adverse effects on women seeking asylum, notably identified in Dr Hanley's report.

39. The fate of this case rests largely on the evidence provided to establish the disproportionate effect of the contested measure on the protected group. In the present case, the evidence presented by the respondent was "convincing" [35] and the detrimental effects on members of the

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29 *Stadler* v *Director, St Boniface/St Vital,* 2020 MBCA 46 *[Stadler].*

30 Applicant's Brief, para. 33, **DAA, p. 68.**

31 Stadler, *supra* note 29, para. 95.

32 Judgment of the Court of Appeal, para. 102, **DAA, p. 54.**

33 Applicant's Brief, para. 30, **DAA, pp. 67-68.**

34 *Sharma, supra* note 27, para. 49.

35 Judgment of the Court of Appeal, para. 89, **DAA, p. 49.**

group of women seeking asylum "have been clearly demonstrated by Mrs Kanyinda, scientific proof to support it »[36].

40. In other cases, on the contrary, the evidence was not sufficient. This was the case for example in the *Sharma* case and in the *Yao* case cited by the Attorney General. In *Sharma,* The majority stressed that the respondent "had not produced *any* statistical data"[37] (italics in the original), expert evidence or other evidence to demonstrate that the provisions contested had a disproportionate impact on the Aboriginal offender group. In *Yao,* the Tax Court of Canada concluded that there was insufficient evidence of disproportionate impact38 (subject to the upcoming decision of the Federal Court of Appeal).

41. The determining role of the nature and quality of the evidence is easily seen. However, this The Court does not take up cases to, fundamentally, reweigh the evidence.

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## PART II – STATEMENT OF ISSUES IN DISPUTE

42. In the context of the Attorney General's application for leave to appeal, the questions following constitutional issues are raised:

has. Does section 3 of the *RCR* infringe section 15 of the *Canadian Charter* on the basis of the prohibited motive of sex?

b. Has the Attorney General demonstrated that the infringement of Article 15 is justified? under section 1 of the *Canadian Charter?*

c. What is the appropriate constitutional remedy in the circumstances?

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## PART III – STATEMENT OF ARGUMENTS

### A. Section 3 of the *RCR* infringes section 15 of the *Canadian Charter* on the basis that prohibited sex motive

#### *(i) The Attorney General's argument alleging an analysis by the Court of Appeal limited to circumstances independent of the contested provision*

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36 Judgment of the Court of Appeal, para. 115, **DAA, p. 57.**

37 *Sharma, supra* note 27, para. 36; see also paras. 74, 76.

38 *Yao* v. *The King,* 2024 TCC 19, para. 197-199.

43. The Attorney General's argument is that the Court of Appeal limited itself to to note the pre-existing disadvantage of women in accessing the labour market, so that its analysis under section 15 of the *Charter* would be completely divorced from the measure contested, namely Article 3 of the *RCR.* However, this is not the case at all.

44. Indeed, the evidence analyzed by the Court of Appeal testifies both to "the situation of the group of applicants »[39] "practical consequences"[40] of the contested provision, i.e. *the* two categories of evidence that are not mandatory, but "particularly useful for proving has a disproportionate effect on members of a protected group"[41] identified in that a law *Fraser* and Sharma decisions . The Court of Appeal thus notes the pre-existing obstacles to which the women face in accessing the labor market due to the fact that they assume a share disproportionate burden of child care and custody obligations. But the evidence examined by the Court also considers the "practical consequences" of the contested provision, namely the exclusion of asylum seekers from subsidized childcare services. For example, the Court cites in particular the following consequences of this exclusion resulting from article 3 of the *RCR* identified in Dr. Hanley 's expert report :

> […] 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 labor market in the absence of affordable childcare.
>
> B. Parents denied access to the labor 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 workforce 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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39 *Fraser, supra* note 1, para. 56; *Sharma, supra* note 27, para. 49.

40 *Fraser, supra* note 1, para. 58; *Sharma, supra* note 27, para. 49.

41 *Fraser, supra* note 1, para. 56.

> 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 being denied opportunities for development and social connection.
>
> [Emphasis added.]

45. The evidence analyzed by the Court of Appeal is therefore in no way limited to "circumstances which exist independently of the provision" 42. The entire interview process with asylum seekers conducted by Dr. Hanley and Drs. Morantz et al. also relates directly to the effects resulting from the exclusion created by Article 3 of the *RCR.*

46. The Attorney General writes that section 3 of the *RCR* does not guarantee the right to a place in child care services or access to the labour market. 43 This is correct, but the challenge The respondent's constitutional claim does not in any way claim a guaranteed right to a place or to access to labour market, but rather the removal *of discriminatory obstacles,* which is the purpose of the guarantee real equality of Article 15.

47. The Attorney General completely ignores the *effects* of Article 3 in the question with far too restrictive terms which, according to him, should be asked44. This does not comply with the criterion of Article 15, which deals with the effects of the measure.

48. Let us recall that it is a question of examining "the real effect of the legislative measure on [the] 45 members of the group, the "practical consequences of the law" 46, "the repercussions of the situation" concrete significant effects that the contested law has on the applicant and the protected group(s) to which it belongs to their real situation, which includes social, political and historical or current legal » [47].

49. The Court of Appeal is thus perfectly in line with the teachings of this Court and faithful to the standard of real equality guaranteed by Article 15 by focusing on the effects of exclusion asylum seekers provided for in Article 3 of the *RCR.*

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42 Applicant's Brief, para. 45, **DAA, p. 71.**
43 Applicant's Brief, para. 44, **DAA, pp. 70-71.**
44 Applicant's Brief, paras. 46, 60, 64, **DAA, pp. 71, 74-75.**
45 *Fraser, supra* note 1, para. 42; see also *Withler, supra* note 21, para. 39.
46 *Fraser, supra* note 1, para. 58; *Sharma, supra* note 27, para. 49.
47 *Ontario v.* G, *supra* note 22, para. 43.

50. It should be recalled that at the first stage of the analysis under Article 15, the question is whether the contested measure "creates, prima facie or by its effect, a distinction based on a ground listed or similar" [48] and that in the case of discrimination by adverse effect, This exercise "involves asking whether the contested [measure] created or contributed to a *disproportionate effect* on the applicant group for a protected reason." (emphasis in original)49 .

51. *The very essence* of the concept of disproportionate effect is that the measure will not affect exclusively members of the protected group invoked, but also persons not belonging not to this group, whether to a lesser extent or in an attenuated manner.

52. In *Fraser,* this Court raises the possibility of demonstrating a disparity statistical evidence to demonstrate the disproportionate effect, while stressing that it is not appropriate to establish a precise threshold50 .

53. As early as the *Symes51 judgment,* this Court noted that discrimination by prejudicial effect could exist in cases where a measure *also* has effects on persons who are *not* members of the protected group:

> [...] in a case requiring an adverse effects analysis under s. 63 of the Act, it could be argued that a limit on the child care expense deduction could have a negative impact on both men and women.52

54. The Attorney General appears to distinguish the *Fraser* case from the present case by insisting heavily on the fact that the only people who have used the share program position were women53. However, as indicated above, the criterion of Article 15 regarding discrimination by adverse effect is not an exclusive effect criterion , but rather a criterion disproportionate effect . Let us recall that in any case, the disproportionate effect on women The number of asylum seekers here is massive, as evidenced in particular by the data collected during the survey conducted by Dr Hanley54 .

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48 *Fraser, supra* note 1, para. 27; *Sharma, supra* note 27, para. 28.

49 *Sharma, supra* note 27, para. 31.

50 *Fraser, supra* note 1, para. 59.

51 *Symes v. Canada,* [1993] 4 SCR 695.

52 *Ibid.,* p. 770.

53 Applicant's Brief, paras. 50-51, 63, **DAA, pp. 72, 75.**

54 *Supra* para. 8.

55. Contrary to what the Attorney General claims55, the Court of Appeal engaged in the relevant comparison exercise according to the applicable legal criterion. In matters of discrimination as a result of a detrimental effect, the comparison exercise involves demonstrating a disproportionate effect of the contested provision on the members of the group56 . The Court of Appeal conducts such an examination by noting the evidence which establishes the disproportionate effect on women seeking asylum from the exclusion provided for in Article 3 of the *RCR.*

56. The Attorney General argues that the Court of Appeal limited itself to finding a disadvantage existing for women, without doing the required comparison exercise. The Attorney General claims in the same breath that the disadvantage should only be taken into account at the second stage of the analysis57. This is incorrect.

57. First, while it is true that disadvantage is an important part of the second stage of analysis, it is wrong to say that it cannot be addressed within the framework of the first stage. Moreover, the word "disadvantaged" appearing in paragraph 99 of the Court of Appeal's decision that reproduced by the Attorney General in his memorandum, in fact relies essentially on a quotation by the Court of Appeal of paragraph 103 of *Fraser,* which is precisely in the portion of the analysis devoted to the *first* stage. This is not surprising, because the analysis of the situation of the group of applicants, which is part of the first stage, is interested in the "evidence [which] aim to demonstrate that membership in the applicant group is associated with certain characteristics that disadvantaged members of the group" [58] (emphasis added).

58. That being said, the Court of Appeal did not limit itself to the pre-existing disadvantage of women in its analysis of the disproportionate effect, this aspect being moreover relevant. The Court takes firstly, the group situation is taken into account – the disadvantage suffered by women with regard to access to the labour market due to their family responsibilities.

59. It *also* notes that the exclusion of Article 3 of the *RCR* has the following aims: practical consequence of posing an obstacle to access to the labour market for women asylum seekers suffer disproportionately. The evidence also establishes that the latter

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55 Applicant's Brief, para. 52-53, **DAA, p. 72.**

56 *Sharma, supra* note 27, para. 31, 41-42.

57 Applicant's Brief, para. 52 and footnote 60, **DAA, p, 72.**

58 *Fraser, supra* note 1, para. 57.

suffer disproportionately, as a result of the effects of Article 3, obstacles to the francization and more broadly regarding integration into Quebec society.

60. The exercise is obviously comparative: the Court notes that the measure has an effect disproportionate on women, and in particular women seeking asylum, compared to men. Evidence shows that it is women who are most *likely* to be affected (due to the predominant role played by women in family responsibilities and barriers to accessing the job market posed by lack of access to childcare services) and that it is *actually* they, and in particular women seeking asylum, who are the most affected by the exclusion provided for in Article 3 of the *RCR* (which is confirmed in particular by the surveys conducted by Drs . Hanley and Morantz et al.).

61. It is important to note that the Court of Appeal concluded that there was discrimination based on on gender because Article 3 of the *RCR* "has a disproportionate negative impact on women seeking asylum »[59] (emphasis added). In other words, discrimination based on on sex targets a subgroup of women.

62. It is well established in case law that discrimination can be established on the basis of with respect to a subgroup. For example, in Symes , Iacobucci J., for the majority, wrote the following:

> In another context, a different subgroup of women, presenting different evidence under s. 63, might well be able to demonstrate the adverse effects required by s. 15(1). […]60

> In my view, if it were possible to establish in another case that s. 63 of the *Act* has a prejudicial effect on a certain group of women, that section would be discriminatory on a ground based on sex, in accordance with the decisions in *Brooks* and *Janzen,* supra. […]61

63. The Attorney General alleges that the logic adopted by the Court of Appeal would lead to the same finding of gender discrimination if foreign students did not have the certificate and the scholarship set as conditions in paragraph 4 of article 3 of the *RCR* and were by consequently ineligible for the reduced contribution.

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59 Judgment of the Court of Appeal, para. 88, **DAA, p. 49.**

60 *Symes, supra* note 49, p. 766.

61 *Ibid.,* p. 770.

64. Without making a definitive statement on the hypothetical case raised by the prosecutor General, we note all the same that we cannot, without more, transpose the conclusion of the Court appeal to this hypothetical situation, since it is based on a finding of discrimination against of the particular subgroup of women seeking asylum, which implies a very difficult situation different from the example of foreign students.

65. The Attorney General's argument that the respondent's grant of refugee status would demonstrate the absence of discrimination based on sex is also worthless. By becoming a recognized refugee, the respondent was no longer covered by the exclusion of Article 3 of the *RCR.* She no longer belonged to the subgroup of women seeking asylum. The disproportionate effect of The exclusion of women still belonging to this subgroup is not, however, erased: these women continue to suffer it, precisely because they still belong to this subgroup.

66. We also note that the *Duperron* case62 cited by the Attorney General63 does not provide useful insight here, since the nature of this case and the evidence were very different. In this case, the complainant had been treated differently from *all* the prisoners, whether they were men or women. In short, there was no distinction in treatment between men and women, but simply improper treatment *of the complainant.* There was therefore no allegation in this case of a disproportionate effect on men – and therefore, of course, no evidence of such a disproportionate effect.

***(ii) The Attorney General's argument that the two stages of the analysis of Article 15 have not been distinctly filled in***

67. The Attorney General alleges that the Court of Appeal failed to respect the two stages distinct from the analysis under Article 15.

68. First, let us emphasize that a combined reading of the *Fraser* and *Sharma* decisions – where the majority indicates that it does not change the applicable test in matters of the right to equality64 nor repudiate or modify the principles identified in the *Fraser* decision65 – highlights the following elements66 : it there are no watertight bulkheads between the two stages; the two stages are distinct, but can

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62 *Attorney General of Quebec* v. *Human Rights and Youth Rights Commission (Duperron),* 2024 QCCA 12.

63 Applicant's Brief, footnote 62, **DAA, p. 73.**

64 *Sharma, supra* note 27, para. 33.

65 *Ibid.,* para. 28-30, 37-38, 41-42, 46-49, 52-55, 71.

66 *Fraser, supra* note 1, para. 82; *Sharma, supra* note 27, para. 30 and 194.

overlap, the important thing being to answer the distinct questions posed by each of the steps; the same evidence can be used to answer questions at both steps.

69. Let us first note that the Attorney General evades a significant part of the findings made at the first step by retaining only the portions relating to the historical disadvantage of women, excluding, among other things, everything reported in paragraphs 93 to 95 of the decision.

70. As regards the second step, the Court of Appeal answers the separate question correctly that this poses, indicating that the exclusion resulting from Article 3 reinforces, perpetuates and accentuates the disadvantage suffered by women seeking asylum.

71. It is normal, in the present case, that the analysis of the second stage be concise and relies on evidence used in the first stage. Indeed, in the present case, the superposition of historical disadvantages suffered by women with the disproportionate effect of The exclusion of women seeking asylum means that the conclusion that Article 3 The fact that the *RCR* reinforces, perpetuates and accentuates the disadvantage they experience is immediately apparent.

72. In short, the most important part of the work in this case consisted in establishing the effect disproportionate impact of Article 3 of the *RCR* on women seeking asylum, which explains why the most of the analysis is devoted to it.

73. The Attorney General also criticises the Court of Appeal in this part of its argument for not "making the connection with Article 3 of the Regulations" 67. Let us first note that the question of the connection essentially falls under the first stage68. That being said, the evidence noted by the The Court of Appeal, on the contrary, clearly establishes the link between the exclusion resulting from Article 3 of the *RCR* and the disproportionate impact suffered by women seeking asylum, as explained above69 . Thus, the exclusion provided for in Article 3 is clearly identified as one of the causes of the difficulties in integrating women seeking asylum into the labour market. Finally, let us stress that *Sharma* is explicit that "it is sufficient to demonstrate that the law was *a* cause" [70] (italics in the original), and not "the *sole* or *principal* cause of the disproportionate effect" [71].

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67 Applicant's Brief, para. 62, **DAA, p. 75.**
68 *Sharma, supra* note 27, para. 49.
69 *Supra* para. 47-48.
70 *Sharma, supra* note 27, para. 49 b).
71 *Ibid.*

74. Contrary to what the Attorney General claims72, the situation in the present case is analogous to the *Fraser* case : just as the pre-existing disadvantage of women in This matter was exacerbated by the deprivation of the right to buy back service linked to the program of job sharing, here the pre-existing disadvantage of women seeking asylum is exacerbated by the exclusion resulting from article 3 of the *RCR.*

**B. The Attorney General has not demonstrated that the infringement of Article 15 is justified under section 1 of the *Canadian Charter***

75. The Attorney General's call to disregard the concrete situation of asylum seekers Quebecers regarding the processing times for their requests amounts to proposing an analysis constitutional divorced from reality. The analysis of the constitutionality of provisions legislative or regulatory measures should not be made in an abstract and theoretical framework; it is necessary to take into account the provision as it produces its effects in practice.

76. Thus, long delays in processing asylum applications, far from conferring immunity on the State or a means of defence, exacerbate the detrimental effects suffered by members of the group involved here.

77. Furthermore, contrary to what the Attorney General states73, the Court of Appeal summarized all of its arguments on section 1 of the *Charter74 .*

78. Let us recall that the objective proposed by the Attorney General was to limit financial assistance to persons with a "sufficient connection" with Quebec. One may wonder whether this objective is really that of the specific infringing measure75 at issue here rather than a more general objective, but the Court of Appeal nevertheless accepted it while expressing reservations76 .

79. As the Court of Appeal pointed out, several of the categories of persons eligible for terms of article 3 of the *RCR* are on the territory of Quebec in an eminently temporary manner: this is the case for workers referred to in paragraph 3, foreign students referred to in paragraph 4 and persons holding a temporary residence permit issued under section 24 of the *Act*

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72 Applicant's Brief, para. 63, **DAA, p. 75.**

73 *Ibid.,* para. 70, **DAA, p. 76.**

74 Judgment of the Court of Appeal, para. 105 et seq., **DAA, pp. 55-57.**

75 *Frank* v. *Canada (Attorney General),* 2019 SCC 1, para. 46.

76 Judgment of the Court of Appeal, para. 106, **DAA, p. 55.**

*on immigration and refugee protection77.* As the Court has recognised, this latter case of figure is particularly striking: the permit provided for in Article 24 of this law is granted in exceptional circumstances to allow a foreign national to be in Canada *despite a banishment from territory or failure to comply with this law* is obviously temporary and is additionally revocable at any time.

80. The Attorney General does not explain in any way how these people would be linked sufficient with Quebec while asylum seekers would not present any. It does not provide in in particular no explanation relating to paragraph 7 of Article 3.

81. Furthermore, he did not provide any evidence before the lower courts or present argument to demonstrate that the beneficial effects of exclusion outweighed the effects detrimental effects suffered by excluded persons.

**C. The appropriate constitutional remedy in the circumstances is the method of broad interpretation**

82. The Attorney General maintains that in the event of a finding of unconstitutionality, the remedy The appropriate course would have been to simply invalidate Article 3 of the *RCR* – accompanied by a ten-month suspension – rather than the broad interpretation adopted by the Court of Appeal78 .

83. This position is surprising given the – unfounded – criticism that the Attorney General made to the Court of Appeal for having unduly encroached on the legislative domain by applying the technique of broad interpretation.

84. Indeed, the invalidation of Article 3 would have been a remedy which would have encroached greatly more on the legislative field. Rather than limiting itself to correcting the unconstitutional exclusion, This remedy would have completely annulled any notion of eligibility categories and extended access to subsidized childcare services for everyone, including categories that remain to date not covered. The Attorney General has also made absolutely no demonstration that this would be one of the "exceptionally rare cases where it is appropriate to suspend temporarily the effect of a declaration of constitutional invalidity" [79] based on the criterion very demanding which applies in this matter80 .

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77 *Immigration and Refugee Protection Act,* SC 2001, c 27.

78 Applicant's Brief, para. 77, **DAA, p. 78.**

79 *R.* v. *Albashir,* 2021 SCC 48, para. 1.

80 *Ontario* v. G, *supra* note 22, para. 117.

85. In this case, the three conditions established by case law for the broad interpretation to be applied are met81 : (a) the broad interpretation would promote the achievement of the objective of the government to provide affordable, quality educational childcare services and would constitute a lesser encroachment on that objective than the invalidation of Article 3; (b) the choice of means used by the legislator to achieve this objective is not sufficiently incontestable for the broad interpretation constitutes an unacceptable encroachment on the legislative domain; (c) the broad interpretation would not entail such a significant encroachment on the decisions financial statements of the legislator that it would modify the nature of the child care services regime subsidized.

86. The Attorney General also criticises the Court of Appeal's decision to extend access to subsidised childcare services to all asylum seekers rather than just women.82 But not only is such a result not unusual in cases of discrimination as a result of of a detrimental effect, but it is even expected.

87. For example, in *Fraser* the remedy ordered was

> declare that there has been a breach of the rights guaranteed by s. 15(1) of full-time members of the RCMP who temporarily reduce their hours of work under a job-sharing arrangement, because of the inability of those members to buy back their period of full-time pensionable service.83

88. If the Attorney General's position were accepted, it would amount to criticizing the decision of this Court in *Fraser* to grant a working condition not to women, but to all full-time RCMP members who are temporarily reducing their hours as part of a job sharing agreement.

89. In any case, as explained above, it is of the very essence of a measure having a disproportionate effect on a group of people that it *also* has – lesser – effects on other groups of people. Thus, correcting this discriminatory measure will result naturally also effects on these other groups of people.

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81 *Schachter* v. *Canada,* [1992] 2 SCR 679, p. 695-696, 700-702, 707 and 711-715; *Vriend* c. *Alberta,* [1998] 1 SCR 493, para. 150, 153, 155 and 160-171.

82 Applicant's Brief, para. 3, **DAA, p. 60.**

83 *Fraser, supra* note 1, para. 138.

90. Finally, the Attorney General claims that the exclusion of asylum seekers results only of subsection 3(5) of the *RCR,* so that the broad interpretation applied by the Court appeal to subsection 3(3) would be inappropriate.

91. In reality, the Court of Appeal does not say that asylum seekers are excluded by the paragraph 5, but rather that neither paragraph 3 nor paragraph 5 refers to asylum seekers.[84] Their exclusion in fact follows from Article 3 as a whole.[85] Moreover, the prosecutor General himself does not propose as a subsidiary measure the invalidation of paragraph 3(5) alone, but of Article 3 in its entirety, because only the invalidation of the entire article would resolve the under-inclusion unconstitutional in the case of this hypothesis of reparation.

92. The broad interpretation allows the unconstitutional exclusion to be corrected in the most circumscribed possible. The repair is also designed in connection with the argument of discrimination presented, which relies largely on the effects of exclusion relative to market integration work, hence the work permit requirement and the fact that it is modelled on the paragraph 3. Furthermore, the remedy sought actually repeats the interpretation of Article 3 adopted by the government before its about-face in 2018. The government remains free to to extend access to asylum seekers who do not hold a work permit if this is the case his desire.

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## PART IV – ARGUMENTS ON COSTS

93. Considering the nature of the dispute, the parties involved and the very great disproportion of their respective resources, the respondent's means being extremely limited and those of the attorney general not being so, the respondent requests that costs be awarded to it if the application for authorization appeal is dismissed and that no costs be awarded against him otherwise.

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## PART V – ORDERS REQUESTED

94. The respondent requests that the application for leave to appeal be dismissed, with costs.

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84 Judgment of the Court of Appeal, para. 64-65, **DAA, p. 42.**

85 *Ibid.,* para. 7, 60, 67.

Montreal, May 10, 2024

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## PART VI – TABLE OF SOURCES

**Case law *(continued)*** **Paragraph(s)**



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