L-5033

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File No. 41210
SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE QUEBEC COURT OF APPEAL)

BETWEEN:
ATTORNEY GENERAL OF QUEBEC
APPELLANT
(Appellant /
Respondent on Cross-Appeal)

- and -

BIJOU CIBUABUA KANYINDA
RESPONDENT
(Respondent /
Appellant on Cross-Appeal)

- and -

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE
RESPONDENT
(Intervener /
Appellant on Cross-Appeal)

- and -

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

APPELLANT'S FACTUM

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

APPELLANT'S FACTUM

PART I – STATEMENT OF POSITION AND STATEMENT OF FACTS

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1. This appeal concerns the benefits that the State has a constitutional obligation to provide to asylum seekers under the equality right protected by Section 15(1) of the Canadian Charter of Rights and Freedoms ("Canadian Charter"). Asylum seekers are individuals who enter Canada, claim refugee status, and await a decision by the competent federal authorities regarding their status.

2. In this case, Quebec has chosen to make several categories of parents residing in its territory eligible for reduced contributions—and consequently, subsidized educational childcare services—but has not included asylum seekers. This exclusion is conditional, as they become eligible when they are granted refugee status and, if applicable, issued a Quebec Selection Certificate ("CSQ") by the Quebec Minister of Immigration.

3. The Quebec Court of Appeal found that this exclusion unjustifiably infringes on Section 15(1) of the Canadian Charter because it disadvantages female asylum seekers in their access to the labor market.

4. The Attorney General of Quebec ("AGQ") argues that the exclusion of asylum seekers from reduced contributions does not, in any way, violate the equality right protected by Section 15(1) of the Canadian Charter.

FACTUAL AND PROCEDURAL CONTEXT

5. The respondent is originally from the Democratic Republic of Congo.

6. On October 9, 2018, she entered Canada via Roxham Road, located in Quebec.

7. She subsequently applied for refugee status under the Immigration and Refugee Protection Act[1] ("IRPA").

[1] Immigration and Refugee Protection Act, SC 2001, c. 27 [IRPA].

8. While awaiting a decision on her asylum application, she sought to be eligible for reduced contributions under the Regulation on Reduced Contributions[2] ("RRC") so that her children could access subsidized daycare services, subject to availability.

9. Due to her status as an asylum seeker, she was not eligible for reduced contributions under Section 3 of the RRC. That section states:

"3. A parent who resides in Quebec and meets one of the following conditions is eligible for reduced contributions:

(1) They are a Canadian citizen;
(2) They are a permanent resident under the Immigration and Refugee Protection Act (IRPA);
(3) They reside in Quebec primarily for work purposes and hold a work permit issued under the IRPA or are exempt from the requirement to hold such a permit under that Act;
(4) They are an international student with a certificate of acceptance issued under the Act respecting immigration to Quebec and a recipient of a Quebec government scholarship under the policy for international students in colleges and universities in Quebec;
(5) They are recognized by the competent Canadian tribunal as a refugee or a person to be protected under the IRPA and hold a selection certificate issued under Section 3.1 of the Act respecting immigration to Quebec;
(6) They have been granted protection under the IRPA by the Minister of Citizenship and Immigration and hold the selection certificate referred to in paragraph 5;
(7) They hold a temporary residence permit issued under Section 24 of the IRPA for eventual permanent residence and the selection certificate referred to in paragraph 5;
(8) They are authorized to submit a permanent residence application in Canada under the IRPA or its regulations and hold the selection certificate referred to in paragraph 5."

10. On May 30, 2019, the respondent filed a judicial review application, with the Commission des droits de la personne et des droits de la jeunesse ("CDPDJ") intervening. The respondent argued that:

I Section 3 of the RRC is ultra vires because no legislative authority empowers its enactment and that, even if properly authorized, it cannot include eligibility criteria.

II Section 3(3) of the RRC, properly interpreted, grants asylum seekers the right to reduced contributions.

III This provision unjustifiably violates Sections 12 and 15 of the Canadian Charter.

11. Regarding Section 15(1) of the Canadian Charter, the respondent cited the grounds of sex, citizenship, and immigration status. The CDPDJ argued that the exclusion of asylum seekers unjustifiably violates Sections 10, 4, and 12 of the Quebec Charter of Human Rights and Freedoms ("Quebec Charter").

12. Before the Superior Court hearing, the respondent was granted refugee status and thus became eligible for reduced contributions under Section 3(5) of the RRC.

13. In a judgment dated May 25, 2022, the Quebec Superior Court concluded that Section 3(3) cannot be interpreted to include asylum seekers, as their exclusion stems from Section

[2] Regulation respecting reduced contribution, CQLR c. s-4.1.1, r. 1 [RRC].

3(5).[3] The Court also determined that the eligibility conditions outlined in Section 3 of the RRC are ultra vires the government's authority under the Act respecting Educational Childcare Services [4]("Act"). According to the Court, the legislature must explicitly designate the government as the authority empowered to establish eligibility conditions for reduced contributions, which it had not done.[5]

14. Despite this conclusion, the Superior Court addressed the other arguments raised by the respondent and the CDPDJ. It concluded that the exclusion of asylum seekers does not violate the rights protected under Sections 12 and 15 of the Canadian Charter[6], nor the rights protected under Sections 10, 4, and 12 of the Quebec Charter of Human Rights and Freedoms.[7]

15. The Attorney General of Quebec ("AGQ") appealed the Superior Court's decision regarding the government's authority to establish eligibility criteria for reduced contributions. In cross-appeals, the respondent and the CDPDJ challenged the Superior Court's other conclusions.

16. In a decision rendered on February 7, 2024, the Court of Appeal allowed the AGQ's appeal and concluded that the Quebec government is empowered to enact Section 3 of the RRC.[8]

17. It also partially allowed the respondent's appeal. First, it rejected the respondent's claim that Section 3(3) of the RRC could be interpreted to include asylum seekers, as this subsection only applies to temporary workers.[9] Second, it overturned the Superior Court's conclusions and found that Section 3 of the RRC creates an exclusion based on gender, which unjustifiably infringes the equality right protected by Section 15(1) of the Canadian Charter.[10] However, the Court did not rule on the grounds of citizenship or immigration[11] status and dismissed the CDPDJ's cross-appeal concerning Sections 10 and 12 of the Quebec Charter.[12]

18. As a remedy, the Court of Appeal stated it applied the technique of broad interpretation and concluded that Section 3(3) of the RRC "must henceforth be read as allowing a parent residing in Quebec for the purpose of an asylum application and holding a work permit to be eligible for reduced contributions."[13]

FEDERAL LEGISLATIVE FRAMEWORK

19. In Canada, asylum is governed by the Immigration and Refugee Protection Act (IRPA). It provides protection to individuals who are recognized by the competent authorities as refugees or persons in need of protection, based on the definitions provided in Sections 96 and 97.

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[3] Trial judgment, para. 27, Appellant's Record (hereinafter "A.R."), Vol. I, p. 6.
[4] Educational Childcare Act, CQLR c. S-4.1.1 [Act].
[5] Trial judgment, paras. 29-35, A.R., Vol. I, pp. 7-8.
[6] Id., paras. 36-62, A.R., Vol. I, pp. 8-12.
[7] Id., paras. 63-80, A.R., Vol. I, pp. 12-14.
[8] Judgment under appeal, paras. 33-55, A.R., Vol. I, pp. 23-35.
[9] Id., paras. 64-65, A.R., Vol. I, p. 39.
[10] Id., paras. 71-116, A.R., Vol. I, pp. 40-54.
[11] Id., para. 121, A.R., Vol. I, p. 55.
[12] Id., paras. 122-124, A.R., Vol. I, pp. 55-56.
[13] Id., paras. 117-120, A.R., Vol. I, pp. 54-55.

20. Under the IRPA, an asylum seeker is someone seeking refugee status or protection. Obtaining these statuses is not automatic; it requires submitting an application and meeting the criteria set out in the IRPA.

21. When such an application is made by an individual already in Canada, as in the case of the respondent on October 9, 2018, it must be submitted to an immigration officer.[14]

22. Once the application is received, the immigration officer generally has three business days to assess its admissibility, barring exceptions.[15]

23. The application will be deemed inadmissible if, for instance, the asylum seeker has already been granted asylum, their application has previously been rejected by the Refugee Protection Division, another country where they could be returned has already granted them asylum, or they are subject to inadmissibility due to security, human rights violations, or serious criminality.

24. At this stage, no examination of the criteria for refugee recognition is conducted.[16]

25. If the immigration officer determines the application is admissible, it is referred to the Refugee Protection Division of the Immigration and Refugee Board for a decision on its merits.

26. A hearing before the Refugee Protection Division must generally be held within a maximum of 30, 45, or 60 days from the date the application is referred, depending on the circumstances of the applicant.[17]

27. Thus, under the federal regime, the respondent's hearing should have been held no later than December 11, 2018.

28. While awaiting this hearing and a decision on their application, the asylum seeker is subject to a conditional removal order, which takes effect under specific circumstances outlined in Section 49(2) of the IRPA.

29. During this period, the individual may request a work permit from an immigration officer. Without such a permit, they are not authorized to work in Canada.[18] The immigration officer issues this permit if the individual demonstrates that they cannot support themselves otherwise[19]. However, obtaining or renewing a work permit alone does not provide the right to remain in Canada.[20]

30. If the Refugee Protection Division accepts the asylum application and grants the individual "protected person" status, they may apply to become a permanent resident of Canada through Immigration, Refugees, and Citizenship Canada.

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[14] LIPR, supra, note 1, art. 99.
[15] Id., s. 100; Immigration and Refugee Protection Regulations, SOR/2002-227 [IRPR], ss. 159 and 159.9.
[16] LIPR, supra, note 1, art. 101.
[17] RIPR, supra, note 15, art. 159.9.
[18] Id., art. 196.
[19] Id., art. 206(1)a).
[20] *Singh v. Canada (Citizenship and Immigration)*, 2008 CanLII 87163 (IRB), paras. 10 and 25.

31. Simultaneously, the protected person can apply for permanent selection through Quebec's Ministry of Immigration, Francization, and Integration to obtain a Quebec Selection Certificate (CSQ).

32. While awaiting permanent resident status, a protected person who has obtained a CSQ may begin integration procedures and access certain services, such as the Quebec health insurance program[21].

THE DRASTIC INCREASE IN ASYLUM APPLICATIONS IN CANADA AND QUEBEC

33. Between 2017 and 2020, the sociopolitical context in the United States led to an exceptional volume of asylum applications in Canada[22].

34. For instance, while 2,310 applications were received at a Quebec port of entry in 2016, the number rose to 24,396 in 2017[23].

35. Of these, 18,518 applications, including the respondent's, were submitted following interceptions by law enforcement authorities between official ports of entry[24].

36. This increase in asylum applications significantly reduced the proportion of cases heard within the timeframe prescribed under the Immigration and Refugee Protection Regulations (IRPR). For example, while 61% of cases were heard within the deadline in 2015, only 18% were heard on time in 2017.[25] These delays inevitably postponed access to services or benefits requiring refugee status as a condition of eligibility, such as the Canada Child Benefit[26].

37. Among the 29,240 asylum applications submitted after being intercepted by the RCMP between ports of entry and resolved between February 2017 and June 2020, 14,994 (51%) were accepted[27].

THE ACT RESPECTING EDUCATIONAL CHILDCARE SERVICES AND THE REGULATION ON REDUCED CONTRIBUTIONS

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[21] Health Insurance Act, CQLR c. A-29, s. 5(4).
[22] Exhibit D-2: Auditor General of Canada – Spring 2019 – Report 2 – Processing of Asylum Claims, para. 2.6, A.R., Vol. X, p. 146.
[23] Exhibit D-3: Asylum Claims by Year – 2011-2016, A.R., Vol. X, pp. 168-176; Exhibit D-4: Asylum Claims, 2017, A.R., Vol. X, pp. 177-194.
[24] Pre-hearing examination of the applicant, p. 16, A.R., Vol. XI, p. 114; Exhibit D-5: Asylum Claims, 2018, A.R., Vol. XI, pp. 1-14.
[25] Exhibit D-2: Auditor General of Canada – Spring 2019 – Report 2 – Processing of Asylum Claims, para. 2.25, A.R., Vol. X, p. 149.
[26] Income Tax Act, RSC (1985), c. 1 (5th Supp.) [ITA], s. 122.6. This provision is challenged in *Yao v. The King*, 2024 TCC 19 [Yao] (Decision under appeal), on the grounds that it excludes asylum seekers.
[27] Exhibit D-8: Statistics on individuals arriving as a result of irregular border crossings – Immigration and Refugee Board of Canada, A.R., Vol. XI, pp. 42–50; For data on all asylum claims received, see Exhibit D-9: Statistics on asylum claims, A.R., Vol. XI, pp. 51–55.

38. In Quebec, the Act[28] governs the provision of educational childcare services for young children. It grants the Minister of Families the authority to provide subsidies to certain childcare service providers for offering services where the parental contribution is set by regulation[29].

39. A subsidized childcare provider cannot charge or receive an amount exceeding what is established under the Regulation on Reduced Contributions (RRC)[30], except in certain specific situations where additional fees may apply[31]. Thus, eligible parents who enter into agreements with subsidized childcare providers pay the contribution established under the RRC in exchange for the provision of educational childcare services[32].

40. Section 3 of the RRC outlines various eligibility conditions. To qualify, a parent must reside in Quebec and fall into one of the categories listed in this section (see paragraph 9 above).

41. Under Section 3(5) of the RRC, asylum seekers are not eligible for reduced contributions. An eligible individual under this subsection is someone whose asylum application has been accepted by the competent authorities, granting them refugee or protected person status. Additionally, this individual must hold a Quebec Selection Certificate (CSQ)[33].

42. Eligibility for reduced contributions does not, however, guarantee access to a subsidized childcare spot. Evidence presented at the trial stage regarding the situation in 2019 showed that, due to a limited number of spaces (235,535), the parents of nearly 42,000 children were waiting for a spot, even though they were eligible for reduced contributions. Furthermore, over 70,000 children attended non-subsidized childcare services, regardless of their parents' eligibility for reduced contributions[34].

43. It is also worth noting that the right provided under Section 3 of the RRC applies without regard to a parent's willingness or ability to work. The only subsection that makes holding a work permit a condition of eligibility is subsection 3(3), which applies to temporary workers. The other subsections impose no such requirement.

PART II – ISSUES IN DISPUTE

44. According to the Attorney General of Quebec (AGQ), this appeal raises the following questions:

1) Does Section 3 of the RRC infringe on the equality right protected by Section 15(1) of the Canadian Charter?

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[28] Act, supra, note 4.
[29] Id., art. 90.
[30] Id., art. 86.
[31] See notably IRPR, supra, note 2, s. 10.
[32] Id., s. 5; Note that the Act and the IRPR do not require children to attend an educational daycare service, unlike the obligations imposed in the school system.
[33] It is worth noting that, unlike what is provided for under subsection 3(5) of the IRPR, since the amendment to the Quebec Immigration Act, CQLR c. I-0.2.1 [QIA], in 2018, the CSQ is issued under section 22 of the Quebec Immigration Regulation, CQLR c. I-0.2.1, r. 3 [QIR].
[34] Sworn Declaration of Danielle Dubé, paras. 9–11, A.R., Vol. II, p. 66.

2) If so, is this infringement justified under Section 1 of the Canadian Charter?

3) If this Court concludes that Section 3 of the RRC unjustifiably infringes on Section 15(1) of the Canadian Charter, what would be the appropriate remedy?

PART III – STATEMENT OF ARGUMENTS

1. SECTION 3 OF THE RRC DOES NOT INFRINGE ON THE EQUALITY RIGHT PROTECTED BY SECTION 15(1) OF THE CANADIAN CHARTER

45. The burden of demonstrating an infringement of the equality right protected by Section 15(1) of the Canadian Charter is divided into two steps. The respondent must show that the contested provision "creates, either on its face or by its effect, a distinction based on an enumerated or analogous ground that imposes a burden or denies a benefit in a way that reinforces, perpetuates, or exacerbates disadvantage."[35]

46. The Quebec Court of Appeal concluded that Section 3 of the RRC creates an exclusion based on gender through its effect, as it disadvantages female asylum seekers in their access to the labor market, reinforcing, perpetuating, or exacerbating the historical disadvantage experienced by women seeking to enter this market[36]. Given its conclusions on women's equality rights, the Court of Appeal found it unnecessary to determine whether Section 3 creates an exclusion based on the analogous ground of citizenship or whether immigration status is an analogous ground of discrimination[37].

47. According to the Attorney General of Quebec (AGQ), at the first step of the analysis, Section 3 does not create an exclusion based on gender through disproportionate effects. No evidence was provided to demonstrate that women are disproportionately excluded from access to the benefit provided by the law, namely reduced contributions. The same applies to individuals without Canadian citizenship. By excluding asylum seekers, Section 3 of the RRC creates an exclusion based on immigration status, which is not an analogous ground of discrimination.

48. At the second step of the analysis, the exclusion based on any of these grounds does not reinforce, perpetuate, or exacerbate a disadvantage for a protected group.

1.1 The Exclusion of Asylum Seekers from Section 3 of the RRC Is Not Based on an Enumerated or Analogous Ground

1.1.1 Framework for the First Step of the Analysis

49. Before explaining why the Court of Appeal's conclusions are incorrect, the AGQ deems it necessary to present the framework for the first step of any challenge based on Section 15(1) of the Canadian Charter.

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[35] *R. v. Sharma*, 2022 SCC 39 [*Sharma*], para. 28.
[36] Judgment under appeal, paras. 76–103, A.R., Vol. I, pp. 42–51.
[37] Id., para. 121, A.R., Vol. I, p. 55.

50. Section 15(1) does not provide a guarantee of general or abstract equality among all members of society, nor does it guarantee to mitigate inequalities that exist independently of the law[38]. Thus, the claimant must demonstrate that "the law imposes a burden on them that it does not impose on others or denies them a benefit that it grants to others."[39]

51. In cases of facial exclusion, where the law explicitly provides for an exclusion based on a prohibited ground, meeting this requirement poses little difficulty: the law explicitly states that certain individuals, identified by a specific ground, are denied a benefit granted to others or are burdened in a way that others are not. In such cases, the link between the prohibited ground and access to the benefit or the imposition of the burden is evident.

52. In cases of exclusion through disproportionate effects, the law does not explicitly provide for an exclusion but, through its effect, excludes a person or group based on a prohibited ground. This constitutes a form of indirect discrimination.

53. The equality guarantee provided by Section 15(1) of the Canadian Charter is the same whether the contested exclusion is facial or through disproportionate effects[40]. The Court has made it clear that the protection against exclusion through disproportionate effects (or indirect discrimination) does not warrant a different approach compared to protection against facial exclusion[41].

54. Moreover, the first step of the analysis must always focus on access to the benefit provided by the law[42]. Jurisprudence from this Court underscores the importance of this requirement. For example, in Fraser, this Court concluded that, in practice, women were deprived of the ability "to buy back full-time pensionable service."[43] Indeed, almost all individuals availing themselves of job-sharing were women[44].

55. Regarding the benefit provided by the law[45], the claimant must demonstrate that the exclusion has a causal link to an enumerated or analogous ground[46]. To do so, as stated by the Court in Sharma, "a comparison between the claimant group and other groups or the general population is necessarily required" (emphasis in the original)[47].

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[38] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*], pp. 163–164 (Justice McIntyre); *Sharma*, supra, note 35, para. 40.
[39] *Withler v. Canada (Attorney General)*, 2011 SCC 12 [*Withler*], para. 64.
[40] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [*Fraser v. Canada (Attorney General)*], paras. 48 and 53.
[41] *Withler*, supra, note 39, para. 64.
[42] *Andrews*, supra, note 38, pp. 163–164 and 182; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*], paras. 58, 60, and 71; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 [*Auton*], para. 27; *Withler*, supra, note 39, para. 31.
[43] *Fraser v. Canada (Attorney General)*, supra, note 40, paras. 83 and 97.
[44] Id., para. 97.
[45] See, notably: *Andrews*, supra, note 38, p. 164 (Justice McIntyre); *Symes v. Canada*, [1993] 4 SCR 695 [*Symes*], p. 765; *Auton*, supra, note 42, paras. 23 and 26; *Sharma*, supra, note 35, para. 44.
[46] *Sharma*, supra, note 35, para. 45.
[47] Id., para. 31; see also: *Symes*, supra, note 45, p. 771; *Westmount (City of) v. Quebec (Attorney General)*, 2001 CanLII 13655 (QC CA) [*Westmount*], para. 163; Canadian Union of Public Employees, Local 3333 v. Réseau de transport de Longueuil, 2024 QCCA 204, para. 85; *Fair Change v. His Majesty the King in Right of Ontario,* 2024 ONSC 1895 [*Fair Change*], para. 326.

56. It is not necessary to identify a comparator group with identical characteristics[48], but as recently noted by the Quebec Court of Appeal in another context, an allegation of infringement of the equality right without a comparative exercise is inherently flawed[49].

57. Generally, two types of evidence are useful to demonstrate that the first step is met: evidence regarding the law's consequences on the claimant group and evidence regarding the situation of the claimant group[50]. Both types of evidence are not always required, but the submitted evidence must be complete and not based on intuition[51].

58. Demonstrating that the law generates exclusion through disproportionate effects can be qualitative or quantitative, depending on the case[52].

59. *Eldridge*[53] is an example of qualitative evidence. In that case, the disproportionate effect on access to the law's benefit was apparent from the claimant's situation: it was evident that the failure to account for his physical disability deprived him of what was granted to all—free access to quality care[54]. Evidence that many other deaf individuals were in the same situation as the claimant would have been useful but was unnecessary to support the claim. The situation was similar for the child in Moore[55].

60. In other cases, examining the law's effect on an individual or group covered by a prohibited ground of discrimination may not initially reveal exclusion based on a prohibited ground. In such cases, quantitative evidence may be required.

61. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [56], a woman failed to meet the aerobic standard required to qualify as a forest firefighter[57]. At first glance, she appeared to be in the same situation as men who also failed to meet the requirement: neither obtained the desired job. Similarly, in *Griggs*[58], both African Americans and white Americans lacked high school diplomas and failed standardized tests[59]. At first glance, the consequences seemed identical for both groups: lack of mobility within the company.

62. In these cases, the consequences of "neutral" measures were not the same for women and African Americans. Indeed, statistical evidence revealed exclusion through disproportionate effects based on a prohibited ground. Specifically, the demonstration of exclusion through disproportionate effects relied on the significant difference in the proportions of women or African Americans disqualified from the job or position sought compared to men or white

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[48] *Withler*, supra, note 39, paras. 2 and 63.
[49] *Attorney General of Quebec v. Commission des droits de la personne et des droits de la jeunesse (Duperron)*, 2024 QCCA 12 [*Duperron*], paras. 17, 32–33.
[50] *Fraser v. Canada (Attorney General)*, supra, note 40, paras. 56–61; *Weatherley v. Canada (Attorney General)*, 2021 FCA 158 [*Weatherley*], para. 39; *Sharma*, supra, note 35, para. 49.
[51] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [*Taypotat*], para. 34.
[52] *Fraser v. Canada (Attorney General)*, supra, note 40, para. 55.
[53] *Eldridge*, supra, note 42.
[54] Id., para. 66.
[55] *Moore v. British Columbia (Education)*, 2012 SCC 61.
[56] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].
[57] Id., para. 10.
[58] *Griggs v. Duke Power Co.*, 401 US 424 (1971) [*Griggs*].
[59] Id., p. 427.

employees[60]. In other words, a quantitative approach showed that the effect of the contested measures was to exclude women or African Americans to a greater extent than those who were not part of these groups.

1.1.2 Section 3 of the RCR Does Not Create Exclusion Based on Sex

63. It is undisputed that the eligibility criteria for the reduced contribution do not, on their face, create any distinction based on sex[61]. However, the Court of Appeal concluded that by establishing eligibility conditions, Section 3 of the RCR creates exclusion based on sex through disproportionate effects[62]. With respect, these conclusions are erroneous. First, Section 3 of the RCR does not disproportionately exclude women. Second, the Court of Appeal confuses the effects of the law with the historical disadvantage faced by women in accessing the labor market.

Section 3 of the RCR does not result in disproportionate exclusion of women.

64. While it is not necessary to demonstrate that all women are excluded simultaneously[63], exclusion based on sex requires determining whether Section 3 of the RCR disproportionately excludes women from the benefits conferred by the contested provision compared to men.

65. At the outset, it should be noted that the Court of Appeal did not conduct any comparative analysis in the first stage, which constitutes a major omission in an equality rights analysis[64].

66. Had it conducted such an analysis, it would have necessarily concluded that there is no distinction based on sex. Both women and men are eligible for the reduced contribution[65]. The only individuals excluded are those—regardless of sex—who fail to meet one of the eligibility criteria established by Section 3 of the RCR. Thus, this section does not have the effect or consequence of disproportionately excluding women. The Court of Appeal avoids this fact by evaluating only the exclusion of women seeking asylum.

67. With respect to access to the reduced contribution, the respondent is in the exact same situation as all other asylum seekers: they are not entitled to the reduced contribution and cannot obtain a place in a subsidized childcare service. Therefore, the Court of Appeal should have concluded that the respondent failed to provide qualitative evidence[66].

68. The absence of proof that the eligibility criteria create exclusion through disproportionate effects is also evident when examining access to the reduced contribution for the entire group of women asylum seekers. In the absence of any statistical evidence suggesting otherwise, it can be presumed that the group of asylum seekers is composed equally or almost equally of men and women. Since all asylum seekers are denied access to the reduced contribution, both men and women are equally deprived of the sought-after benefit.

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[60] *Meiorin*, supra, note 56, paras. 11 and 69; *Griggs*, supra, note 58, footnote 6.
[61] Judgment under appeal, paras. 88 and 102, D.A., vol. I, pp. 46 and 51.
[62] Id., paras. 88 and 103, D.A., vol. I, pp. 46 and 51.
[63] *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252.
[64] *Duperron*, supra, note 49, para. 32-33; *Fair Change*, supra, note 47, para. 326.
[65] See by analogy: Yao, supra, note 26, para. 198-199 (Judgment under appeal).
[66] Judgment under appeal, para. 61, D.A., vol. I, p. 38.

69. This distinguishes the present case from Fraser, where all individuals who participated in the job-sharing program were women[67]. Among asylum seekers, the proportion of men and women deprived of the benefit is the same: 100%. This also distinguishes the present case from *Meiorin* and *Griggs* for the reasons outlined above. Thus, the Court of Appeal should have concluded that the respondent also failed to provide quantitative evidence[68].

70. Regardless of whether the perspective used to examine the allegation of exclusion through disproportionate effects is qualitative or quantitative, the respondent fails in their demonstration. The Court of Appeal's analysis could have stopped here.

The Court of Appeal Confuses the Consequences of Section 3 of the RCR with the Historical Disadvantage of Women in Accessing the Labor Market

71. To circumvent the lack of evidence of exclusion based on sex in access to the reduced contribution, the Court of Appeal addresses the same question twice—essentially that of the second stage—arguing that the exclusion of asylum seekers reinforces, perpetuates, and exacerbates the historical disadvantage experienced by women in accessing the labor market. This approach represents a marked departure from this Court's guidance, reiterated recently in Sharma, which states that the two stages of the Section 15(1) analysis pose "fundamentally different" questions[69].

72. The Court of Appeal's Use of Evidence Regarding Women's Disadvantage in the Labor Market. The Court of Appeal indeed mentions that, according to the respondent's evidence, women are disadvantaged in accessing the labor market and that access to affordable childcare supports their integration into this market[70]. However, such evidence is irrelevant to answering the question posed in the first stage: whether Section 3 of the RCR disproportionately deprives women compared to men of access to the reduced contribution. Despite this, it is on this evidence that the Court of Appeal bases its conclusion that Section 3 of the RCR creates an exclusion based on sex[71.]

73. The Court of Appeal also notes that its conclusions are supported by the Fraser decision, which recognizes "that women are disadvantaged in the labor market due to their family responsibilities.[72]" With respect, this is a partial reading of that decision. In the first stage of the Fraser case, this Court concluded that statistical evidence showed all individuals who had reduced their working hours by participating in the job-sharing program were women[73]. It further stated, "These statistics were reinforced by compelling evidence of the disadvantages women face as a group when balancing their professional lives and domestic work[74]" [emphasis

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[67] *Fraser v. Canada (Attorney General)*, supra, note 40, para. 97.
[68] Id., para. 62-63.
[69] *Sharma*, supra, note 35, para. 30.
[70] Judgment under appeal, para. 90, D.A., vol. I, p. 46.
[71] Id., paras. 89 and 100, D.A., vol. I, pp. 46 and 51.
[72] Id., para. 99, D.A., vol. I, p. 50.
[73] *Fraser v. Canada (Attorney General)*, supra, note 40, para. 97.
[74] Id., para. 98.

added]. In that case, probative evidence demonstrated a distinction based on sex, and those conclusions were reinforced by evidence of historical disadvantage.

74. The approach in the Fraser decision aligns with the teachings in Withler, which indicates that "the existence of a historical or sociological disadvantage may help demonstrate that the law imposes a burden on the claimant that it does not impose on others or denies them a benefit granted to others"[75] [emphasis added]. Evidence of historical disadvantage may therefore assist in passing the first stage, but it is clear that it is not sufficient on its

75. In this case, in the absence of useful and relevant evidence at the first stage, the Court of Appeal cannot rely solely on evidence of historical disadvantage to pass this stage.

76. According to the PGQ (Attorney General of Quebec), if the first stage could be passed by referring exclusively to the historical disadvantage of a group, all eligibility conditions provided under Section 3 of the RCR would have a disproportionate effect on women. This is because women are generally disadvantaged in accessing the labor market, and the eligibility conditions exclude some of them. For instance, women who do not reside in Quebec are not eligible for the reduced contribution payment. Although residency has never been recognized as an analogous ground[76], it would suffice to invoke sex to circumvent the ground causing the exclusion[77].

77. Despite the Superior Court's conclusion that the respondent's evidence is inconclusive[78], the Court of Appeal re-analyzed this evidence. It concluded that all parents who claim they cannot work due to exclusion based on asylum seeker status are women[79] and deemed this evidence "compelling."[80] Thus, women asylum seekers with work permits would experience a disproportionate effect due to their exclusion. With respect, this conclusion is erroneous. The evidence on the situation of the asylum seeker group is incomplete, as it is marred by seven omissions.

78. Indeed, the evidence reveals that the expert consulted 325 asylum seekers:

> "43. In our recent study on refugee claimants, it was clear that childcare would be a necessity for many of our participants to work:
> • 53.5% (174) of our 325 respondents had children with them here in Quebec.
> • Of the 174 respondents with children in Quebec, 57% had children aged 0–5 years and thus eligible for childcare.
> • 57.5% of the 174 respondents with children in Quebec did not have a spouse in Quebec and were, in terms of direct care for their children, single parents.
> 44. Among those not working, most had children under 6 years old (54.5%). A quarter of unemployed respondents with children under 6 **stated that they were not working because childcare was too expensive. Of these, 100% were women, and 61% were**

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[75] *Withler*, supra, note 39, para. 64.
[76] *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 [*Haig*], p. 1044; *Siemens v. Manitoba (Attorney General)*, [2003] 1 SCR 6 [*Siemens*], para. 48.
[77] The Quebec Court of Appeal opposes this approach in *Westmount*, supra, note 47, para. 162-163.
[78] Superior Court Judgment, para. 43, D.A., vol. I, p. 9.
[79] Judgment on appeal, para. 94, D.A., vol. I, p. 48.
[80] Id., para. 89, D.A., vol. I, p. 46.

single parents.[81]"
[Bold emphasis in the original text]

79. First, the evidence does not disclose the methodology used to identify these 325 asylum seekers. It also does not indicate whether these 325 individuals are representative of the asylum seeker group in 2017.

80. Second, the expert never discloses the sex of the respondents within each category. This is a major omission, as evidence of the exclusion of women through disproportionate effects must at least allow for a comparison of results by sex[82].

81. Thirdly, the evidence divides the 325 asylum seekers into various categories, for example, asylum seekers who have children with them in Quebec. The only category where the number of respondents is disclosed is that of asylum seekers with children: there are 174 of them. The other categories refer only to percentages.

82. As indicated by the Ontario Court of Appeal, when a plaintiff refers only to percentages, this can be misleading in an analysis where the proposed sample is so small. For example, any variation in the number of respondents can lead to major changes in the alleged percentages[83]. Consequently, to enable the Superior Court and the Court of Appeal to conduct a thorough analysis, the respondent should have referred to the number of respondents in each category, not just to percentages.

83. In this respect, the present case concretely illustrates the difficulties that arise when a party does not disclose the numbers that are nevertheless in its possession. Indeed, in the category of respondents who are not working—whose number and gender are unknown—the evidence reveals that 54.5% have children under six years of age. Twenty-five percent (25%) of this 54.5% say they are not working because childcare is too expensive. One hundred percent (100%) of this 25% are women, and 61% of them are single mothers. Put differently, 61% of 100% of 25% of 54.5% of respondents with children under six, among an indeterminate number of respondents who are not working and whose gender is unknown, are single mothers.

84. Fourthly, the evidence does not disclose the number and percentage of female asylum seekers, and therefore those subject to the same eligibility condition, who are working while being mothers of children aged 0 to 6 years.

85. Fifthly, although the evidence indicates that for newly arrived immigrants, access to subsidized childcare has a less significant impact on their integration into the labor market—partly due to other priorities or cultural reasons[84]—this fact is ignored in the statistics.

86. Sixthly, although the Court of Appeal concludes that section 3 of the RCR has a disproportionate effect on female asylum seekers with work permits[85], the statistics do not distinguish respondents based on whether or not they have a work permit.

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[81] Report by Jill Hanley, paras. 43-44, D.A., vol. II, p. 83.
[82] Yao, supra, note 26, para. 97; *Fair Change*, supra, note 47, paras. 371 and 384.
[83] *Ontario Teacher Candidates' Council v. Ontario (Education)*, 2023 ONCA 788 [*Ontario (Education)*], paragraph 71.
[84] Report of Jill Hanley, paragraph 32, D.A., vol. II, p. 79.
[85] Judgment under appeal, paragraph 100, D.A., vol. I, p. 51.

87. Finally, the expert claims to supplement the statistics with a table "that makes clear the negative relationship between employment, gender, being a single parent, or being a parent of young children for the participants in [their] study.[86]" However, this table does not indicate whether the statistics (presented only as percentages) are calculated from the 325 asylum seekers or from the 174 asylum seekers who are parents. Moreover, in the female category, neither the number nor the percentage of parents is indicated. Similarly, in the category of parents with children aged 0 to 6 years, neither the number nor the percentage of women and men is disclosed.

88. The respondent's evidence regarding the situation of the group of claimants is therefore manifestly incomplete, something the Court of Appeal could not ignore[87]. According to the PGQ, as concluded by the Superior Court, "the plaintiff's expert's figures are not conclusive.[88]" Indeed, according to this Court, when the plaintiff presents data regarding the situation of the claimant group but that data is incomplete, the first step of the analysis cannot be met[89].

89. The Ontario Court of Appeal agrees: "a sufficient evidentiary record is not a mere technicality.[90]" Indeed, courts cannot conclude that the first step of the analysis is satisfied without a careful analysis of the evidence[91]. While the burden of proof should not be excessive at the first step[92], presenting complete data, which is in the respondent's possession, does not unduly increase their burden.

1.1.3 Section 3 of the RCR does not create exclusion based on the ground of citizenship

90. The right to equality is a comparative concept. Thus, an exclusion based on the ground of Canadian citizenship requires comparing the situation of people with Canadian citizenship to those without it.

91. A reading of section 3 of the RCR reveals that it excludes certain people who hold Canadian citizenship. Indeed, the first eligibility condition stipulated in this section is residency. A parent who holds Canadian citizenship but does not reside in Quebec is not eligible for reduced-contribution payments[93].

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[86] Report of Jill Hanley, para. 46, D.A., vol. II, p. 84.
[87] See by analogy *Ontario (Education)*, supra, note 83, paras. 72-81: in this case, the Ontario Court of Appeal notably reproaches the trial court for having rendered conclusions in light of statistics that the court knew were incomplete.
[88] Trial judgment, para. 43, D.A., vol. I, p. 9.
[89] Taypotat, supra, note 51, para. 27.
[90] *Ontario (Education)*, supra, note 83, para. 81.
[91] *Sharma*, supra, note 35, para. 49(d).
[92] Id., para. 50.
[93] *Irshad (Litigation Guardian of) v. Ontario (Minister of Health)*, 2001 CanLII 24155 (ON CA) [*Irshad*], paras. 144–145; *Li v. British Columbia*, 2021 BCCA 256 [*Li*], para. 210.

92. Moreover, among people residing in Quebec, section 3 of the RCR makes several categories of non-citizens eligible for reduced-contribution benefits. Apart from subsection 3(1) of the RCR, the other seven subsections of this section grant eligibility to non-citizens[94].

93. Thus, section 3 of the RCR excludes people with Canadian citizenship and includes people without Canadian citizenship. The absence of Canadian citizenship is therefore not the cause of asylum seekers' exclusion.

1.1.4 Immigration status is not an analogous ground of discrimination

94. The PGQ does not deny that section 3 of the RCR creates an exclusion based on immigration status, as it excludes asylum seekers. However, immigration status has never been recognized as an analogous ground of discrimination by the Court. Therefore, this exclusion cannot constitute a violation of subsection 15(1).

95. The respondent asks the Court to recognize this status as an analogous ground, even though courts have, in the vast majority of cases, refused to do so[95]. The PGQ believes the Court should uphold precedent and refuse to recognize immigration status as an analogous ground.

96. An analogous ground must constitute "a lasting legal principle," as recognizing a prohibited ground is a serious issue with significant consequences[96]. The criteria for recognizing a new analogous ground were outlined in the Corbiere[97] decision and reiterated in the Dickson decision[98]: the ground must be immutable or alterable only at an unacceptable cost to personal identity. Based on these criteria, several grounds have not been recognized, such as place of residence[99], occupation[100], or poverty[101].

97. As we shall see, immigration status allows individuals who do not hold Canadian citizenship to enter and remain in Canada under conditions set by the state. Such a status is neither an immutable characteristic nor one that can only be changed at an unacceptable cost to

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[94] *Brink v. Canada*, 2022 FC 1231, paras. 54–58, affirmed by *Brink v. Canada*, 2024 FCA 43, para. 84, application for leave to appeal to the Supreme Court dismissed, October 10, 2024, No. 41266; Li, supra, note 93, paras. 181–182.

[95] *Clarken v. Ontario Health Insurance Plan*, 1998 CarswellOnt 1925 [*Clarken*], para. 52, Appellant's Book of Authorities (hereinafter "A.B.A."), Tab 1; *Irshad*, supra, note 93, para. 136; *Forrest v. Canada (Attorney General)*, 2006 FCA 400, paras. 16–17; *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, para. 99, application for leave to appeal to the Supreme Court dismissed, April 5, 2012, No. 34446; Almadhoun v. Canada, 2018 FCA 112, para. 28; *Li*, supra, note 93, paras. 178 and 182; X (Re), 2015 CanLII 109280 (CA IRB), para. 254; *Bakhtiari*, supra, note 116, para. 44; Yao, supra, note 26, paras. 184–188 (judgment under appeal); *Brink v. Canada*, 2024 FCA 43, para. 100, application for leave to appeal to the Supreme Court dismissed, October 10, 2024, No. 41266.

[96] *Fraser v. Canada (Attorney General)*, supra, note 40, para. 115.

[97] *Corbiere v. Canada (Minister of Indian Affairs and Northern Development*), [1999] 2 SCR 203, para. 13

[98] *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*], para. 193.

[99] *Haig*, supra, note 76, p. 1044; *Siemens*, supra, note 76, para. 48.

[100] *Baier v. Alberta*, 2007 SCC 31, paras. 63-65.

[101] *Boulter v. Nova Scotia Power Incorporated*, 2009 NSCA 17, para. 42, application for leave to appeal to the Supreme Court rejected, September 10, 2009, no. 33124, 2009 CanLII 47476 (SCC); *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, paras. 49-90 confirmed by *Toussaint v. Canada (Citizenship and Immigration)*, 2011 FCA 146, para. 59(3), application for leave to appeal to the Supreme Court rejected, November 3, 2011, no. 34336.

personal identity. Finally, contrary to what some minority jurisprudence suggests, recognizing citizenship as an analogous ground does not imply that immigration status must also be recognized.

Immigration status is a status allowing individuals without Canadian citizenship to enter and remain in Canada under conditions set by the state

98. Subsection 6(1) of the Canadian Charter provides that "every citizen of Canada has the right to enter, remain in, and leave Canada." In accordance with this subsection, this Court recognizes that the state can condition the freedom to enter and remain in Canada on the immigration statuses it creates.

99. Indeed, "Parliament has [...] the right to adopt an immigration policy and legislate to prescribe the conditions to be met by non-citizens for them to enter and remain in Canada.[102]" Thus, an individual may decide to come to Canada, but the conditions of entry and residence are beyond their control.

100. The IRPA governs the rules allowing individuals without Canadian citizenship to enter and remain in Canada. Depending on the category, conditions for entry and residence are determined for the granting of a status, without requiring absolute uniformity among them[103].

101. There are many different and heterogeneous categories that can lead to the granting of an immigration status: asylum seekers are one example, but there are also tourists, international students, permanent residents, and temporary workers, to name just a few.

102. The Loi sur l'immigration au Québec104[104] (LIQ or Quebec Immigration Act) also governs the right of foreign nationals to temporarily stay in Quebec or to settle there permanently. According to section 6 of the LIQ, the categories of foreign nationals who wish to temporarily stay in Quebec include the following: the category of temporary foreign workers, the category of international students, and the category of individuals staying temporarily for medical treatment. Unless exempt, a foreign national who belongs to one of the categories specified in section 6 must be selected by the minister by obtaining their consent to stay[105]. The minister's consent for the stay of a foreign national is certified by the issuance of a Quebec Acceptance Certificate (CAQ) under section 3 of the Règlement sur l'immigration au Québec[106] (RIQ or Quebec Immigration Regulation).

103. Regarding permanent immigration, section 7 of the LIQ provides that the categories of foreign nationals who wish to settle permanently in Quebec include the following: the economic immigration category, the family reunification category, and the humanitarian immigration category. In order to settle permanently in Quebec, a foreign national must be selected by the minister unless they are covered by an exemption established by government regulation[107]. Under section 22 of the RIQ, the minister's decision to select a foreign national for permanent

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[102] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, pp. 733-734.
[103] *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, para. 59.
[104] QIA, supra, note 33.
[105] Id., art. 12.
[106] RIQ, supra, note 33.
[107] LIQ, supra, note 33, art. 18.

residency is certified by the issuance of a Certificat de sélection du Québec (CSQ or Quebec Selection Certificate).

Un statut d'immigration n'est pas un motif immuable

104. Immigration status is, by definition, a transitional status leading to another status or a status subject to a time frame or conditions of establishment in Canada. For this reason, courts have concluded that it is not an immutable characteristic:

> [136] A person's status as a non-permanent resident for the purposes of OHIP eligibility is not immutable. In the course of this litigation, four of the five appellants who were non-permanent residents for the purposes of OHIP eligibility became permanent residents by virtue of changes in their immigration status. The residency status of the fifth appellant, Raja, will also change if his immigration status changes, either because he is reclassified or because the Minister grants him landed immigrant status. While Raja's physical disability is an immutable characteristic, and that characteristic is the reason for his present immigration classification and consequently his ineligibility for OHIP, there is no basis in this record for concluding that his immigration status, unlike his physical disability, is immutable. To the contrary, to the limited extent that the record speaks to the issue, it demonstrates that the immigration status of persons with physical disabilities changes. When that status changes, those persons may become eligible for OHIP[108].

105. Similarly, the status of an asylum seeker is, by definition, a transitional status. Therefore, it does not constitute an immutable characteristic like race or ethnic origin, nor is it considered immutable like religion, marital status, or citizenship. By analogy, this Court has refused to conclude that place of residence is an analogous ground because "people are constantly added to it and cease to be part of it as soon as they meet the requirements set by Quebec.[109]"

106. In the respondent's case, her situation changed between the filing of her application and the hearing of the case in the first instance. She was an asylum seeker, and when federal authorities finalized the review of her case, she was granted refugee status.

> Immigration status is not a characteristic modifiable at an unacceptable cost to personal identity.

107. A characteristic may not be completely immutable but can be considered immutable if modifying it is unacceptable in terms of personal identity[110.]

108. Religion is an example illustrating this point. In Amselem, this Court explained the connections between religion and personal identity: "[Religion] is intrinsically linked to how a person defines and fulfills themselves and is based on notions of personal choice and individual

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[108] *Irshad*, supra, note 93, para. 136.
[109] *Haig*, supra, note 76, p. 1044.
[110] *Dickson*, supra, note 98, para. 193.

autonomy.[111]" Thus, regardless of how long a person adheres to a religion, during that period, religion is modifiable at an unacceptable cost in terms of personal identity.

109. In the present case, immigration status does not have as significant a personal dimension as other enumerated or analogous grounds. Indeed, jurisprudence does not consider immigration status to be a characteristic modifiable at an unacceptable cost to personal identity to the same extent as religion or citizenship[112]. Furthermore, the case file contains no evidence or allegation that immigration status is modifiable at such a cost. Nevertheless, it is undeniable that asylum seekers wish to change their situation to obtain another immigration status, such as refugee status.

Recognizing citizenship as an analogous ground does not mean that immigration status is also an analogous ground

110. In the Church of Scientology decision, the Ontario Court of Appeal appears to confuse the grounds of citizenship and immigration status, then asserts that immigration status is an analogous ground[113]. However, the analysis of the Ontario Court of Appeal is not based on any of the factors established by this Court's jurisprudence.

111. Subsequently, the Fraser (2005) decision claims that, due to the Church of Scientology case, the question of whether immigration status could be protected as an analogous ground is serious, at least at the stage of an interlocutory proceeding[114]. Another decision, Jaballah, asserts that immigration status is an analogous ground but without any explanation[115].

112. To the PGQ's knowledge, apart from these decisions, no judgment has concluded or suggested that immigration status is an analogous ground. The Fraser (2005) and Jaballah decisions, however, are criticized by jurisprudence[116].

113. With respect, the PGQ believes that these two decisions, as well as the Church of Scientology decision, are flawed. First, they do not reference this Court's precedents to conclude that immigration status would be an analogous ground.

114. Second, the fact that Canadian citizenship is a recognized analogous ground under the Andrews[117] decision does not mean that immigration status is also an analogous ground. The grounds of citizenship and immigration status are not interchangeable, as retaining one ground necessarily affects the indispensable comparator group in equality law analysis.

115. Finally, as we will see below, the Andrews decision rightly concluded that Canadian citizenship is an immutable (or considered immutable) ground and modifiable at an unacceptable cost to personal identity. Immigration status, however, has none of these characteristics.

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[111] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, para. 42.
[112] Supra, note 95.
[113] *R. v. Church of Scientology of Toronto*, 1997 CanLII 16226 (ON CA).
[114] *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC), para. 77-78.
[115] Jaballah (Re) (F.C.), 2006 FC 115, para. 81.
[116] *Li*, supra, note 93, para. 179; *Bakhtiari v British Columbia (Minister of Finance)*, 2023 BCSC 1260 [*Bakhtiari*], para. 43.
[117] *Andrews*, supra, note 38.

Unlike immigration status, citizenship is an immutable ground

116. To understand this conclusion, it is necessary to know that at birth, citizenship is granted automatically under the conditions set out in the *Citizenship Act*[118], such as birthright citizenship (*jus soli*)[119] or citizenship by descent (*jus sanguinis*)[120]. Thus, when a child is born in Canada (*jus soli*), or when one of their parents holds Canadian citizenship (*jus sanguinis*), the child automatically acquires Canadian citizenship without needing to apply. Apart from naturalization (which is related to immigration), the means to acquire citizenship do not depend on individual actions.

117. It is also important to note that Canadian citizenship is generally immutable (or irrevocable) once granted. Under Canadian law, the exceptions to the immovability of citizenship are limited: they include cases where the individual renounces their citizenship[121] or loses it if it was obtained through fraud, misrepresentation, or the intentional concealment of material facts[122].

118. These exceptions are explained by the fact that international law protects individuals from becoming stateless. Statelessness is a condition where "a person is not considered a national by any state under the operation of its law.[123]" In compliance with Canada's international obligations, Canadian citizenship is therefore irrevocable to the extent provided by the *Convention on the Reduction of Statelessness.[124]

119. An analysis of the ground of citizenship thus helps to understand why this ground is immutable or considered immutable, unlike immigration status.

Unlike immigration status, citizenship is modifiable at an unacceptable cost to personal identity

120. In international law, citizenship was long equated with allegiance[125]. Just as it was once inconceivable for an individual to owe allegiance to more than one king, it was inconceivable for an individual to owe allegiance to more than one state[126]. Consequently, international law sometimes expressly opposed an individual having more than one citizenship or allegiance[127].

121. The same applied in Canada: allegiance was recognized by this Court as an integral part of Canadian citizenship[128], and the Nationality and Naturalization Act, as well as the Status of

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[118] Citizenship Act, RSC (1985), c. C-29.
[119] Id., art. 3(1)a).
[120] Id., art. 3(1)b).
[121] Id., art. 9.
[122] Id., art. 10(1).
[123] United Nations, Convention relating to the Status of Stateless Persons, No. 5158, Treaty Series, vol. 360, June 6, 1960, p. 117, art. 1, para. 1.
[124] United Nations, Convention on the Reduction of Statelessness, No. 14458, Treaty Series, vol. 989, December 13, 1975, p. 175, art. 7 and 8(2).
[125] For a jurisprudential example, see Nottebohm (*Liechtenstein v. Guatemala*), Second Phase, Judgment of April 6, 1955, International Court of Justice, p. 24.
[126] Michel VERWILGHEN, Conflit de nationalités, pluriantionalité et apatridie, Leiden, Martinus Nijhoff Publishers, 1999 [VERWILGHEN], para. 20, R.S.A., Tab 2.
[127] See, for example, the preamble of the United Nations, Convention of April 12, 1930, concerning certain questions relating to the conflict of nationality laws, No. 4137, Treaty Series, vol. 179, July 1, 1937.
[128] *Winner v. S.M.T. (Eastern) Ltd*., [1951] SCR 887, p. 918.

Aliens Act[129], in force between 1947 and 1976, opposed the idea that an individual could hold more than one citizenship[130].

122. The hostility towards multiple citizenships had significant consequences, as citizenship carries an important sociological connection with the state[131]. In practice, people who had left their country of origin had to choose between their deep-rooted connections and their allegiance to their host country[132]. This factor was one of those that led to a new conception of citizenship, which gives significant weight to personal autonomy[133] (without entirely renouncing the historical notion of allegiance).

123. Canadian law reflects this evolution, as since the coming into force of the Citizenship Act in 1977, an individual may hold more than one citizenship. However, Canadian citizenship policy continues to emphasize citizenship as a bond uniting Canadians and fostering a sense of unity and civicism, as recognized by this Court in the Lavoie decision[134].

124. Thus, while citizenship has both a collective and personal significance, immigration status lacks these dimensions.

Conclusion

125. For all these reasons, immigration status is not an analogous ground. However, this conclusion does not mean that asylum seekers will never be protected by the Canadian Charter. Under section 15(1), these individuals may be protected under another prohibited ground of distinction, such as sex, provided there is a causal link between that ground and the distinction. They may also, in some cases, benefit from rights conferred by other sections, including sections 7 and 12 of the Canadian Charter.

1.2 The Exclusion Under Article 3 of the RCR Does Not Strengthen, Perpetuate, or Aggravate Disadvantages

126. At the second stage, the Court of Appeal had to determine whether the eligibility conditions set out by Article 3 of the RCR impose a burden or deny a benefit that strengthens, perpetuates, or aggravates a disadvantage. As stated earlier, since the Court of Appeal erroneously concluded that the first stage had been passed by solely considering the

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[129] An Act Respecting Citizenship, Nationality, Naturalization and Status of Aliens, 10 George VI, chap. 15, 1946.
[130] Act respecting Citizenship, Nationality, and Naturalization, as well as the Status of Aliens, 10 George VI, c. 15, 1946, s. 17(1).
[131] VERWILGHEN, supra, note 127, paras. 42–46, R.S.A., Tab 2.
[132] Id., para. 365, R.S.A., Tab 2.
[133] Id., paragraph 367, R.S.A., tab 2; In the United States, in the Afroyim v. Rusk case, 387 US 253 (1967), the petitioner lost his American citizenship on the grounds that he had voted in Israeli elections. The United States Supreme Court concluded that this practice is unconstitutional, as citizenship cannot be revoked without the individual's consent. To reach this conclusion, the Court overturned the Perez v. Brownell decision, 356 US 44 (1958), which it had rendered less than a decade earlier.
[134] *Lavoie v. Canada*, 2002 SCC 23, paragraph 57.

disadvantage of women in accessing the job market, it had no choice but to repeat itself at the second stage of the analysis:

> [101] At the second step of the analysis, it is necessary to demonstrate that Article 3 of the RCR imposes a burden or denies a benefit in a way that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage. I conclude that this is the case here.
>
> [102] Indeed, although women seeking asylum are not specifically excluded by Article 3 of the RCR, the latter reinforces, perpetuates, and exacerbates the disadvantage suffered by them as women in the job market. The evidence provided by Ms. Kanyinda demonstrates this. Women suffer a historical disadvantage in the workplace due to the fact that they disproportionately bear the responsibilities related to childcare and caregiving. The Supreme Court has recognized this fact on numerous occasions, as I mentioned. As a result, women have less participation in the job market than men. The fact that asylum seekers, solely for this reason, are ineligible for the reduced contribution for subsidized daycare places has a manifestly disproportionate effect on women in this group135.
>
> [References omitted]

127. This passage confirms a significant confusion between the two steps of the analysis. The disproportionate effect, which is mentioned in the last sentence of this passage, should be a component of the analysis at the first stage and not the second.

128. That being said, the Court of Appeal's conclusions at the second stage are tainted by two other errors.

129. First, the Court of Appeal concludes that the RCR has a positive effect on women's access to the job market[136], which the PGQ does not deny. Indeed, it is because the RCR has a beneficial effect that the respondent wishes asylum seekers to be included before refugee status is granted.

130. However, by conflating the two stages of the analysis into one, the Court of Appeal's conclusions lead to an absurd result: the eligibility conditions for accessing a program with a positive effect on women are presented as an "obstacle" to women's integration into the job market[137]. It should be noted that without the RCR[138], this positive effect does not exist.

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[135] Judgment being appealed, paras. 101-102, A.R., vol. I, p. 51.
[136] Id., para. 92, A.R., vol. I, p. 47.
[137] Id., para. 87, D.A., vol. I, p. 46.
[138] RCR, supra, note 2, art. 5.

Article 3 is therefore declared discriminatory because the RCR addresses the historical disadvantage of women in accessing the job market but in an insufficient manner, as not all women benefit from it.

131. Such a result is expressly contradicted by the Sharma decision, which indicates that when the state legislates to address disadvantages, it may do so gradually[139]. The Weatherley decision, from the Federal Court of Appeal, supports this view:

> [62] If the applicant's arguments were accepted, that provisions perpetuating a pre-existing disadvantage without addressing it could be invalidated, many provisions of the Canada Pension Plan could be at risk of invalidity. According to the applicant's viewpoint, all provisions of the Canada Pension Plan would have to be interpreted in light of situations for which they do not remedy the pre-existing disadvantage based on one of the grounds listed in section 15(1). The Canada Pension Plan should correct all these situations, except in cases justified by section one.
>
> [63] Not only would the legislator be prevented from designing the kind of plan it has created—a contribution-based insurance program aimed at providing a minimal supplementary income—but it would also be required to design and implement a broad program intended to eliminate all pre-existing inequalities, whether or not caused by the state, in all foreseeable circumstances. The Supreme Court repeats that section 15(1) does not go that far (Auton, para. 2 and 41; *Québec (Attorney General) v. Health and Social Services Personnel Alliance*, 2018 SCC 17, [2018] 1 S.C.R. 464, para. 42; Andrews p. 163, 164, 171 and 175 S.C.R.; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, p. 318, 1990 CanLII 60; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, para. 90 to 92)[140].

132. The Fraser decision, upon which the Court of Appeal relied, does not further support its conclusion. Indeed, that decision did not address whether the state had sufficiently remedied a historical disadvantage, as that was not the issue in dispute.

133. Second, the respondent's evidence shows that for immigrants who have recently arrived, access to subsidized daycare has little impact on their integration into the job market[141]. It should also be noted that the status of asylum seekers should theoretically be determined within 60 days of their arrival. Therefore, the disadvantageous effects considered by the Court of Appeal should not occur during the period when an asylum seeker is awaiting a decision on

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[139] *Sharma*, supra, note 35, paras. 64-65.
[140] *Weatherley*, supra, note 50, paras. 62-63.
[141] Jill Hanley Report, para. 32, D.A., vol. II, p. 79.

their application.

134. However, since federal authorities are unable to make a decision within the prescribed time, the period of ineligibility for the reduced contribution is extended accordingly. This is also the case for other benefits that require refugee status as a condition of eligibility, whether or not they concern early childhood[142].

135. These delays are inherently disadvantageous, as they delay access to benefits across Canada, but they exist independently of Article 3 of the RCR and are not caused by it[143]. If the time required to recognize refugee status were reduced in accordance with the obligation set out by the RIPR, the disadvantage of exclusion resulting from the asylum seeker status would disappear without the need to modify Article 3.

IF THERE IS A VIOLATION OF SECTION 15(1) OF THE CANADIAN CHARTER, IT IS JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY

136. In order for a violation to be justified in a free and democratic society, the burden of proof of the Government of Quebec (GQ) is divided into four steps. It must demonstrate that the state measure is based on a pressing and real objective; that the measure is rationally connected to this objective; that the violation is minimal; and finally, that there is proportionality between the effects of the measure and the objective[144]. For the following reasons, the Court of Appeal erred in concluding that the alleged violation is not justified.

2.1 The Urgent and Real Objective

137. At the first step, the state must demonstrate that the contested measure addresses concerns that are urgent and real in a free and democratic society[145]. As this Court has indicated, when a tribunal analyzes a measure whose scope is too limiting, it is important to take into account the contested omission in interpreting the objective[146]. In other words, the omission of including a group of claimants must fit within the achievement of the defended objective[147].

138. Courts must show deference regarding the formulation of the objectives defended by the legislature[148]. Moreover, the objective should not be formulated too broadly or too narrowly[149].

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[142] See notably: in Canada, LIR, supra, note 26, sec. 122.6; in Alberta, Disability Related Employment Supports And Services Regulation, Alberta Regulation 117/2011, sec. 2(2)b); in British Columbia, Early Learning and Child Care Regulation, B.C. Reg. 189/2024, sec. 11(c); in Ontario, Learning and Maintenance Grants, Ont. Reg. 282/13, sec. 2(1)b).
[143] See by analogy *Irshad*, supra, note 93, para. 128.
[144] *R. v. Oakes*, [1986] 1 SCR 103, para. 69-70.
[145] *Société Radio-Canada v. Canada (Attorney General)*, 2011 SCC 2, para. 65.
[146] *M. v. H.*, [1999] 2 SCR 3, para. 100.
[147] Ibid.
[148] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], paras. 46, 53.
[149] *Frank v. Canada (Attorney General)*, 2019 SCC 1 [*Frank*], para. 46.

It should be clarified, however, that this case presents unique difficulties, as the courts have never ruled on the justification of a provision that establishes the exclusion of asylum seekers, or more broadly, people subject to an immigration status[150].

139. In this case, the categories of persons eligible for the reduced contribution under Article 3 of the RCR (Regulation on Contribution Reduction) reflect a recognized objective in case law in other contexts, namely providing financial assistance to persons with a sufficient[151] connection to Quebec. More specifically, in immigration matters, parents are eligible if their status has been duly recognized by the competent administrative authority and all procedures for obtaining that status have been completed. The Court of Appeal acknowledges that this objective is urgent and real[152].

2.2 Rational Conection

140. At the rational link step, this Court indicates that "the government must demonstrate that it is reasonable to assume that the restriction can contribute to achieving the objective, and not that it will actually do so.[153]" It also clarifies that: "in cases where such a link cannot be scientifically measured, its existence can be established on the basis of reason or logic, rather than evidence.[154]" This is therefore an exercise in reasonable inference[155].

141. In this case, the ineligibility of persons whose immigration status is not duly recognized presents a rational link to the urgent and real objective. Being an asylum seeker means being in waiting for the eventual attribution, or not, of refugee status. As long as this status is not granted, the state cannot assume that the asylum claim is valid and that the claimant will stay in the country. For example, between 2017 and 2020, nearly half of these claimants had their applications rejected[156]. This explains why asylum seekers do not receive all the benefits given to other categories of people.

142. The Court of Appeal asserts that the Government of Quebec fails to demonstrate a rational link between the measure and the urgent and real objective. According to the Court, the RCR makes many people staying temporarily in Quebec eligible for the reduced contribution, including those targeted in paragraphs 3, 4, and 7 of Article 3 of the RCR. The Court adds that "what seems to be the common point between all the categories of people in Article 3 RCR is the fact that they must all have a work permit and not that they can stay in Quebec."[157] With respect, the Court of Appeal's conclusions at this stage are flawed by three errors.

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[150] This ground has not, to date, been recognized as an analogous ground.

[151] *Peterson v. Canada (Minister of State (Grains and Oilseeds))*, 1993 CanLII 9367 (FC), para. 23, affirmed by *Peterson v. Canada (Minister of State, Grains and Oilseeds)*, 1995 CanLII 11038 (FCA), para. 28; *Ruel v. Quebec (Minister of Education)*, [2001] RJQ 2590, para. 124.

[152] Judgment under appeal, para. 106, D.A., vol. I, p. 52.

[153] *Hutterian Brethren*, supra, note 149, para. 48.

[154] *Frank*, supra, note 150, para. 59.

[155] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*Mounted Police Association*], para. 143.

[156] Exhibit D-8: Statistics on individuals arriving following irregular border crossings – Immigration and Refugee Board of Canada, D.A., vol. XI, pp. 42–50; For data on all asylum claims received, see Exhibit D-9: Statistics on asylum claims, D.A., vol. XI, pp. 51–55.

[157] Judgment under appeal, para. 112, D.A., vol. I, p. 53.

143. First, the Court of Appeal errs when it claims that the common point among eligible persons is not that they stay in Quebec. Residence in Quebec is the first eligibility condition required by Article 3 of the RCR. It follows that individuals who do not reside in Quebec do not have a sufficient link to Quebec[158].

144. Second, the assertion that the common point among eligible persons is that they have a work permit is false. In fact, the only paragraph that requires a work permit as a condition of eligibility is paragraph 3(3) of the RCR. The other paragraphs do not provide for anything equivalent. The right to work, the ability to work, or holding a job are not conditions of eligibility for the reduced contribution.

145. Finally, the Court of Appeal fails to consider the grounds for each immigration status targeted by Article 3 of the RCR.

146. Paragraph 3(3) primarily targets temporary workers who hold an employer-specific[159] work permit and come to Quebec to address labor shortages. To obtain such a permit, the employer must usually conduct a Labor Market Impact Assessment[160] (LMIA) to demonstrate the need to hire someone from another country to fill a position in Quebec.

147. Paragraph 3(4) applies to foreign students who hold scholarships and whose status is duly recognized by the competent administrative authority. All necessary steps to obtain this status, including acquiring a Certificat de sélection du Québec (CSQ), must have been completed. Once again, these individuals come to Quebec at the invitation of the government under a well-established program.

148. Paragraph 3(7) of the RCR, meanwhile, targets individuals holding a temporary resident permit issued under section 24 of the Immigration and Refugee Protection Act (IRPA) and who also hold a CSQ. This latter requirement, which also applies to individuals covered under paragraphs 5, 6, and 8 of Article 3, implies that Quebec's Minister of Immigration has selected them to settle permanently in Quebec[161].

149. Therefore, it is incorrect to claim that the eligibility conditions set out in Article 3 of the RCR share the common factor of parents having the right to work. Instead, their common factor is that the parents have a sufficient connection to Quebec. In the context of immigration, all eligible parents have a status duly recognized by the competent administrative authority, with all the steps required to obtain this status having been completed, including obtaining a Certificat de sélection du Québec (CSQ).

2.3 Minimal Impairment

150. In this case, the alleged violation is minimal. At this step, the issue is not simply to verify whether the exclusion of asylum seekers impinges minimally on the right to equality, but

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[158] *Clarken*, supra, note 95, para. 53, R.S.A., tab 1.
[159] RCR, supra, note 2, art. 15(2).
[160] RIQ, supra, note 33, art. 5.
[161] Id., art. 22.

whether there are less intrusive means of achieving the defended objective. The exercise is to determine if the contested law falls within a range of reasonable measures[162]. Indeed, "courts show deference to the legislature, especially in complex social issues where the legislature is better positioned than courts to choose from a range of measures.[163]" Therefore, "the criterion of minimal violation is respected as long as the chosen solution is one that is reasonably defensible.[164]"

151. Like many of Quebec's legislative provisions in immigration matters, some eligibility conditions in Article 3 of the RCR refer to federal laws. Specifically, paragraph 3(5) of the RCR must be read with the IRPR (Immigration and Refugee Protection Regulations), which requires that hearings before the Refugee Protection Division be held within a maximum of 30, 45, or 60 days after the application is referred, depending on the claimant's situation[165].

152. However, as mentioned in the introduction, the circumstances mean that federal authorities are unable to meet the deadlines set by federal laws and regulations.

153. This inability to hear asylum claims within the IRPR's timelines means that asylum seekers may now wait up to two years before obtaining refugee status[166]. Incidentally, the granting of any benefit that requires the recognition of refugee status as a condition of eligibility, such as the one provided for in Article 3 of the RCR, is delayed.

154. In this case, asylum seekers become eligible for the reduced contribution when they have a sufficient link to Quebec, i.e., when federal authorities grant them refugee status and they are permanently settled through the issuance of a CSQ[167] (Certificat de Sélection du Québec). It is a conditional exclusion, which strongly supports a conclusion of minimal violation[168].

155. Moreover, although Article 3 of the RCR provides for the exclusion of asylum seekers, the delays in obtaining refugee status are not caused or influenced by this article. It relies solely on decisions that fall under the federal government. It cannot be declared invalid due to a problem that it does not contribute to and which far exceeds the scope of the present litigation.

156. The Court of Appeal concludes that the violation is not minimal by failing to discuss the difficulties faced by federal authorities in meeting the deadlines set by the IRPR. By doing so, it does not take into account the fact that the eligibility condition under paragraph 3(5) of the RCR depends on a federal agency. Paradoxically, the eligibility condition accepted by the Court of Appeal—the granting of a work permit—also falls under another level of government, and it temporarily excludes asylum seekers who do not have a work permit.

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[162] See, notably: *Frank*, supra, note 150, para. 66; *Hutterian Brethren*, supra, note 149, para. 53; Mounted Police Association, supra, note 156, para. 149.
[163] *Hutterian Brethren*, supra, note 149, para. 53; see also *Libman v. Quebec (Attorney General)*, [1997] 3 SCR 569, para. 59; *Frank*, supra, note 150, para. 66
[164] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, para. 101.
[165] IRPR, supra, note 15, s. 159.9.
[166] Exhibit D-2: Auditor General of Canada – Spring 2019 – Report 2 – Processing Asylum Claims, para. 2.25, D.A., vol. X, p. 149.
[167] RCR, supra, note 2, art. 3(5); RIQ, supra, note 33, art. 22.
[168] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, para. 153.

2.4 Proportionality

157. Finally, the alleged violation is proportional. By making only those parents with a sufficient link to Quebec eligible, Article 3 of the RCR prevents benefits from being granted to people whose presence in Canada is uncertain. In the context of a shortage of subsidized daycare spaces, as in this case, the state cannot be obliged to offer benefits to an indeterminate number of people over whom it has no control concerning their access to the territory and whose status as refugees is uncertain. Concluding otherwise could undermine the sustainability of services offered by the state[169].

158. Lastly, during this period of ineligibility, the children of asylum seekers have access to other services, such as kindergarten from the age of 4 or unsubsidized daycare services for which there is a refundable[170] tax credit and which, as holders of permits issued by the Minister of Families, are subject to the same rules as subsidized early childhood centers and daycare centers concerning non-financial aspects.

3. PARAGRAPH 3(3) OF THE RCR CANNOT BE INTERPRETED TO INCLUDE ASYLUM SEEKERS WITH A WORK PERMIT

159. In the event that this Court concludes that Article 3 of the RCR unjustifiably infringes on the right to equality protected by paragraph 15(1) of the Canadian Charter, the Attorney General of Quebec (AGQ) is of the opinion that the appropriate remedy is a declaration of invalidity suspended for ten months.

160. Indeed, when a legislative provision produces an unconstitutional effect, the remedy is usually governed by paragraph 52(1) of the Constitution Act, 1982, which provides that provisions incompatible with the Charter are of no force or effect[171]. As this Court has stated, courts must exercise restraint and caution before granting a remedy other than a declaration of invalidity, as they risk encroaching on the role of the legislator[172]. In this regard, in the case of *Ontario v. G.*, this Court stated:

> [116] "...To respect the distinct roles of courts and legislators, a fundamental principle of our constitutional architecture, the decision to annul a law in its entirety or grant a remedy by giving the law a broad interpretation, a diluted interpretation, or by removing one of its provisions depends on the answer to the question of whether the legislator's intent is such that a court can reasonably conclude it would have enacted the law as modified by the court.173"

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[169] See by analogy *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, para. 113, leave to appeal to the Supreme Court denied, April 5, 2012, no 34446.
[170] Exhibit D-10 - The refundable tax credit for childcare expenses, D.A., vol. XI, p. 56-71.
[171] *R. v. Ferguson*, 2008 SCC 6 [*Ferguson*], para. 59.
[172] Id., para. 50; *Ontario (Attorney General) v. G*, 2020 SCC 38 [*G*], para. 114.
[173] Id., para. 116.

161. Therefore, “if it seems unlikely that the legislator would have enacted the adapted version of the law [through a broad interpretation], the adaptation of the remedy would not be in accordance with its policy choice and would thus infringe on parliamentary sovereignty.[174]”

162. Despite this Court’s guidance, the Court of Appeal decided that the appropriate remedy was a broad interpretation of paragraph 3(3) of the RCR. Specifically, it stated that the appropriate remedy is "that paragraph 3(3) of the RCR should be read as rendering a parent residing in Quebec for the purpose of making an asylum claim eligible for the reduced contribution payment, while holding a work permit.[175]" This approach is incorrect.

163. Indeed, the Court of Appeal concluded that paragraph 3(3) only applies to temporary workers, which excludes asylum seekers[176]. Despite this, it decided that this paragraph should be interpreted as including asylum seekers.

164. However, in *Ontario v. G.*, this Court stated that “broad interpretation consists of a court expanding the scope of a law by declaring an implicit limitation to be of no force or effect.[177]” In Schachter, this Court indicated that “the purpose of broad interpretation is to be as faithful as possible, within the requirements of the Constitution, to the legislative text adopted by the legislator.[178]” In both cases, this Court emphasized that broad interpretation should not allow courts to substitute the legislator’s intent.

165. In concluding as it did, the Court of Appeal substitutes its role for that of the legislator. The wording of paragraph 3(3) of the RCR clearly indicates that those eligible for the reduced contribution payment are individuals residing in Quebec primarily to work. However, the Court of Appeal decided to interpret this provision broadly to include asylum seekers with a work permit, but by removing the terms "primarily to work" from the interpretation. In other words, this "broad interpretation" of paragraph 3(3) has the unprecedented effect of ignoring the words that do not support the broad interpretation. It also disregards the fact that the temporary workers referred to in this article have a work permit that must indicate "the place of work and the name of the employer,[179]" meaning a "closed" work permit. In contrast, asylum seekers have an "open" work permit, meaning the immigration officer grants a permit regardless of a specific employer or workplace[180].

166. In reality, the Court of Appeal is doing more than providing a broad interpretation. It is deciding for the legislator the conditions under which asylum seekers should be eligible for the reduced contribution payment. By conditioning the eligibility of asylum seekers on possessing a work permit, the Court of Appeal introduces a condition foreign to the eligibility conditions laid out in Article 3 of the RCR, except for paragraph 3(3). The Court should instead have preserved the role of the State in addressing the infringement of the protected right – an infringement of paragraph 15(1) based on gender – under the conditions it determines and that are compatible with the system established in the RCR.

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[174] Id., para. 114; See also *Ferguson*, supra, note 172, para. 51.
[175] Judgment under appeal, para. 120, D.A., vol. I, p. 55.
[176] Id., para. 64, D.A., vol. I, p. 39.
[177] *G*, supra, note 173, para. 113.
[178] *Schachter v. Canada*, [1992] 2 SCR 679, p. 700.
[179] RCR, supra, note 2, sec. 15(2).
[180] IPRA, supra, note 15, sec. 206(1)(a).

167. In summary, the only appropriate remedy is the declaration of invalidity of Article 3 of the RCR. As for the other paragraphs, such as paragraph 5, they cannot be interpreted without distorting their wording and the legislator's intent, as they do not concern asylum seekers.

168. The AGQ believes that the declaration of invalidity of Article 3 of the RCR should be suspended for ten months to allow the government to amend the RCR accordingly. On one hand, this delay accounts for the inherent delays in exercising regulatory power (ministerial drafting, government approval phase, publication as a proposal in the official Gazette, time to receive and analyze comments, the enactment process, and the time for the new regulations to come into force). On the other hand, in this particular case, the coming-into-force delay must account for the time required to adjust the administrative documentation for over 1800 early childhood centers and daycare centers, as well as 160 coordinating offices, that will need to adopt and apply this new regulation, in accordance with Articles 16 and 17 of the RCR. Moreover, an immediate declaration of invalidity would deprive parents who meet the eligibility conditions of Article 3 of the RCR of its benefits.

PART IV – ARGUMENTS REGARDING COSTS

169. The AGQ believes that there is no reason to deviate from the rule that costs follow the outcome of the litigation.

PART V – REQUESTED ORDERS

170. For the reasons previously stated, the AGQ requests that the Court allow the appeal of the judgment rendered by the Court of Appeal in case number 500-09-030116-222.

PART VI – ARGUMENTS ON THE SENSITIVE NATURE OF THE PROCEEDINGS

171. The case file contains no restrictions under Rule 42(2)(f) of the Rules of the Supreme Court of Canada.

RESPECTFULLY SUBMITTED.

Manuel Klein	Christophe Achdjian

Montréal, 13 janvier 2025 **Me Manuel Klein** **Me Luc-Vincent Gendron-Bouchard** **Bernard, Roy (Justice-Québec)**	Montréal, 13 janvier 2025 **Me Christophe Achdjian** **Me Amélie Pelletier Desrosier** **Ministère de la justice**
Procureurs de l'appelant	

Montreal, January 13, 2025