What's at Stake in the Kanyinda Appeal at the Supreme Court of Canada?

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Introduction

The Kanyinda appeal at the SCC raises a number of critical issues for social rights advocates and equality seeking groups:

i) Whether the right to equality and non-discrimination in section 15 of the *Canadian Charter* imposes positive obligations on governments to implement ameliorative measures, programs or legislative measures to address systemic inequality and disadvantage experienced by protected groups. In this case, the issue is the obligation to address the disadvantage experienced by women in the labour market and in access to education because of the disproportionate responsibility assumed by women for the care of dependent children.

   Whether immigration status should be recognized as a prohibited ground of discrimination under section 15 of the Charter as it has been recognized under international human rights law, particularly in the case of *Toussaint v Canada* CCPR/C/123/D/2348/2014 (30 August 2018).

ii) The proper approach to intersecting grounds of discrimination in equality rights cases, which in the present case, may require consideration of recognition of discrimination on grounds of both sex and immigration status.

Background

When disadvantaged claimants have argued for interpretations of *Charter* rights that would provide equal protection to those who require positive measures to address systemic deprivation and disadvantage, their claims have often been rejected on the basis that the *Canadian Charter* does not impose positive obligations to remedy systemic socio-economic inequality and deprivation, even where such deprivations clearly engage interests protected by the right to life, security of the person and equality.

Courts have relied on the absence of freestanding socio-economic rights in the *Canadian Charter* to dismiss claims requiring positive measures to address homelessness and access to essential health care, even in cases where the evidence is accepted that the

absence of positive measures results in the deprivation of life and disproportionately harms groups guaranteed the equal benefit of the law under section 15.[1]

Justice Perell's decision in 2022 dismissing Canada's motion to strike the claim in Toussaint v. Canada (Attorney General) 2022 ONSC 4747 was the first time we succeeded in getting a court to identify the prejudicial and unfair mischaracterization of claims to the right to life and equality from the most disadvantaged groups as non-justiciable claims to economic benefits like "free health care" or housing rather than as legitimate claims to the right to life and equality which happen to be interdependent with rights that are categorized as socio-economic rights.

In the present case we are hopeful that the minority decision in *Sharma* will become a majority, and that the Court will return the concern expressed by the minority in *Sharma* that the Court should not retreat from its commitment to substantive equality "by pre-emptively foreclosing the possibility of "general, positive obligation[s] on the state to remedy social inequalities or enact remedial legislation."

We hope to encourage the Court to relinquish its irrational resistance to positive obligations under the Charter, given that such obligations are central to Canada's international human rights obligations.

ESCR-Net intervened in the *Toussaint* case to address the concern that courts and many legal scholars in Canada have misunderstood the implications of Canada's dualist system. Many seem to believe that a dualist system relieves the courts of any role in ensuring access to effective remedies to international human rights law and leave governments free to decide which international human rights law will be protected domestically and which will not. In fact, state obligations to give effect to international obligations through the adoption of necessary legislative measures and the responsibility of courts to interpret constitutional rights consistently with substantive obligations under international law are particularly important and critical in a dualist country like Canada. If the right to equality under international law requires States to adopt remedial legislative measures and to implement necessary programs, it is critical that section 15 be interpreted as imposing similar obligations. Otherwise, there is no access to effective remedies for many of the most egregious violations of the right to equality. ESCR-Net is seeking leave to intervene in Kanyinda to advance similar arguments in the context of access to affordable childcare.

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[1] See, for example, Tanudjaja v. Canada (Attorney General) ,2014 ONCA 852; Canadian Doctors For Refugee Care v. Canada (Attorney General), 2014 FC 651 at paras 511-571 , [2015] 2 FCR 267; Toussaint v. Canada (Attorney General), 2011 **FCA** 213.

The CCPI Coalition also intervened in the Motion to Strike in *Toussaint* and has been granted lave to intervene in the ongoing action to counter Canada's argument that the Charter does not impose a positive obligation to ensure access to essential health care to protect the right to life and the right to equality without discrimination because of immigrations status. CCPI brings the important perspectives of irregular migrants who continue to be denied access to essential health care, of those working directly with migrants in need of health care, and of those working to combat discrimination and stigma faced by members of this group. The CCPI Coalition assisted the Court in considering the critical issues about the scope of sections 7 and 15 of the Charter, and the application of these sections to irregular migrants when their lives are placed at risk by the denial of access to essential health care.The *Kanyinda* case seems to us to offer a unique opportunity for the Supreme Court to clarify the issue of positive obligations under section 15 that we have not had since the *Vriend* case. We made positive advances in the *Eldridge* case, just prior to *Vriend*, in which the Court rejected as "thin and impoverished" the view that section 15 that does not require governments to adopt measures to address disadvantage that is not caused by the government itself. However, despite the fact that the underlying issue in *Eldridge* was the need for a separate program to provide interpreter services, courts have managed to restrict the positive obligations affirmed in *Eldridge* to the accepted idea that there is an obligation to accommodate disabilities in the provision of health care services. The dominant refrain which courts derive from the subsequent *Chaoulli* case is that: "There is no obligation to provide health care but once it is provided, it must not violate *Charter* rights." That is not what was actually said by Justices McLachlin and Major in Chaoulli. They stated that "the Charter does not confer a freestanding right to health care," which is correct. Auton is also cited against us in most of our cases: "This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner."

It is somewhat likely that the court will be attracted to a similar formulation of the issue in this case, suggesting that there is no obligation to have a childcare program but once one has it, it must comply with section 15 and must not exclude a group from the benefit on a discriminatory ground. We don't think that is a correct understanding of the substantive equality issue in this case, however, so we want to suggest a different approach that is more consistent with international human rights law.

The Kanyinda case is mostly analogous to the *Vriend* case and we will be urging the Supreme Court to return to its clarification of the substantive equality analysis in that case. The inequality being addressed in *Vriend* was discrimination that occurs largely in the private realm and what was challenged was government's failure to provide a necessary

protection – what Dianne Pothier, quoted by the court, referred to as "the sounds of silence". In that case the Court distinguished between two types of equality analysis. The exclusion of sexual orientation as a ground could be found to discriminate against LGB persons in comparison to other groups such as racial minorities, who faced similar discrimination and who had been provided the necessary protection. In the formal equality analysis, it could be said that there is no obligation to enact human rights legislation but, once enacted, it was required to provide equal treatment to LGB persons. Under the formal equality analysis, it could be contemplated, and indeed it WAS contemplated by Justice Major, that Alberta could comply with section 15 by revoking the legislation altogether.

This version of section 15's protections, however, is fundamentally at odds with Canada's obligations under international human rights law. Ensuring legislative protection in domestic law from discrimination is a clear obligation under international law, so why would we interpret section 15 so differently?

It is in **Vriend** that the Supreme Court provided the basis for an approach to section 15 that is consistent with international law and with the purposes of the equality guarantee.

> It is clear that the *IRPA*, by reason of its under-inclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.
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> The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more difficult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group.

Under the substantive equality analysis, it is clear that a failure to provide ANY human rights protections would in no way escape its obligations under section 15 to provide

necessary protections. And this is really the substantive equality analysis that grounds positive obligations that are more routinely recognized under equality law. A failure to provide a wheelchair ramp creates a discriminatory distinction between those who need the ramp and those who don't.

Kanyinda is analogous to *Vriend* in that the inequality being addressed is largely in the private sphere. There is a formal equality distinction on the basis of immigration status, but the sex equality discrimination relies on a substantive equality analysis. Access to affordable childcare is required for women's equality in the labour force. Providing no subsidized childcare to anyone would not resolve the substantive equality violation. The court may want to repeat what it has stated in other cases that "there is no obligation to provide childcare but once it is provided, it must be provided in compliance with the Charter without discrimination." That does not really make sense, however, when the violation is a failure to address systemic disadvantage faced by women in the labour force. So this might be an occasion to use international human rights law to encourage the court not to continue with the idea that the right to equality does not impose any obligation to adopt ameliorative programs.

If the Canadian Charter of Rights is to be interpreted as providing protections of the right to equality in line with Canada's international human rights obligations, it is critical that it be interpreted as imposing obligations on governments to adopt necessary policies, programs and legislation to give effect to international human rights obligations. Canadian courts must play a central role in ensuring good faith implementation of international human rights obligations by interpreting and applying Charter rights based on a presumption of conformity. Recognizing positive obligations of governments to act to address systemic disadvantage and deprivation affecting protected groups is foundational to that presumption.

1. Positive Obligations and Access to Childcare as a component of the right to equality in International Human Rights Law

Positive obligations to implement international human rights through the adoption of legislation and programs is fundamental to Canada's obligations to implement its obligations under UN human rights treaties in good faith.

Article 2 of the ICCPR clarifies the obligation of State Parties "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

Article 3 establishes the obligation to ensure access to effective remedies under domestic law.

Article 2 of the ICESCR establishes the obligation on States:

> to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" and to guarantee the exercise of the rights in the ICESCR, including the right to work, "without discrimination of any kind.

Article 3 of the ICESCR Article 3 establishes that State Parties "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

Article 2 of CEDAW clarifies that women's right to equality under international law requires States to o adopt appropriate legislative and other measures; establish legal protection of the rights of women; take all appropriate measures to eliminate discrimination against women and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

UN Human Rights treaty body commentary and jurisprudence consistently emphasizes the obligation of states to ameliorate and remedy existing socio-economic inequality and disadvantage. This include the disadvantage experienced by women in the exercise of the right to work because of child care responsibilities.

CESCR

In its *General Comment No. 20* on Non-Discrimination in Economic, Social and Cultural Rights, the CESCR underscores that eliminating discrimination requires addressing both formal and substantive aspects. It states that "merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by Article 2(2)."

The Committee further notes that "eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice." This necessitates that "States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination."

The CESCR has applied this principle directly to women's right to equality in work and the state obligation to ensure access to affordable childcare.

In General Comment No. 16 on The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3) the CESCR states that:

> "States parties should take measures to reduce the constraints that women face in enjoying their rights, such as by ensuring access to affordable childcare facilities, paid parental leave, and flexible working arrangements." CESCR, General Comment No. 16, (2005) at para 24

In General Comment No. 23: The Right to Just and Favorable Conditions of Work (Article 7) the Committee states that;

> Equality in promotion requires the analysis of direct and indirect obstacles to promotion, as well as the introduction of measures such as training and initiatives to reconcile work and family responsibilities, including affordable day-care services for children and dependent adults. In order to accelerate de facto equality, temporary special measures might be necessary. They should be regularly reviewed and appropriate sanctions applied in the event of non-compliance
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> CESCR, General Comment No. 23, para 32 (2016).

In its Concluding Observations on Canada in the CESCR's most recent periodic review of compliance with the ICESCR, the Committee recommended that Canada

> Pursue its commitment to provide affordable childcare services across the country so as to assist parents to balance family and employment responsibilities; (para
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> CESCR, Concluding Observations on the Sixth Periodic Report of Canada, UN Doc. E/C.12/CAN/CO/6, para. 33 (2016).

CEDAW

Article 11 of the Convention on the Elimination of All Forms of Discrimination Against women states that

> In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:,,,
>
> (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and

> participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

In its jurisprudence the CEDAW Committee has established that women's right to equality in work requires positive measures to address structural disadvantage in the labour force because of disproportionate childcare responsibilities and that a failure to provide necessary benefits violates the Convention.

See: *Natalia Ciobanu v. Republic of Moldova* CEDAW/C/74/D/104/2016 at par 7.15 in which the Committee found that a failure by the State to provide necessary assistance for combining child care and work responsibilities violated the Convention.

The CEDAW Committee has also clarified in periodic reviews of Canada that women's right to equality requires positive measures to ensure access to affordable childcare.

In its periodic review of Canada in 2016 the CEDAW Committee expressed concern about the lack of affordable childcare and recommended that Canada "Intensify its efforts to provide sufficient numbers of affordable childcare facilities and affordable and adequate housing options, including in indigenous communities, with priority being given to low-income women." (CEDAW Concluding Observations: Canada (2016 at para 47(d); that it adopt "a rights-based national childcare framework in order to provide sufficient and adequate childcare facilities" (para 39(c)).

In its 2024 periodic review of Canada, the CEDAW Committee again expressed concern regarding "insufficient services to meet the high demand for childcare spaces, the uneven availability of affordable licensed childcare …" (para 35(a))

The CEDAW Committee recommended:

> Ensure access to comprehensive social support measures for women engaged in unpaid care work, develop mechanisms to assess and evaluate the impact of unpaid and underpaid labour on poverty and economic inequality among women, particularly Indigenous women, women with disabilities and immigrant women, and develop policies and programmes to reduce the burden of unpaid care work, including through social protection, childcare services and economic empowerment initiatives tailored to support these groups. (at para 40(d))

2. Immigration Status as a Prohibited Ground of Discrimination

ICCPR

The leading authority relied on by the Appellant in this case and by the Quebec Superior Court in finding that immigration status is not an analogous ground of discrimination is the decision of Statas J. in *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 (CanLII). The Appellant and the Superior Court also cite a subsequent case, Almadhoun v. Canada in which the Federal Court of Appeal referred to Justice Stratas' decision in *Toussaint* but did not rule on a section15 challenge based on immigration status.

Significantly for the present case, Justice Stratas' decision with respect to immigration status has now been found to be fundamentally at odds with Canada's obligations under *the International Covenant on Civil and Political Rights*. In its decision in *Toussaint v Canada CCPR/C/123/D/2348/2014 (30 August 2018)* the UN Human Rights Committee found that in the circumstances of that case, where Canada had denied access to essential health care based on irregular immigration status , "the distinction between those with legal status in the country and those who had not been fully admitted to Canada was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26 of the ICCPR." (para 11.8)

Canada's subsequent refusal to comply with the UN Human Rights Committee's decision by ensuring access to essential health care regardless of immigration status is currently being challenged in an action before the Ontario Superior Court as a violation of sections 7 and 15 of the *Charter*. The Plaintiff has argued, *inter alia*, that in light of the Human Rights Committee's clarification of Canada's obligations under the ICCPR, section 15 should be interpreted to provide protection from discrimination based on immigration status. The Ontario Superior Court of Justice dismissed Canada's Motion to Strike the claim (*Toussaint v. Canada (Attorney General)* 2022 ONSC 4747.) With respect to the Plaintiff's argument that immigration status should be considered analogous under section 15, Justice Perell found that the federal court did not consider Canada's obligations under the ICCPR and that Justice Stratas' conclusion that immigration status is not an analogous ground has been criticized by human rights' academics and may be an unsettled issue.[10].

ICESCR

Article 2(2) of the ICESCR mandates states to guarantee the rights within the Covenant without discrimination, including on the basis of "national origin." General Comment No. 20 clarifies that

> The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.23"

ICERD

Article 1 of ICERD prohibits racial discrimination, including distinctions based on "national origin." The Committee on the Elimination of Racial Discrimination (CERD), in General Recommendation No. 30,

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim." (para 7_

Convention on the Rights of the Child

The CRC's General Comment No. 6 emphasizes that children, regardless of immigration status, must enjoy all rights under the Convention on the Rights of the Child.

> Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness. At para 12

Access to Justice

The Human Rights Committee' General Comment No. 32 affirms that the right to an effective remedy under Article 2(3) of the ICCPR must be applied without discrimination on the basis of immigration status.

> Migrants must have access to legal recourse to challenge discriminatory treatment, regardless of their immigration status (HRC, General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial, 2007, para. 19).
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> The CERD, in its General Recommendation No. 30 clarifies that States must ensure that once a non-citizen has established a prima facie case that he or she has been a victim of such [prohibited] discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment.]

Immigration Status and Refugee Claimant Status

International human rights law also provides specific protections for refugee claimants and their children. While the specific protections accorded to refugees under international law are relevant to the consideration of obligations of governments in this and other cases, it is important to define the analogous ground under section 15 in an inclusive manner as "immigration status" in the manner applied by the UN Human Rights Committee in its decision in Toussaint v Canada. Distinctions between refugee claimants and others who do not have legal residency status may be relevant to the section 1 analysis in this and other cases, but these distinctions should not be applied to narrow the scope of the recognized analogous ground.

3. Intersectionality

The United Nations treaty bodies have increasingly emphasized the importance of recognizing discrimination on intersecting or multiple grounds. In the present case this would mean considering the discrimination under section 15 on the grounds of both sex and immigration status. Migrant women have been identified as a group that is particularly vulnerable to intersection of multiple grounds of discrimination.

In its General Comment No. 28 on core obligations under the Convention, CEDAW Committee recognizes intersectionality as critical to ensuring the right to equality for women. It states at para 18

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.

In its most recent periodic review of Canada, the CEDAW Committee emphasized the need for Canada to address intersectional forms of discrimination, including the intersecting forms of discrimination experienced by migrant women.

CEDAW Concluding Observations, Canada 2014 at para 36(e)

The Committee on the Elimination of Racial Discrimination (CERD) addresses intersectionality in *General Recommendation No. 25* (2000) on gender-related dimensions of racial discrimination, stating that:

> Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.

See, The Committee on the Rights of Persons with Disabilities, *General Comment No. 3* (2016) paras

CESCR, *General Comment No. 20* (2009) (para. 17).