SUPREME COURT OF CANADA

CITATION: Quebec (Attorney General) *v.* Kanyinda, 2026 SCC 7

APPEAL HEARD: May 14 and 15, 2025
JUDGMENT RENDERED: March 6, 2026
DOCKET: 41210

BETWEEN:

Attorney General of Quebec
Appellant

and

Bijou Cibuabua Kanyinda
Respondent

\- and -

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Alberta,
Canadian Constitution Foundation,
Advocates for the Rule of Law,
Refugee Centre,
Centrale des syndicats du Québec,
Black Action Defense Committee,
Amnistie internationale Canada francophone,
FCJ Refugee Centre,
Madhu Verma Migrant Justice Centre,
Canadian Association of Refugee Lawyers,

Charter Committee on Poverty Issues,
National Association of Women and the Law,
David Asper Centre for Constitutional Rights,
Income Security Advocacy Centre,
United Nations High Commissioner for Refugees,
British Columbia Civil Liberties Association,
Canadian Council for Refugees,
Canadian Civil Liberties Association,
ESCR-Net – International Network for Economic, Social and Cultural Rights,
Canadian Association of Black Lawyers,
Black Legal Action Centre,
Women's Legal Education and Action Fund Inc. and
Association québécoise des avocats et avocates en droit de l'immigration
Interveners

OFFICIAL ENGLISH TRANSLATION:
Reasons of Wagner C.J. and reasons of Côté J.

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 113)	Karakatsanis J. (Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)
CONCURRING REASONS: (paras. 114 to 203)	Rowe J.
CONCURRING REASONS: (paras. 204 to 267)	Wagner C.J.
DISSENTING REASONS: (paras. 268 to 403)	Côté J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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2026 SCC 7

File No.: 41210.

2025: May 14, 15; 2026: March 6.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Right to equality — Discrimination based on sex — Adverse impact discrimination — Quebec providing subsidized childcare to categories of residents established by regulation — Whether exclusion of refugee claimants from eligibility for subsidized childcare infringes their right to equality — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Educational Childcare Act, CQLR, c. S-4.1.1, s. 82 — Reduced Contribution Regulation, CQLR, c. S-4.1.1, r. 1, s. 3.

K entered Quebec in October 2018 with her three young children and immediately claimed refugee protection. Her claim was approved in January 2021. While waiting for the adjudication of her claim, K was refused subsidized daycare for her children because of her refugee claimant status. She filed an application for judicial review, arguing that her exclusion from eligibility for subsidized daycare under s. 3 of

Quebec's *Reduced Contribution Regulation* ("*RCR*"), which lists the categories of people eligible to receive subsidized daycare in that province, infringes s. 15(1) of the *Charter* because it discriminates based on sex, citizenship, and a new proposed analogous ground of immigration status.

The application judge held that s. 3 of the *RCR* did not create a sex-based distinction between women and men refugee claimants. The Court of Appeal allowed K's appeal, concluding that s. 3 of the *RCR* creates a distinction based on sex, and that the sex-based distinction was discriminatory because it reinforces, perpetuates, and contributes to women's historical disadvantage and underrepresentation in the workforce. With respect to whether the discrimination was justified under s. 1 of the *Charter*, the Court of Appeal accepted as pressing and substantial Quebec's objective that only those with a sufficient connection with the province should receive the daycare subsidy, but held that Quebec failed to demonstrate a rational connection between the objective of the *RCR* and the restrictive measure adopted. As a remedy, the Court of Appeal ordered that the category of refugee claimants with a work permit and residing in Quebec be read into s. 3 of the *RCR*.

Held (Côté J. dissenting): The appeal should be allowed in part.

Per **Karakatsanis**, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.: Section 3 of the *RCR* infringes s. 15(1) of the *Charter* because it discriminates against women refugee claimants based on sex. It does so in a way that cannot be saved by s.

1. There is agreement with the Court of Appeal that the appropriate remedy is reading in the category of refugee claimants to s. 3 of the *RCR*; however, the Court of Appeal erred by reading in a work permit as a condition of eligibility. Rather, s. 3 of the *RCR* should be read as including, as eligible for the subsidized daycare rate, parents residing in Quebec who are refugee claimants.

Section 15(1) of the *Charter* protects individuals not only from laws which directly discriminate but also from adverse effects discrimination. People in the same protected group may have very different experiences and face unique challenges based on their intersecting identities and realities. An intersectional approach is not novel in the s. 15(1) analysis. Intersecting group membership tends to amplify discriminatory effects or can create unique discriminatory effects not visited upon any group viewed in isolation. Consideration of a claimant group's intersecting identities is relevant at both stages of the s. 15(1) analysis. In the first step, which focuses on identifying a distinction based on an enumerated or analogous ground, consideration of a claimant group's intersecting identities and realities may assist in understanding how a government decision disproportionately impacts a particular claimant group. Differential treatment can occur on the basis of an enumerated or analogous ground despite the fact that not all persons belonging to the relevant group are equally mistreated. Claimants can satisfy step one of the s. 15(1) analysis even if they only make up a subgroup experiencing adverse effects. Consideration of a claimant group's intersecting identities and realities is similarly relevant under the second step of the s. 15(1) analysis, where courts must assess whether the distinction has the effect of

reinforcing, perpetuating or exacerbating a claimant's disadvantage. Disadvantage can be intimately related to, if not rooted in, the specific identities and realities shared by a particular group.

To prove an infringement of s. 15(1), a claimant must show the challenged law or state action: (1) on its face or in its impact, creates a distinction based on listed or analogous grounds; and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. At the first step of the test, where a measure does not explicitly distinguish based on a protected ground, the claimant can still show that the law creates a distinction in effect because of the law's disproportionate impact on the protected group. While the claim must be clearly anchored in a recognized ground of discrimination, the claimant may also point to additional characteristics that contribute to establishing a disproportionate effect on the claimant group. Where discrimination affects only a subgroup, the failure to account for intersecting identities in step one of the s. 15(1) inquiry could effectively obscure the specific adverse effects experienced by that subgroup. Two types of evidence can help a claimant establish these impacts: (a) evidence about the claimant group's situation, including physical, social, cultural, or other barriers faced by the claimant group; and (b) evidence about the results produced by the challenged law in practice. However, no specific form of evidence is required. In some cases, a court may reasonably infer an adverse effect on a claimant group, or the disproportionate impact on a claimant group may be apparent and immediate and judicial notice can be taken

when appropriate. While the evidentiary burden at the first step should not be undue, it must be fulfilled.

The second step focuses on the protection of groups that have experienced exclusionary disadvantage based on group characteristics. Even if a law treats people differently based on a protected ground, it does not necessarily follow that the law increases or reinforces a disadvantage. The broader legislative context may also be relevant to the analysis at step two, but the emphasis on context must not conflate an analysis of the discriminatory impact of a measure on a disadvantaged group with a consideration of whether the distinction is justified based on legislative objectives. Courts should not ignore infringements of s. 15(1) merely because the law is ameliorative, non-arbitrary, or only perpetuates the disadvantage of some members of the protected group.

Section 3 of the *RCR* creates, in its effects, a distinction based on sex. This satisfies the first step of the s. 15(1) test because the provision has a disproportionate impact on a subgroup of women, specifically women refugee claimants. While all refugee claimants are denied access to subsidized daycare under the scheme, the discriminatory impact on women is unique because they carry a greater share of childcare responsibilities and the availability of affordable daycare is directly linked to their ability to work.

At step two of the s. 15(1) test, s. 3 of the *RCR* reinforces, perpetuates, and exacerbates the disadvantage of women refugee claimants. The analysis must go beyond sex alone to consider the multiple, intersecting forms of disadvantage faced by this group of women. The record makes clear that women refugee claimants face distinct and heightened forms of disadvantage. Their disproportionate responsibility for childcare not only limits their ability to participate in the workforce but also reinforces their social exclusion. Blocking access to subsidized daycare threatens to reinforce and worsen economic disadvantage, and further marginalizes women refugee claimants from Quebec society. These disadvantages are intensified by their precarious immigration status and marginalized social position. That the daycare scheme is ameliorative does not make it immune from s. 15(1) scrutiny, nor does it prevent the state from acting incrementally to remedy disadvantage. While s. 3 makes many women eligible for the reduced contribution and thus facilitates their access to the workforce, the provision continues to exclude the category of women refugee claimants in a discriminatory fashion. The disadvantage perpetuated here flows directly from s. 3 of the *RCR*. While the delay in processing refugee applications heightens the disadvantage, the delay is not the true source of a woman refugee claimant's disadvantage: women refugee claimants are disadvantaged because the provision functions to exclude them as a class of parents from subsidized daycare, regardless of the delay in processing their application.

The infringement by s. 3 of the *RCR* of s. 15(1) of the *Charter* is not justified under s. 1 of the *Charter*. Assuming, for the purposes of the analysis, that

Quebec's stated objective of limiting daycare subsidies to those with a sufficient link to Quebec is pressing and substantial, there is no rational connection between the exclusion of refugee claimants and the stated objective of the law. Section 3 of the *RCR* makes several categories of people eligible for the reduced contribution who are residing in Quebec without permanent status. If these categories of people are considered sufficiently connected with the province, it is difficult to see how refugee claimants, who wish to establish themselves more permanently in Canada, are not.

Section 52(1) of the *Constitution Act, 1982*, provides that an unconstitutional law is of no force or effect to the extent of the inconsistency. In practical terms, this means, first, defining the extent of the inconsistency between the legislation and the *Charter* and, second, determining the form that the declaration of invalidity should take. The remedy of reading in has been used where benefits are underinclusive, and is appropriate when the inconsistency with the Constitution can be defined as what the statute wrongly excludes rather than what it wrongly includes. In the case at bar, reading in is the appropriate remedy. The effect of invalidating the entirety of s. 3 of the *RCR* would be to remove eligibility requirements for accessing the reduced contribution for all parents. By contrast, reading in refugee claimants as eligible for the reduced contribution would preserve the otherwise constitutional aspects of the legislation. However, a requirement that refugee claimants hold a work permit should not be read in. The eligibility requirements in s. 3 of the *RCR* largely apply regardless of a parent's ability to work. It cannot be fairly concluded that this additional requirement would have been enacted by the government. It should be read

in that s. 3 of the *RCR* includes all parents residing in Quebec who are refugee claimants.

Per **Rowe** J.: There is agreement with the majority in the result. There is agreement with the majority that s. 3 of the *RCR* is discriminatory on the basis of sex, and thus violates s. 15 of the *Charter*, and that the infringement is not justified under s. 1. With respect to s. 1, there is agreement with the majority's conclusion, but for different reasons. Section 3 of the *RCR* pursues a pressing and substantial objective; the limit on the s. 15 right is rationally connected to the objective, and the impugned provision is minimally impairing. However, the salutary effects do not outweigh the deleterious.

Section 15 does not impose obligations on governments to create programs to provide benefits, but it does impose an obligation on governments to remedy discriminatory underinclusion when it does choose to provide benefits. This obligation does not mean that every time that a legislature adopts a benefits program, it must include everyone to whom the *Charter* applies, nor that a government would be prevented from excluding any members of a protected group from access to benefit programs. In order to avoid transforming s. 15 into a positive obligation to remedy all social inequities, courts are to apply the two-step s. 15 test carefully and methodically, notably as regards ameliorative programs.

At the first step, the question of causation needs to be treated seriously. A court must ask whether the challenged law or state action creates the distinction on its face or its impact. In the instant case, the evidence demonstrates that s. 3 of the *RCR* creates a distinction that, in its impact, is based on sex.

At the second step, special attention should be given to the question of whether the claimants have met their burden to demonstrate that it is the underinclusive program that perpetuates, reinforces or exacerbates the disadvantage. If the program creates a distinction but one that is not discriminatory, there will be no violation of s. 15. In the instant case, s. 3 of the *RCR*, in excluding refugee claimants from access to subsidized daycares, reinforces, perpetuates or exacerbates economic and social disadvantage faced by women refugee claimants. Lack of access to daycare worsens women's situation and widens the gap between the genders.

There is disagreement with the majority that it is appropriate to consider intersecting forms of disadvantage at the first step of the s. 15 framework. This step focuses on whether or not there is a distinction based on an enumerated or recognized analogous ground. An analysis under s. 15 that incorporates a recognition of multiple forms of disadvantage should not become a disguised way to find discrimination on the basis of previously unrecognized analogous grounds. The potential recognition of new analogous grounds must be decided according to the methodology previously set out by the Court.

The notion of intersecting forms of disadvantage is instead relevant at two different steps of a s. 15 *Charter* claim. First, at the second step of the test, it is useful to look at the particular situation of the member of the protected group, because the task is to examine the full impact of the harm by applying a contextual analysis grounded in the actual situation of the group. Second, the full impact of the situation of the claimant may also be relevant at the final balancing stage of the s. 1 analysis. If the deleterious effects of the law are particularly severe due to intersecting forms of disadvantage the claimants face, the burden on government to demonstrate the law's salutary effects will be heightened.

In s. 15 challenges there should be serious, meaningful engagement with s. 1. Section 1 is arguably the most consequential part of the *Charter*. It was a contentious provision during the political process that led to the adoption of the *Charter* and its inclusion was integral to the compromise that led to the provinces' agreement to the entrenchment of rights. It provides a means of reconciling the interests in the *Charter* with other fundamental values not specifically enumerated. The *raison d'être* of the rights protected in the *Charter* and their limitation under s. 1 are both rooted in the same normative goal: that Canada is to be a free and democratic society. The *Oakes* test and its incorporation of proportionality reflects a compromise between parliamentary sovereignty and human rights, and captures the idea that some limitations are necessary for the realization of goals of collective importance. Section 1 also shapes the methodology for the interpretation of rights. If courts give guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the

courts will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right and that judicial review will shift more deeply into the domain of policy considerations. Courts should adhere to the strict standard of justification prescribed by *Oakes*, and should give a purposive, rather than a generous, interpretation to the guaranteed rights.

In the instant case, the governments objective of allocating limited public resources for subsidized child care based on the parents' sufficient connection with Quebec is pressing and substantial. While budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1, they are nonetheless relevant and courts should not be dismissive as to matters of public finance.

With respect to whether there is a rational connection between the impugned provision and the infringement, there is disagreement with the majority's conclusion. It is logical to exclude refugee claimants from access to subsidized childcare when the objective is to give financial support to individuals who have a sufficient connection with Quebec. While some refugee claimants will go on to live in Quebec long term, others will not. Those who are eligible for subsidized daycare and have temporary status in Quebec are selected by the provincial government as a result of a specific demonstrated link with the province.

With respect to minimal impairment, a law is not minimally impairing if there are alternative, less harmful means of achieving the government's objective. The alternative means considered must achieve the same government objective, but the government is accorded a margin of appreciation, since it is nearly impossible to ascertain if other possible laws would be equally as effective or equally as minimally impairing. Faced with a situation of surplus demand for access to daycare spaces, the provincial government's choice to exclude refugee claimants, whose link with Quebec is tenuous, is impairing as little as is reasonably possible.

The last step of the *Oakes* test requires both the underlying objective of a measure and the salutary effects that actually result from its implementation to be proportional to the deleterious effects the measure has on fundamental rights and freedoms. Only this branch of the test takes full account of the severity of the deleterious effects of a measure on individuals or groups. If the lack of access to a benefit has a severe effect on the affected group, this will weigh especially heavily in the balancing exercise. The salutary effects of allocating funds to others under a given legislative scheme or another program or service may outweigh the deleterious effects on the affected group who are excluded from a benefit program, especially if the costs are high and the benefits are modest. However, in the instant case, the deleterious effects on the affected women are, unquestionably, severe. While these effects are supported by the evidence, the beneficial effects are speculative and marginal. Any benefits arising from the exclusion of refugee claimants from access to subsidized

daycares are greatly outweighed by the severe adverse impacts on the lives of the affected women.

Per **Wagner** C.J.: Section 3 of the *RCR* infringes s. 15(1) of the *Charter*, but direct discrimination based on refugee claimant status is the main pathway to decide this appeal. By excluding refugee claimants, s. 3 of the *RCR* creates a distinction based on this analogous ground. This distinction is discriminatory, because it denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage suffered by refugee claimants. It has not been shown that the infringement is justified under s. 1. In the circumstances, the appropriate constitutional remedy is to read refugee claimants into s. 3 of the *RCR* as a ninth category of eligible parents.

Section 15 of the *Charter* protects refugee claimant status as an analogous ground. The first step of the test involves showing that the impugned provision, on its face or in its impact, creates a distinction based on a protected ground. Section 3 of the *RCR* creates such a distinction. This section sets out a closed list of categories of persons eligible for the reduced contribution, and refugee claimants are not on the list. This is an exclusion by omission and therefore a direct distinction. The following considerations, taken cumulatively, confirm that refugee claimant status should be recognized as an analogous ground. First, a distinction based on refugee claimant status may violate the dignity of the members of this group, because this migration status is apt to give rise to stereotypical reasoning. Judging a person on the basis of an administrative or migration status, rather than according to their merit or attributes,

could well negate the person's dignity and worth. Second, refugee claimant status is an immutable characteristic, because it is a situation that is not within the individual's control; it is not alterable by conscious action by the individual. The transitory nature of migration status does not prevent this status from being considered an immutable characteristic. It is one of those characteristics that, while they last, are considered beyond the individual's conscious control. Third, refugee claimants are a historically disadvantaged group, in addition to being a discrete and insular minority. They lack political power, which makes them vulnerable to having their interests overlooked and their rights to equal concern and respect violated. Fourth, refugee claimants are a vulnerable and marginalized group in society. A number of factors contribute to increasing their vulnerability, including the situation of poverty or economic precarity in which they find themselves as well as difficulty accessing the labour market and social services. Fifth, international instruments and international organizations support the conclusion that refugee claimant status should be identified as an analogous ground.

At the second step of the s. 15 test, it has been shown that the distinction created by s. 3 of the *RCR* denies a benefit and that this benefit is denied in a discriminatory manner. Inability to access subsidized childcare deprives many refugee claimants of the opportunity to integrate fully into society and reach their full potential, in addition to hurting their employment prospects, leading to dependence on social assistance, contributing to their isolation and stigmatization and undermining their sense of belonging and their integration in Quebec. The distinction created by s. 3 of the *RCR* has a negative and adverse impact on refugee claimants because it reinforces,

perpetuates or exacerbates their marginalization and their cycle of precarity or exclusion. Finding that this provision is discriminatory serves not only to counter this bleak message but also to denounce and convey disapproval of such treatment of a disempowered group.

The infringement of the right of refugee claimants is not justified under s. 1 of the *Charter*. The deleterious effects of the exclusion of persons claiming refugee protection are profound, serious and numerous, not only for these persons and their children, but also for society in general. The impact of the infringement of this right is disproportionate to the likely benefits of the impugned measure.

The remedy granted by the Court of Appeal does not go far enough to protect the rights of refugee claimants in Quebec; it is not coextensive with the nature, scope and breadth of the *Charter* infringement. It is clear that the government would have included refugee claimants if it had been aware of the constitutional problem posed by their exclusion. The appropriate remedy is to read into s. 3 of the *RCR*, because this remedy allows a court to extend the reach of a law so that it includes what was wrongly excluded from it. Including refugee claimants as a ninth category is a solution with sufficient precision, since it has the advantage of preserving the benefits that this section already provides to parents who are currently eligible. Given that reading in is the appropriate remedy in this case, there is no need for a declaration of invalidity. The Court's word in this case will very likely not be the last one; the government is free to amend the *RCR* if it deems this expedient.

Per **Côté** J. (dissenting): The appeal should be allowed, the judgments of the courts below set aside and K's application for judicial review dismissed. The *RCR* does not create a distinction based on the ground of sex, but rather on the ground of refugee claimant status. However, the distinction is a lawful one because refugee claimant status cannot be recognized as a new analogous ground. Consequently, there is no infringement of the right to equality protected by s. 15 of the *Charter*.

The first step of the test under s. 15(1) of the *Charter*, which is focused on causation and the comparative exercise, is not satisfied on the basis of the enumerated ground of sex. Imposing an obligation on the state to provide any benefit in a non-discriminatory manner could paradoxically discourage state initiatives aimed at reducing inequalities. The legislature could not decide to enact an ameliorative law to address the inequalities suffered by women while excluding — directly or indirectly — homosexual women, for example. However, it can exclude certain groups in society that include women by making distinctions that are based not on a protected ground, but on grounds like income, immigration status or place of residence. Section 3 of the *RCR* does not create a distinction between men and women in general, but rather between different groups of women, because they are refugee claimants. The non-inclusion of certain segments of the population cannot be unconstitutional in its impact given the principle of incrementalism, which requires that s. 15 not undermine the state's ability to act incrementally in addressing systemic inequality. The legislature may choose to limit the categories of persons eligible for the reduced contribution on the basis of criteria that are not protected by s. 15(1) of the *Charter*. For the categories

of persons not included in s. 3 of the *RCR* — such as refugee claimants — it is clear that Quebec decided not to take action on existing inequalities between the sexes.

The mere fact that some women are affected by the exclusion set out in s. 3 of the *RCR* is not sufficient to establish that this provision causes or has contributed to a disproportionate impact. Determining whether the impugned provision has a disproportionate impact requires a comparison with the situation of men refugee claimants in the excluded group, given the inherently comparative nature of s. 15. It is not enough to show that the group of persons excluded by the legislative provision includes members of the protected group. In this case, the evidence in the record is incomplete, since it has significant shortcomings that prevent it from yielding reliable results. The statistical evidence involves a very small number of participants, the method used by the expert to identify the refugee claimants was not established and, even more importantly, the sex of the respondents in each of the categories listed was not revealed. This omission is important, because establishing a disproportionate impact on the basis of sex requires a comparison between men and women. The fact that the sex of the respondents was not mentioned prevents such a comparison from being made. The evidence merely indicates that, by not including refugee claimants in the list of parents eligible for the reduced contribution, Quebec has left untouched the pre-existing inequality between women and men refugee claimants when it comes to the burden of childcare, without worsening it or creating it. In this context, the Court of Appeal should have deferred to the trial judge's finding, because this finding involved no palpable and overriding error that warranted its intervention.

The second step of the s. 15(1) test is also not satisfied on the basis of the enumerated ground of sex. Even if one were to accept that s. 3 of the *RCR* creates a distinction based on the enumerated ground of sex, this distinction is not discriminatory because it does not have the effect of reinforcing, perpetuating or exacerbating the disadvantage suffered by women refugee claimants. One of the disadvantages addressed by the *Educational Childcare Act*, the enabling statute for the *RCR*, was the increased difficulty that women had in accessing the labour market because of their parental responsibilities. The non-inclusion of women refugee claimants in s. 3 of the *RCR* does not make the disadvantage they face in accessing the labour market any more difficult than before. It leaves it untouched, without worsening it. Furthermore, it is important to stress that even where women refugee claimants do not have access to the reduced contribution, they can receive a tax credit for almost all of the expenses incurred for a non-subsidized childcare space — consequently, the non-inclusion cannot be viewed as perpetuating an economic disadvantage.

Even if s. 15(1) were infringed, the violation of the right to equality on the basis of sex is justified under s. 1. At the proportionality stage, the evidence does not support a finding that the deleterious effects of the state's objective on women refugee claimants' right to equality outweigh its salutary effects. Limiting access to the reduced contribution to persons who have a sufficient connection with Quebec has the salutary effect of ensuring the sustainability of the services offered by the state. While the evidence sets out deleterious effects on women refugee claimants that result from their non-inclusion in the list of persons eligible for the benefit of subsidized daycare, it does

not indicate the number and proportion of women refugee claimants affected by this exclusion. It is therefore impossible to determine whether these deleterious effects outweigh the salutary effects flowing from the state measure that involves not granting all refugee claimants, men and women alike, the benefit of subsidized daycare. Moreover, the harm suffered by women refugee claimants is greatly alleviated because of the tax credit that makes a non-subsidized childcare space nearly as affordable as a subsidized space.

One of the two main purposes of the *RCR*'s enabling statute is to foster the development of an educational childcare service supply that takes into account the needs of parents, notably by facilitating the reconciliation of their parental responsibilities with their professional or student responsibilities. If there were to be a remedy, it should be limited to the inclusion of refugee claimants who hold a work permit or study permit. In this manner, the law would pursue the objective of ensuring that women, and specifically women refugee claimants, are able to enter the labour market, either by studying first or simply by working, despite their parental responsibilities.

Section 3 of the *RCR* does not infringe the right to equality on the basis of the ground of refugee claimant status either. The adoption of a multifactorial test is unnecessary and underestimates the flexibility of the current test. The evidence in the record, even when analyzed on the basis of a multifactorial test, does not support the recognition of refugee claimant status as an analogous ground. Five points buttress this

assertion. First, the evidence does not show that refugee claimants are stereotyped on the basis of their refugee claimant status, but suggests that they are stereotyped because of their status as non-citizens or their national origin. A concern about being stereotyped is not sufficient to establish that such stereotyping actually exists. Second, refugee claimant status is not an immutable characteristic, nor is it constructively immutable. Third, there is no evidence indicating that refugee claimants form a discrete and insular minority and a historically disadvantaged group because of their status as refugee claimants rather than as non-citizens. Fourth, the evidence presented is not sufficient to show that refugee claimants are, as a group, marginalized because of their specific migration status. Lastly, while Canada has ratified the international instruments that gave rise to two United Nations committees, these sources have no mandatory effect and are not binding on Canada.

Refugee claimant status cannot be an analogous ground, essentially because it is not an immutable characteristic. The temporary nature of this status prevents it from being characterized as immutable. Refugee claimant status is not constructively immutable either. To begin with, this status has little impact on an individual's personal identity. Next, the fact that a change in status depends on a government decision is also not a basis for finding the status to be constructively immutable. Otherwise, such recognition would have a significant impact on the laws in force across the country, particularly in the area of immigration, but also in relation to many social services.

Section 3 of the *RCR* creates a distinction based on refugee claimant status, and this distinction denies a benefit to the persons in question, namely access to subsidized daycare. However, this distinction is not discriminatory. Even when refugee claimants do not have access to the reduced contribution, they can receive a tax credit for almost all of the expenses incurred for a non-subsidized childcare space. The non-inclusion of refugee claimants in s. 3 of the *RCR* does not deprive them of affordable options for access to a daycare facility. The second step of s. 15(1) is therefore not satisfied.

The infringement of the right to equality on the basis of the ground of refugee claimant status, if an infringement existed, would be justified under s. 1. The salutary effects of limiting access to the reduced contribution to persons who have a sufficient connection with Quebec in order to ensure the sustainability of the services offered by the state are proportional to the deleterious effects that result from not including refugee claimants in the list of persons with access to the reduced contribution. The harm suffered by refugee claimants is greatly alleviated because of the tax credit that makes a non-subsidized childcare space nearly as affordable as a subsidized childcare space. In addition, the fact that persons eligible for the reduced contribution are not guaranteed a subsidized childcare space does not diminish the impact that the inclusion of refugee claimants would have on the sustainability of the subsidized childcare system.

The tailored remedy in this case would have been to amend the *RCR* to include only refugee claimants who hold a work permit or study permit. Including all refugee claimants without exception in s. 3 of the *RCR* would be contrary to parliamentary sovereignty. The remedy must be tailored to the infringement in issue, not tailored to improve a group's overall position in society.

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APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Mainville and Moore JJ.A.), 2024 QCCA 144, [2024] AZ-52002355, [2024] Q.J. No. 585 (Lexis), 2024 CarswellQue 15898 (WL), allowing in part an appeal from a decision of St-Pierre J., 2022 QCCS 1887, [2022] AZ-51854930, [2022] J.Q. n° 4425 (Lexis), 2022 CarswellQue 9547 (WL), allowing in part an application for judicial review. Appeal allowed in part, Côté J. dissenting.

Luc-Vincent Gendron-Bouchard, *Manuel Klein* and *Christophe Achdjian*, for the appellant.

Sibel Ataogul and *Guillaume Grenier*, for the respondent.

Lindy Rouillard-Labbé, *François Joyal* and *Justine Malone*, for the intervener Attorney General of Canada.

Rochelle S. Fox and *Maia Stevenson*, for the intervener Attorney General of Ontario.

Ashley A. Caron and *Sergio Ortega*, for the intervener Attorney General of British Columbia.

Leah M. McDaniel, for the intervener Attorney General of Alberta.

Guillaume Pelegrin and *Jean-François Trudelle*, for the intervener Canadian Constitution Foundation.

Asher Honickman and *Chelsea Dobrindt*, for the intervener Advocates for the Rule of Law.

Pierre-Luc Bouchard, for the intervener Refugee Centre.

Amy Nguyen and *Ariane Roberge*, for the intervener Centrale des syndicats du Québec.

Mohsen Seddigh and *Karine Bédard*, for the intervener Black Action Defense Committee.

Julien Thibault, for the intervener Amnistie internationale Canada francophone.

Yin Yuan Chen and *Joshua Eisen*, for the interveners FCJ Refugee Centre and Madhu Verma Migrant Justice Centre.

Connor Bildfell, *Simon Bouthillier* and *Katherine Griffin*, for the intervener Canadian Association of Refugee Lawyers.

Martha Jackman and *Vince Calderhead*, for the intervener Charter Committee on Poverty Issues.

Kerri Froc, *Suzanne Zaccour* and *Cheryl Milne*, for the interveners National Association of Women and the Law and David Asper Centre for Constitutional Rights.

Robin Nobleman and *Adrian Merdzan*, for the intervener Income Security Advocacy Centre.

François Grondin, *Karine Fahmy* and *Sarah Marinier-Doucet*, for the intervener United Nations High Commissioner for Refugees.

Mannu Chowdhury and *Kartiga Thavaraj*, for the intervener British Columbia Civil Liberties Association.

Colin Grey and *Peter Shams*, for the intervener Canadian Council for Refugees.

Lex Gill, for the intervener Canadian Civil Liberties Association.

Neil Abraham and *Gib van Ert*, for the intervener ESCR-Net – International Network for Economic, Social and Cultural Rights.

Karine Joizil, *Sajeda Hedaraly*, *Bianca Annie Marcelin* and *Marianne Goyette*, for the interveners Canadian Association of Black Lawyers and Black Legal Action Centre.

Olga Redko and *Vanessa Ntaganda*, for the intervener Women's Legal Education and Action Fund Inc.

Lawrence David and *Gjergji Hasa*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

The judgment of Karakatsanis, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

KARAKATSANIS J. —

[1] Women in Canada have seen gains in their ability to access economic opportunities and to participate in community and public life. But despite progress in reducing barriers to the workplace, and increased participation in childcare by both parents, women continue to face a double challenge — advancing at work while still shouldering a larger share of the childcare responsibilities at home. The need to balance

paid work with caregiving often leads women to take jobs with flexible or part-time hours, to reduce work travel, or to step away from the workforce entirely. The consequences are profound: lower wages, fewer opportunities for advancement, and underrepresentation in positions of leadership.

[2] Legislative initiatives, such as affordable daycare, play a key role in supporting women's access to employment by easing the burden of caregiving. These initiatives are especially significant for women with fewer means, such as women refugee claimants, for whom access to affordable daycare will often make the difference between entering the workforce and staying at home.

[3] In 1997, Quebec became the first province in Canada to introduce universal subsidized daycare, which marked an important step in the province's goal to make equal access to the workforce a reality. This program is now governed by the *Educational Childcare Act*, CQLR, c. S-4.1.1 (*ECA*), which aims to help parents reconcile their work or study obligations with their family responsibilities (s. 1).

[4] At issue in this appeal is s. 3 of the *Reduced Contribution Regulation*, CQLR, c. S-4.1.1, r. 1 (*RCR*), a regulation made under the *ECA*. Section 3 lists the categories of people eligible to receive subsidized daycare, including residents of Quebec who are Canadian citizens, permanent residents, international students, holders of a temporary resident permit or a work permit, and those with refugee status. Quebec does not provide this subsidy to refugee claimants who have yet to obtain refugee

status. Because the application process for refugee status often takes years to complete, this denial of access to subsidized daycare impacts the ability of some refugee claimants with young children to enter the workforce.

[5] The respondent, Ms. Bijou Cibuabua Kanyinda, started an application for judicial review claiming that, by excluding refugee claimants, s. 3 of the *RCR* discriminates based on sex, citizenship, and a new analogous ground of immigration status and infringes s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The application judge dismissed these arguments. But the Court of Appeal of Quebec concluded that the provision discriminated based on sex and infringed s. 15(1) of the *Charter*. It also held that the infringement could not be justified under s. 1. The Attorney General of Quebec (AGQ) now appeals that decision.

[6] As I will explain, I agree with the Court of Appeal that s. 3 of the *RCR* discriminates based on sex, thus infringing s. 15(1) of the *Charter*. It does so in a way that cannot be saved by s. 1.

[7] It has long been settled that the underlying principle animating s. 15(1) is substantive equality — rather than formal equality — which is satisfied by treating all individuals the same regardless of their unique circumstances. The insufficiency of this formal equality approach was captured by the French novelist Anatole France, who wrote of "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread" (*The Red Lily* (1921),

at p. 95). Instead, substantive equality looks past neutral text to look at the actual impact of the law on disadvantaged groups.

[8] To establish an infringement of s. 15(1), the claimant must show: (1) the denial of access to subsidized daycare to refugee claimants disproportionately impacts women refugee claimants and thus creates a distinction based on sex; (2) this distinction reinforces, perpetuates, or exacerbates the disadvantages faced by women refugee claimants.

[9] Ms. Kanyinda has satisfied both steps.

[10] The denial of subsidized daycare to refugee claimants disproportionately impacts the women in this group and thus creates a distinction based on sex. This Court has recognized that women continue to bear a larger share of child-rearing responsibilities and that these additional responsibilities affect their ability to take part equally in the workforce. Judicial notice of this point is supplemented here by other evidence, including an expert report authored by Dr. Jill Hanley based on existing literature and three separate research projects in which she participated. One such project was a qualitative study that interviewed "19 mothers who had precarious immigration status during their pregnancy, childbirth and the early years of their child's life" (*The labour implications of the exclusion of refugee claimants from Quebec's subsidized childcare program* (2020) (reproduced in A.R., vol. II, at pp. 68-90), at pp. 15-16). This evidence establishes that denial of affordable daycare directly impacts

women refugee claimants' access to the labour market, particularly for women refugee claimants with young children under the age of six. Only women cited lack of daycare access as the reason they could not work — unaffordable daycare was not a factor in unemployment for *any* of the men.

[11] This record also makes clear that this sex-based distinction is discriminatory, as lack of access to subsidized daycare perpetuates women's long-standing socio-economic disadvantages that flow from being excluded from the workforce. These disadvantages are exacerbated by additional vulnerabilities faced by asylum seekers connected to sex, race, and the broader realities of poverty and social isolation. By perpetuating the exclusion of these women from the workforce, the law imposes a barrier to their ability to integrate as respected, contributing members of society. The law also reinforces the harmful stereotype that refugee claimants are a financial burden on Canadian society.

[12] The AGQ has not shown that this discrimination is justified under s. 1. While the objective of limiting the daycare subsidy to those with a sufficient link to Quebec may be pressing and substantial, there is no rational connection between that goal and excluding refugee claimants when the subsidy is extended to others. Temporary workers or foreign students, for example, may have a weaker connection to the province. Under both international and domestic Canadian law, refugees have the right to seek asylum, and Canada has committed not to expel them from the country until their claims are determined. In addition, refugee claimants in Canada may apply

for work permits and study permits for post-secondary education. Their children may attend school, and they have access to healthcare services. And more than half of refugee claimants in Quebec are ultimately approved and make their permanent home in Quebec.

[13] This benefit is denied equally to women and men refugee claimants, but its impact is felt disproportionately by women due to the enduring challenges associated with child-rearing responsibilities. While society has made progress in reducing discrimination against women, and men are increasingly involved in caregiving roles within families that often differ greatly from traditional norms, sex discrimination still exists. These ongoing inequalities have especially severe consequences for refugee claimants, whose vulnerable and precarious circumstances heighten their disadvantage.

[14] Thus, to the extent this provision is inconsistent with the equality rights of the *Charter*, it is "of no force or effect" (s. 52(1) of the *Constitution Act, 1982*). I agree with the Court of Appeal of Quebec that "reading in" is the appropriate remedy. That said, I would not read in a requirement that refugee claimants hold a work permit. As the AGQ acknowledges, the eligibility requirements in s. 3 of the *RCR* apply regardless of a parent's ability to work. I would allow the appeal in part, to change the remedy, and declare that s. 3 of the *RCR* be read as including, as eligible for the subsidized daycare rate, parents residing in Quebec who are refugee claimants.

I. Facts

[15] Ms. Kanyinda entered Quebec in October 2018 and immediately made a claim for refugee protection under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). Originally from the Democratic Republic of the Congo, she arrived with her three young children. Her claim for refugee status was approved just over two and a half years later, in January 2021.

[16] While waiting for her refugee claim to be adjudicated, Ms. Kanyinda obtained a permit to work in Quebec. She contacted three daycare centres to find subsidized spaces for her children. She was refused because of her refugee claimant status. Under Quebec's statutory regime governing daycare subsidies, eligibility for subsidies is restricted to parents with refugee status, thus excluding refugee claimants.

[17] Ms. Kanyinda challenged her exclusion from eligibility for subsidized daycare in 2019, arguing that s. 3 of the *RCR*, which sets out eligibility requirements, unjustifiably infringes s. 15(1) of the *Charter*.

II. <u>Decisions Below</u>

A. *Superior Court of Quebec, 2022 QCCS 1887 (St-Pierre J.)*

[18] The Superior Court held that s. 3 of the *RCR* did not create a sex-based distinction between women and men refugee claimants. In the application judge's view, [TRANSLATION] "there is no means of determining in what proportion men and women

refugee claimants would pay the additional childcare expenses for their children" (para. 44). Without this type of statistical evidence, the court concluded that Ms. Kanyinda's claim could not succeed.

[19] The application judge also rejected the citizenship discrimination claim, noting that s. 3 of the *RCR* made not only Canadian citizens eligible for subsidized daycare but also seven other categories of non-citizens. The application judge declined to recognize immigration status as a new analogous ground, holding that this characteristic was not constructively immutable.

B. *Court of Appeal of Quebec, 2024 QCCA 144 (Dutil, Mainville and Moore JJ.A.)*

[20] The Court of Appeal found that Ms. Kanyinda's evidence and the expert report by Dr. Hanley established that women refugee claimants bear a disproportionate responsibility for childcare and that a lack of access to affordable daycare is a major barrier to their equal participation in the workforce. The court considered Dr. Hanley's conclusion, drawn from general reports and academic literature, that affordable daycare increases women's access to the labour market, along with findings from her recent empirical study of 325 refugee claimants. Relying on Dr. Hanley's report, the court accepted that daycare was essential for many women to enter the workforce.

[21] The Court of Appeal concluded that Ms. Kanyinda had met her burden of proving, under the first part of the s. 15(1) test, that s. 3 of the *RCR* creates a distinction

based on sex. The court found the evidence of this distinction was convincing and uncontradicted by the AGQ. The court further concluded that the sex-based distinction was discriminatory because the challenged provision perpetuates women's historical disadvantage and underrepresentation in the workforce.

[22] Turning to whether the discrimination was justified under s. 1, the court accepted as pressing and substantial Quebec's objective that only those with a sufficient connection with the province should receive the daycare subsidy. However, the AGQ failed to demonstrate a rational connection between the pressing and substantial objective of the *RCR* and the restrictive measure adopted. The court noted that several categories of people eligible for reduced contributions were in Quebec only for temporary stays and that what they had in common was that they all had work permits, not that they could remain in Quebec. Finally, while the AGQ did not point to any beneficial effects resulting from the exclusion of refugee claimants, the detrimental effects were clearly demonstrated.

[23] As a remedy, the Court of Appeal ordered that refugee claimants with a work permit and residing in Quebec be "read in" to s. 3 subpara. 3 of the *RCR*. The court concluded that this remedy balanced the elimination of discriminatory practices and the need to preserve the rights of other categories of people who benefit from the subsidized daycare.

[24] The Court of Appeal found it unnecessary to consider alternative grounds of discrimination, such as citizenship or immigration status.

III. Analysis

[25] Ms. Kanyinda argues that s. 3 of the *RCR* discriminates on three grounds: sex, citizenship, and a new analogous ground of immigration status. Because I conclude that the provision discriminates based on sex, it is unnecessary to rule on the other two grounds of discrimination. That said, the claimant group in this case is made up of women refugee claimants, whose unique circumstances are integral to the sex-based analysis in this case.

[26] At the outset, I acknowledge that while I conclude s. 3 of the *RCR* discriminates on sex, the Chief Justice would also recognize refugee claimant status as a new analogous ground under s. 15(1). I agree with the Chief Justice that refugee claimants face stereotypes, historical disadvantage, and distinct vulnerabilities in Canadian society. However, I would leave the issue of whether to recognize such an analogous ground for another day. While the Chief Justice's thoughtful reasons raise important issues, I do not find it necessary to decide them in this case.

[27] The issues addressed in the appeal are thus: whether s. 3 of the *RCR* infringes s. 15(1) of the *Charter* based on sex; if so, whether it can be saved under s. 1; and if it cannot be saved, what is the appropriate remedy.

A. *The Statutory Context*

[28] In Quebec, the provision of educational daycare services is governed by the *Educational Childcare Act*. The *ECA* has its origins in a 1979 bill entitled Bill 77, *An Act respecting child day care*, 4th Sess., 31st Leg., which had two objectives: to enable women to exercise their right to work and to provide quality services for children (National Assembly, Standing Committee on Social Affairs, "Étude du projet de loi no 77 — Loi sur les services de garde à l'enfance", *Journal des débats: commissions parlementaires*, vol. 21, No. 233, 4th Sess., 31st Leg., December 10, 1979, at p. B-11129; *Act respecting child day care*, S.Q. 1979, c. 85, s. 2; I.F., Centrale des syndicats du Québec, at paras. 7-10). In 1997, the Quebec government published a White Paper entitled *Les enfants au cœur de nos choix*, which had three fundamental objectives: to ensure equal opportunities for children, to make it easier to reconcile work and family life, and to provide increased support for low-income families (Secrétariat du Comité des priorités du ministère du Conseil exécutif et al., *Nouvelles dispositions de la politique familiale: Les enfants au cœur de nos choix* (1997)). A network of state-subsidized daycare centres was created soon after, and the first version of the *RCR* came into force (*An Act respecting the Ministère de la Famille et de l'Enfance and amending the Act respecting child day care*, S.Q. 1997, c. 58; Décret 1071-97, (1997) 129 G.O. II, 5618). The *ECA* followed in 2005.

[29] The *ECA* aims to "enhance the quality of the educational services intended for children before their admission to school" while taking into "account the needs of

parents, in order to facilitate the reconciliation of their parental responsibilities with their professional or student responsibilities" (s. 1). Section 90 of the *ECA* empowers the Minister of Families to grant subsidies to certain daycare providers for the provision of services. The *RCR* regulates the daycare subsidies provided for in the *ECA* by determining the financial contribution paid by the parents (currently, $9.65 a day (*RCR*, s. 5)). Section 3 of the *RCR* sets out the requirements for a parent to be eligible for a reduced contribution for daycare services. Section 3 subpara. 5 limits eligibility to a parent who has refugee status, thus excluding refugee claimants.

[30] In addition to Canadian citizens, s. 3 renders several categories of non-citizens eligible, including temporary foreign workers, foreign students, and non-citizens with refugee status:

> **3.** A parent residing in Québec who meets any of the following conditions is eligible for the reduced contribution:
>
> (1) the parent is a Canadian citizen;
>
> (2) the parent is a permanent resident within the meaning of the Immigration and Refugee Protection Act (S.C. 2001, c. 27);
>
> (3) the parent is staying in Québec primarily for work purposes and holds a work permit issued under the Immigration and Refugee Protection Act or is exempted from holding such a permit under that Act;
>
> (4) the parent is a foreign student holding a certificate of acceptance issued under the Québec Immigration Act (chapter I-0.2.1) and is receiving a scholarship from the Government of Québec pursuant to the policy applying to foreign students in Québec colleges and universities;
>
> (5) the parent is recognized by a court in Canada of competent jurisdiction as a refugee or protected person within the meaning of the

> Immigration and Refugee Protection Act and holds a selection certificate issued under section 3.1 of the Québec Immigration Act;
>
> (6) the Minister of Citizenship and Immigration has granted protection to the parent under the Immigration and Refugee Protection Act and the parent holds the selection certificate referred to in paragraph 5;
>
> (7) the parent holds a temporary resident permit issued under section 24 of the Immigration and Refugee Protection Act in view of the granting of permanent residence and holds the selection certificate referred to in paragraph 5; or
>
> (8) the parent is authorized to file in Canada an application for permanent residence under the Immigration and Refugee Protection Act or the Immigration and Refugee Protection Regulations (SOR/02-227) and holds the selection certificate referred to in paragraph 5.

B. *Legal Framework for Equality Rights Under the Charter*

(1) Purpose of Section 15(1) of the *Charter*

[31] Section 15(1) of the *Charter* provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[32] The equality right set out in s. 15(1) has deep roots in Canada's constitutional tradition, including in the pre-*Charter* era (see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 170 and 172). This Court has long recognized the commitment to equality as a value essential to a free and democratic

society (see, e.g., *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136). As Dickson J. explained in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295: "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms . . . . Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person" (p. 336; see also *Andrews*, at p. 171). The principled development and proper application of s. 15(1) is thus of critical importance to our fundamental human rights and to our identity as a country.

[33] From its earliest *Charter* jurisprudence, this Court has recognized that interpreting a *Charter* provision requires something other than the rules of statutory construction. "The task of expounding a constitution", Dickson J. wrote in 1984, "is crucially different from that of construing a statute" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155). While statutes may be repealed, a constitution is deeply entrenched. It cannot be easily changed and it is drafted and interpreted with "an eye to the future" (*ibid.*). The constitution must be responsive to new social, political, and historical realities as they emerge. A feature of Canada's constitutional order long before the advent of the *Charter*, this purposive and generous approach was famously recognized by Lord Sankey in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, where the Constitution was described as "a living tree capable of growth and expansion within its natural limits".

[34] A *Charter* interpretation will be generous and attentive to the broader purpose of the right in question (*Big M Drug Mart Ltd.*, at p. 344). Accordingly, s.

15(1) is part of the *Charter*'s broader vision of a free and democratic society, in which all human beings are "equally deserving of concern, respect and consideration" (*Andrews*, at p. 171).

[35] The approach to equality under s. 15(1) of the *Charter* marks a departure from how it was previously interpreted and applied under the *Canadian Bill of Rights*, S.C. 1960, c. 44. While the *Canadian Bill of Rights* provided only for equality before the law, our Court noted in *Andrews* that s. 15(1) provides "a much broader protection", including equality under the law, equal protection of the law, and equal benefit of the law (p. 170). This case deals with equal benefit of the law. Prior *Canadian Bill of Rights* jurisprudence had interpreted the equality right narrowly and in a formalistic manner (*ibid.*; see *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183). By contrast, with its earliest s. 15(1) jurisprudence, this Court rejected the "rigid formalism" used to interpret the *Canadian Bill of Rights* in favour of a more purposive approach (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 3; *Andrews*, at p. 170).

[36] In line with a purposive approach, this Court has repeatedly affirmed substantive equality as the "animating norm" of s. 15(1) (*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2; see also *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 15-16; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at para. 25; *Fraser v. Canada (Attorney General)*, 2020 SCC 28,

[2020] 3 S.C.R. 113, at para. 42; *R. v. Sharma*, 2022 SCC 39, [2022] 3 S.C.R. 147, at para. 37). Substantive equality underlies our s. 15(1) test; it looks beyond the apparent neutrality of a law to consider a law's actual effects on disadvantaged groups (*Withler*, at paras. 39-40; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 17-18; *Fraser*, at para. 42). "The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group" (*Withler*, at para. 39). These patterns of disadvantage can include financial precarity, physical and psychological harm, political and social exclusion, and other institutional barriers (*Fraser*, at para. 76, citing C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at pp. 62-63; see also S. Fredman, *Discrimination Law* (2nd ed. 2011), at pp. 25-26).

[37] Intended to promote substantive equality, s. 15(1) protects individuals not only from laws which explicitly or intentionally discriminate but also from laws which are facially neutral and yet discriminate through their impact on certain groups. This indirect discrimination is known as adverse effects discrimination (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 279; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 41; see also *Fraser*, at para. 45). Substantive equality is distinct from formal equality, which would treat everyone identically, regardless of their differences. When applied to people in unequal circumstances, formal equality can result in injustice.

[38] Put differently, identical or facially neutral treatment, with no intention to discriminate, can have effects that facilitate the discriminatory treatment of groups based on protected grounds (*Andrews*, at p. 164; *Fraser*, at para. 47). A clear example of adverse impacts discrimination in practice is found in this Court's decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3. That case considered whether the government of British Columbia had improperly dismissed a forest firefighter from her job after she failed to meet a newly adopted aerobic fitness standard, despite having passed three other fitness tests and having successfully performed her duties for three years before the new standard was implemented. While the aerobic fitness standard applied equally to all firefighters, evidence demonstrated that due to physiological differences, most women have a lower aerobic capacity than men and most women, unlike most men, could not increase their capacity even with training to meet the requirements of the aerobic fitness test (para. 11). While 65 to 70 percent of male applicants could pass the new fitness tests on their initial attempts, only 35 percent of female applicants could do so (*ibid.*). This Court accepted that the standard was discriminatory in impact because it effectively prevented otherwise qualified female candidates from employment only due to their sex (paras. 69-70).

[39] To appreciate the full scope of a law's impact, an approach based on substantive equality must acknowledge that discrimination will not be felt by all members of a disadvantaged group in the same way. People in the same protected group may have very different experiences and face unique challenges based on their

intersecting identities and realities — including, for example, their race, religion, ethnic background, sex, age, disability, sexual orientation, parental status, socioeconomic status, immigration status, or language abilities (I.F., National Association of Women and the Law and David Asper Centre for Constitutional Rights, at para. 10; I.F., Refugee Centre, at para. 10).

[40] The recognition of a particular claimant's intersecting identities and realities — sometimes called an intersectional approach — is not novel in the s. 15(1) analysis. Rather, on multiple occasions, this Court has highlighted the importance of taking account of these broader characteristics at both stages of the s. 15(1) test. For instance, in *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, this Court was clear that substantive equality requires a nuanced consideration of the concrete circumstances of a particular claimant group at both steps of the s. 15(1) test: "Substantive equality focuses both steps of the s. 15(1) analysis on the concrete, material impacts the challenged law has on the claimant and the protected group or groups . . . in the context of their actual circumstances, including historical and present-day social, political, and legal disadvantage" (para. 43 (emphasis added); see also *Fraser*, at para. 57). This Court went on to point out that "intersecting group membership tends to amplify discriminatory effects . . . or can create unique discriminatory effects not visited upon any group viewed in isolation" (*Ontario v. G*, at para. 47; see also *Law*, at para. 94; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 81; *Fraser*, at para. 116; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at para. 85).

[41] In the first step of the s. 15(1) inquiry, which focuses on identifying a distinction based on an enumerated or analogous ground, consideration of a claimant group's intersecting identities and realities is relevant because of the step's emphasis on whether a government decision disproportionately impacts a *particular claimant group* directly or indirectly. An inquiry into such impact cannot be divorced from a claimant group's unique situation, which may include intersecting identities and realities that create or contribute to the distinction.

[42] This is clear in cases where a distinction based on a protected ground affects a subset of a protected group. It has long been accepted that "differential treatment can occur on the basis of an enumerated [or analogous] ground despite the fact that not all persons belonging to the relevant group are equally mistreated" (*Fraser*, at para. 75, quoting *Martin*, at para. 76; see also *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 28; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 354-55; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1248). In these contexts, claimants can satisfy step one of the s. 15(1) analysis even if they only make up a subgroup experiencing adverse effects. This is because such adverse effects arise from the nexus between a distinction that *may not* be rooted in an enumerated characteristic and a subgroup that *must* share an enumerated ground. Here, that specific nexus is between "refugee claimant status" (a characteristic that is not protected) and "sex" (an enumerated ground shared by the subgroup experiencing the adverse effect).

[43] This approach does not transform the s. 15(1) analysis into one that captures "'hybridized' grounds" that are not rooted in protected grounds (Rowe J.'s reasons, at para. 150). To the contrary, while the impacts of a law will not always, on their face, involve an enumerated or analogous ground, the basis for the distinction under s. 15(1) will — and must always — be tethered to a protected ground. The nuance here is that to precisely identify and understand a distinction rooted in a protected ground, courts may benefit from looking at a claimant group's intersecting identities and realities (*Fraser*, at para. 57, citing *Withler*, at paras. 43 and 64). This nuance is exemplified in this case, where it is only possible to identify a sex-based distinction after a contextual inquiry into the circumstances shared by individuals like Ms. Kanyinda. It is evident that s. 3 of the *RCR* does not exclude all women, but rather a subset of women — women refugee claimants — from the benefit of subsidized daycare.

[44] Further, it may be that a challenged law creates a distinction on more than one protected ground. I reject any suggestion that there is a mandated order in which the Court must address multiple claims under s. 15(1).

[45] Consideration of a claimant group's intersecting identities and realities is similarly relevant under the second step of the s. 15(1) analysis, where courts must assess whether the distinction has the effect of reinforcing, perpetuating or exacerbating a claimant's disadvantage. This inquiry is shaped by that claimant group's unique circumstances, including any intersecting identities and realities, because it seeks to

understand how a distinction causes or contributes to "economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion" (*Sharma*, at para. 52; see also *Fraser*, at para. 76). These forms of exclusions and harms can be intimately related to, if not rooted in, the specific identities and realities shared by a particular group.

[46] Thus, a contextual appreciation of intersecting identities and realities can help courts in both assessing the specific impacts of the challenged law, and the way that a law may perpetuate existing disadvantage. While many of these circumstances may reflect or result in hardship or marginalization for a particular claimant group — such that the word "disadvantage" is often used in connection with both steps of the s. 15(1) test — this overlap does not undermine the conceptual clarity of the two distinct stages of the test.

(2) The Section 15(1) Test

[47] The test for establishing a s. 15(1) infringement is well established and protects substantive equality by targeting both direct and indirect discrimination.

[48] To prove an infringement of s. 15(1), a claimant must show the challenged law or state action: (1) on its face or in its impact, creates a distinction based on listed or analogous grounds; and (2) imposes burdens or denies a benefit in a manner that has

the effect of reinforcing, perpetuating, or exacerbating disadvantage (see *Sharma*, at para. 28; *Fraser*, at para. 27; *Alliance*, at para. 25; *Centrale*, at para. 22).

[49] Importantly, in cases of adverse effects discrimination, evidence that establishes a disproportionate impact on a protected group at the first stage of the s. 15(1) test will often also be relevant at the second stage, when determining whether a challenged law or state action perpetuates a group's disadvantage. This Court has recognized that the two steps are not "watertight compartments" or "impermeable silos" (*Sharma*, at para. 30; *Fraser*, at para. 82).

(a) *Step One*

[50] At the first step of the test, the claimant must show that the challenged law creates a distinction based on listed or analogous grounds, either on its face or through its impact. Where a measure does not explicitly distinguish based on a protected ground, the claimant can still show that the law creates a distinction *in effect* because of the law's disproportionate impact on the protected group (*Sharma*, at para. 40; *Fraser*, at para. 52).

[51] No rigid template governs how a disproportionate impact at step one is established (*Fraser*, at para. 55). While the claim must be clearly anchored in a recognized ground of discrimination, the claimant may also point to additional characteristics that contribute to establishing a disproportionate *effect* on the claimant

group. In *Fraser*, for example, Abella J. highlighted the significance of a claimant group's broader situation for determining a disproportionate impact at step one: "Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the 'full context of the claimant group's situation'" (para. 57 (emphasis added), quoting *Withler*, at para. 43, and citing para. 64). In other words, consideration of the intersecting identities and circumstances of the claimant group can play a role in the analysis at step one of the s. 15(1) test. The analysis must be attentive to the situation and complexity of the claimant group, acknowledging that a challenged provision may operate within a context of intersecting realities, even though the disproportionate impact must be established for a particular enumerated or analogous ground. Where discrimination affects only a subgroup, as in this case, the failure to account for intersecting identities in step one of the s. 15(1) inquiry could effectively obscure the specific adverse effects experienced by that subgroup.

[52] Two types of evidence can help a claimant establish these impacts on them and the group to which they belong: (a) evidence about the *claimant group's situation*, including physical, social, cultural, or other barriers faced by the claimant group; and (b) evidence about the results produced by the challenged law in practice (*Sharma*, at para. 49; *Fraser*, at para. 56). Ideally, a claimant will lead evidence from both categories. Still, no specific form of evidence is required and the evidence's significance will differ depending on the unique facts of each case (*Fraser*, at paras. 61 and 67; *Sharma*, at para. 49).

[53] Evidence in the first category may include a claimant's own testimony, an expert witness, or judicial notice (*Fraser*, at paras. 55-57). This evidence can help illustrate the unique circumstances of the group to which the claimant belongs, including their intersecting realities and identities, and how the challenged law creates a distinction based on those circumstances. For example, in *Fraser*, evidence was provided on the disadvantages faced by women in the workforce due to the historical and current unequal distribution of childcare responsibilities between women and men. This helped explain why and how the challenged law disproportionately impacted women (para. 98).

[54] Evidence in the second category can take different forms, including statistics, expert testimony, case studies, or qualitative evidence (*Sharma*, at para. 49). Evidence of this nature can help quantify the alleged disproportionate impact and make it concrete (*Fraser*, at para. 58). However, because of the diverse circumstances which can ground a s. 15(1) claim, and the evidentiary hurdles and asymmetry of knowledge often possessed by claimants when compared to the state, statistical evidence is not a requirement (*Sharma*, at paras. 36 and 49; see also *Fraser*, at para. 59).

[55] Furthermore, in some cases, a court may reasonably infer an adverse effect on a claimant group. The disproportionate impact on a claimant group may be "apparent and immediate" and evidence of a specific kind may not be necessary (*Taypotat*, at para. 33; see also *Fraser*, at para. 61; *Sharma*, at para. 49). For example, a rule or requirement may create an obvious adverse effect for most or all members of

a claimant group (see, e.g., in a human rights complaint, *Simpsons-Sears*). Judicial notice can also be taken about a claimant group's situation when appropriate (*Fraser*, at para. 57; see also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 69).

[56] Finally, the following are not required to satisfy the first step of the s. 15(1) test:

- A claimant need not explain *why* the law creates a disproportionate impact (*Sharma*, at para. 46; *Fraser*, at paras. 63 and 70).

- The claimant need not show that the law is the "dominant cause of the disproportionate impact" (*Sharma*, at paras. 45 and 49).

- There is no need to show that the legislature intended to cause the distinction (*Fraser*, at para. 69; *Andrews*, at pp. 173-74; *Eldridge*, at para. 62; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 63; *Alliance*, at para. 28; *Centrale*, at para. 35).

- It has long been unnecessary for a claimant to identify a specific comparator group (*Withler*, at paras. 60 and 63; *Sharma*, at para. 41).

- There is no need to show that all members of a claimant group will be affected by the challenged measure in the same way; there may be a disproportionate impact on only some of the claimant group (*Brooks*, at pp. 1247-48; *Quebec v. A*, at para. 354; *Fraser*, at para. 72).

[57] Some of the interveners to this appeal contend this Court's recent decision in *Sharma* has altered aspects of the s. 15(1) test by revising the causation requirement under the first step (see, e.g., I.F. (British Columbia Civil Liberties Association); I.F. (Attorney General of Ontario); I.F. (Attorney General of Alberta)). This idea has been echoed by some academic commentators (see, e.g., J. Watson Hamilton and J. Koshan, "*Sharma*: The Erasure of Both Group-Based Disadvantage and Individual Impact" (2024), 115 *S.C.L.R.* (2d) 113, at pp. 119-21; C. Salvino, "*R v Sharma's* 'Clarification' of the Section 15 Framework and its Creation of Unique Barriers for Disability-Based Equality Claims" (2024), 32:4 *Const. Forum* 1). The majority in *Sharma* stated that it wished to clarify an uncertainty regarding "causation and its relationship with the evidentiary burden to establish disproportionate impact" (para. 35). To this end, they held that "[s]ection 15(1) claimants must demonstrate that the impugned law or state action *created or contributed to* the disproportionate impact on the claimant group at step one" (para. 45 (emphasis in original)).

[58] What divided the majority and the dissent in *Sharma* was whether the claimant had met the evidentiary burden at step one: i.e., whether the legislated removal of the availability of conditional sentences for certain serious offences had a

disproportionate impact on Indigenous offenders because the removal prevented recourse to the remedial *Gladue* sentencing framework (*R. v. Gladue*, [1999] 1 S.C.R. 688). The dissent found that, given the connection between the statutory provisions removing access to conditional sentences and the requirement to consider all available sanctions other than imprisonment, with particular attention to the circumstances of Indigenous offenders, the disproportionate impact on Indigenous offenders could be reasonably inferred (*Sharma*, at para. 227). The majority, by contrast, did not consider such a link sufficient, on its own, to infer a disproportionate impact and establish that the law created a distinction. They concluded that in finding a s. 15(1) breach, the Court of Appeal for Ontario "failed to identify *any* evidence" that the law "created or contributed to a disproportionate impact on Indigenous offenders" (para. 74 (emphasis in original)).

[59] Despite these differences in application, the majority in *Sharma* explicitly stated that they were not altering the applicable test (paras. 33 and 46). The language of causation used in *Sharma* simply focused on the burden that must be met at the first step of the s. 15(1) test. Causation is inherent in this first step, which asks whether the challenged law or state action *creates* a distinction (*Fraser*, at para. 27). While the majority emphasized the importance of causation, they did not change the test. They recognized that a causal link can be drawn through "a reasonable inference" and that it "may be obvious and require no evidence" — a recognition consistent with decades of this Court's jurisprudence holding that the burden at this stage must not be unduly onerous (*Sharma*, at para. 49). A s. 15(1) claimant need not show that the challenged

law is the sole or dominant cause of the disproportionate impact; it is sufficient for it to be *a cause* (paras. 44-46; see also *Fraser*, at para. 71). Moreover, *Sharma* confirmed the principle that those alleging a breach of their s. 15(1) rights need not show that the protected characteristic "caused" the disproportionate impact (paras. 46-48; *Fraser*, at para. 70).

[60] In conclusion, this Court has repeatedly emphasized that the first step of the s. 15(1) test is not meant to be "an onerous hurdle designed to weed out claims on technical bases" but rather "to exclude claims that have 'nothing to do with substantive equality'" (*Alliance*, at para. 26, quoting *Taypotat*, at para. 19). To achieve the promise of substantive equality, in line with the purposive interpretation of s. 15(1), this Court has eschewed rigid evidentiary requirements in favour of a more flexible approach, regarding how adverse effects may be shown. That said, while the evidentiary burden at the first step should not be undue, it must be fulfilled (*Sharma*, at para. 50). A provision must be shown to create or contribute to a distinction through its disproportionate or differential impact on a protected ground.

(b) *Step Two*

[61] At the second step of the test, an applicant must establish that a law imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (see *Sharma*, at para. 28; *Fraser*, at para. 27; *Alliance*, at para. 25; *Centrale*, at para. 22). Not all distinctions created by law will be found

discriminatory (*Andrews*, at p. 182; *Sharma*, at para. 51). This second step focuses the s. 15(1) inquiry on the "protection of groups that have experienced exclusionary disadvantage based on group characteristics" (*Fraser*, at para. 77). Therefore, even if a law treats people differently based on a protected ground, it does not necessarily follow that the law increases or reinforces a disadvantage.

[62] This Court's decision in *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, illustrates how a law that causes a differential impact may still fail to meet the requirements of step two. There, a male inmate argued that it was discriminatory for male prisoners to be subject to frisk searches and surveillance by female guards, while female inmates were not subject to the same treatment by male guards. This Court disagreed, emphasizing that equality does not always mean identical treatment — rather, in certain cases, different treatment may be necessary to promote substantive equality. This Court found that although this was a sex-based distinction, it was not discriminatory when understood in context. As La Forest J. observed, "[t]he reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors" (p. 877). Because of these historical and social realities — including the fact that women have generally occupied a disadvantaged position in society — cross-gender searches affect female inmates differently, and often more severely, than their male counterparts.

[63] At step two of the s. 15(1) test, it is also necessary to recognize that discrimination cannot be neatly packaged into a single ground and a person will often live with other circumstances, realities, or identities that may enhance or exacerbate their disadvantage. An intersectional approach may play a key role at this stage by allowing a more nuanced understanding of the nature and intensity of the disadvantage experienced. In the words of two interveners: "People experience discrimination as whole persons, not as an aggregate of separate characteristics" (I.F., National Association of Women and the Law and David Asper Centre for Constitutional Rights, at para. 5). Intersectionality enriches the analysis of discriminatory effect by highlighting these additional dimensions of disadvantage. This approach also grounds the analysis in the concrete lived realities of marginalized individuals. To appreciate the effects of the distinction established at step one on the claimant or their group, it may be necessary to consider how these experiences speak to intersecting realities that make an experience of discrimination based on the identified ground particularly acute. For example, race, sexual orientation, disability, age, socioeconomic status, poverty, marginalization, or an inability to integrate into society, may increase their disadvantage.

[64] Although this Court in *Sharma* found the s. 15(1) claim failed at step one, the majority reaffirmed this Court's commitment to contextual analysis in step two of the s. 15(1) test, which includes considering not only the challenged legislation but also the broader social, political, and legal context (paras. 56-61; see also *Eldridge*, at para. 55, citing *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1331; *Vriend*, at para. 106).

[65] The broader legislative context may also be relevant to the analysis at step two (*Sharma*, at para. 56). The relevance and weight of the legislative context will depend on the nature of the case. For example, Wagner C.J., in *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, found it necessary to put more weight on legislative context given that the provision at issue in the *Youth Criminal Justice Act*, S.C. 2002, c. 1, formed part of a comprehensive, "multifaceted legislative scheme" that sought to balance the competing needs of the claimant group (para. 144). However, while it may be relevant to examine how a scheme seeks to balance competing legislative objectives, benefit a protected group, or allocate limited resources, these considerations are only one aspect of a broader analysis on whether a provision has a discriminatory character. In other words, the emphasis on context must not conflate an analysis of the discriminatory *impact* of a measure on a disadvantaged group with a consideration of whether the distinction is *justified* based on legislative objectives (*Fraser*, at paras. 79-80). As Wagner C.J. emphasized in *C.P.*, justifying a provision based on whether it "is relevant to a legitimate state objective or on the basis of the ameliorative effect" of the scheme at issue is "properly left to the inquiry under s. 1 of the *Charter*, and then only to the extent that they can specifically justify the impugned limitation" (para. 153, citing *Fraser*, at para. 69). To emphasize legislative context in a way that blurs this line risks improperly shifting the analysis under s. 15(1) towards an implicit balancing of government interests, an inquiry better left to s. 1. The analytical distinction between finding a *Charter* right infringement and justifying this infringement under s. 1 has

long been part of this Court's jurisprudence (*Andrews*, at p. 178; see also *Oakes*, at p. 134; *Centrale*, at para. 35; *Fraser*, at para. 79).

[66] Although the state can act incrementally to address inequality (*Sharma*, at para. 64), ameliorative legislation protected by s. 15(2) is not categorically immune from s. 15(1) scrutiny (*Fraser*, at para. 69; *Centrale*, at paras. 8 and 35; *Alliance*, at paras. 32-33). Courts should not ignore infringements of s. 15(1) merely because the law is ameliorative and only perpetuates the disadvantage of "some" members of the protected group. As this Court held in *Eldridge*, "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (para. 73).

[67] Finally, at the second step of the s. 15(1) test, there is no need to show that the challenged measure stereotypes or causes prejudice towards the protected group (*Fraser*, at para. 78). In *Quebec v. A*, Abella J., writing for a majority on this issue, clarified these were not additional requirements at step two because such an approach incorrectly focuses the inquiry on whether a discriminatory *attitude* exists as opposed to a discriminatory *impact* (para. 327). The key question under step two is whether the law worsens or reinforces the disadvantage experienced by the protected group.

[68] Nor is it necessary to prove that the distinction is arbitrary (*Fraser*, at para. 80). In other words, an infringement is still made out in circumstances where there is a rational connection between a disadvantage and legitimate state objective (para. 79).

An inquiry under s. 15(1) centres on the effects, rather than the purpose, of the challenged measure on a protected group (para. 41; *Andrews*, at p. 174).

C. *Application*

(1) <u>Section 3 of the *RCR* Creates a Sex-Based Distinction</u>

[69] I turn now to the first stage of the test. This is not a case of direct discrimination. The provision does not, on its face, distinguish between men and women refugee claimants. Rather, Ms. Kanyinda's claim is that the provision, by its exclusion of refugee claimants from eligibility for daycare subsidies, results in a disproportionate impact on the women refugee claimants and creates a distinction based on sex.

[70] The AGQ submits that ineligibility for subsidized daycare is equally a barrier for men and women refugee claimants, such that excluding asylum seekers cannot have a disproportionate impact on the women affected by the provision (A.F., at paras. 65-66). It contends that the Court of Appeal only came to the opposite conclusion by substituting evidence of the distribution of childcare costs between men and women refugee claimants with evidence of historic disadvantage — evidence that the AGQ says can only reinforce a conclusion of a distinction at the first step, but is properly addressed under the second step of the s. 15(1) test (A.F., at paras. 70-75).

[71] Ms. Kanyinda counters that her personal experience and the expert evidence establish that impeding access to affordable daycare has a disproportionate effect on the subgroup of women who are denied a benefit under the provision (R.F., at paras. 70-74).

[72] I agree with Ms. Kanyinda and the Court of Appeal that s. 3 of the *RCR* has a disproportionate impact on women, specifically women refugee claimants, creating a distinction based on sex. While men refugee claimants are also denied subsidized daycare, the impact on the women is greater because they bear more childcare responsibilities and thus face more barriers entering the workforce.

[73] Two types of evidence are particularly helpful in establishing a disproportionate impact: evidence about the claimant group's situation and evidence about the results of the law. Neither form is required and the evidentiary burden cannot be too difficult to meet (*Fraser*, at paras. 56-59; *Sharma*, at para. 49).

[74] Ms. Kanyinda provides both forms of evidence. First, her evidence speaks to the full context of the claimant group's situation. The Hanley report details the high degree of consensus in Canadian and international literature that access to affordable daycare encourages women's participation in the workforce (Dr. Hanley, at pp. 8-12). The report recognizes that within two-parent heterosexual families, women are more likely to stay at home to care for children when daycare is too expensive or unavailable. Moreover, most single-parent households are headed by women (pp. 10-11).

[75] Such general propositions are well established in our jurisprudence. This Court has affirmed on several occasions that women face unequal treatment in the workplace due to "their largely singular responsibility for domestic work" (*Fraser*, at para. 103; see also *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 861; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 113, per L'Heureux-Dubé J., concurring). And while it is encouraging that Canadian society has made advances for equality between the sexes, particularly in challenging traditional family structures and gender roles, women continue to face significant barriers in the workforce. Justice Abella emphasized in *Fraser* that "[r]ecognizing the reality of gender divisions in domestic labour and their impact on women's working lives is neither new nor disputable" (para. 104). And to the extent that there has been noteworthy improvement in some segments of society, it is not universally so.

[76] The evidence also speaks to the unique challenges faced by women who are refugee claimants. These include limited access to support networks, such as extended family, to provide informal childcare (Dr. Hanley, at pp. 12-13 and 17). Such informal alternatives are not an option for most refugee claimants, as the evidence shows that only one fifth of those surveyed had family in the Montreal region (p. 17).

[77] I disagree with the AGQ that this evidence is only relevant to step two of the analysis — i.e., whether the law perpetuates disadvantage — and not to step one, which considers whether a distinction is made based on sex (A.F., at paras. 70-71). On the contrary, the evidence speaks to the unique situation of women generally, and

women refugee claimants specifically. Such evidence has been recognized as establishing a disproportionate impact at step one (see *Fraser*, at paras. 56-57). For example, similar evidence regarding the additional childcare burdens borne by women was cited by this Court in *Fraser* in finding the first step of the test had been met (see paras. 98-106). The steps of the s. 15(1) test are not watertight compartments and the same evidence may be relevant to both stages.

[78] In this appeal, it is the combined effect of women's historical disadvantage regarding their access to employment *and* asylum seekers' exclusion from subsidized daycare that produced the adverse effects on Ms. Kanyinda. This exclusion, therefore, contributed to the current adverse effects. Such analysis does not [TRANSLATION] "conflat[e] the consequences of the law with women's historical disadvantage in accessing the labour market" as the AGQ claims (A.F., at para. 63).

[79] Second, the evidence also expressly establishes the resulting impacts of the law on women refugee claimants. Dr. Hanley's report presents findings on how the exclusion of refugee claimants from subsidized daycare affects women (see pp. 15-19). She writes: "In our analysis of the labour challenges of precarious status mothers raising children in Quebec and in our focus group with refugee claimant mothers of young children, their exclusion from subsidized childcare emerged as an important factor limiting their employment options. . . . Our interviews and focus groups confirm that, in the context of two-parent families, it is overwhelmingly the mother who stays home to care for the children if childcare is unaffordable or unavailable" (p. 17).

[80] It was unnecessary for Ms. Kanyinda to show, as the AGQ submits, that *only* women refugee claimants were harmed because they lacked access to the benefit of the subsidized rate. The AGQ argues that, in *Fraser*, this Court found a disproportionate impact only because everyone who took part in the job-sharing program were women (A.F., at para. 68).

[81] I reject this reading of *Fraser* for two reasons. First, it was not only women who accessed the job-sharing program in *Fraser*. The Court found a disproportionate impact because those who used the program were *predominantly* women (paras. 3 and 97). Second, there is no burden on Ms. Kanyinda to use statistical evidence to show that only women refugee claimants would have their employment impacted due to a lack of access to subsidized daycare (para. 59; *Sharma*, at para. 36). That men refugee claimants are *also* disadvantaged by s. 3 of the *RCR* does not negate a finding of a *disproportionate* impact on women.

[82] I agree with the Court of Appeal that, taken together, the evidence supports a reasonable inference that s. 3 of the *RCR* disproportionately impacts women refugee claimants. While all refugee claimants are equally denied access to subsidized daycare, the impact is different. Women continue to carry a greater share of childcare responsibilities and the availability of affordable daycare is directly linked to their ability to work — something well established in our jurisprudence. Beyond the broader evidence about women, the specific evidence is telling: every refugee claimant

surveyed with children under six, who reported that lack of daycare access prevented them from working, was a woman.

[83] Section 3 of the *RCR* therefore creates, in its effects, a distinction based on sex, satisfying the first step of the s. 15(1) test.

(2) Section 3 of the *RCR* Is Discriminatory

[84] At step two of the s. 15(1) test, the claimant must show that a law imposes burdens or denies a benefit in a way that reinforces, perpetuates, or worsens disadvantage. This second stage is specifically aimed at protecting groups that have historically faced exclusion or disadvantage based on characteristics tied to their group identity.

[85] I agree with the Court of Appeal that s. 3 of the *RCR* reinforces, perpetuates, and exacerbates the disadvantage of women asylum seekers.

[86] The provision denies women refugee claimants access to the benefit of subsidized daycare. The expert report outlines several ways a lack of access to childcare for women refugee claimants reinforces, perpetuates, and worsens their economic disadvantage: by leading to "deskilling" (or losing skills from lack of use or employer recognition); by creating gaps in work trajectory and thus contributing to a wage distinction between men and women; by reducing savings and long-term income

security; and by often forcing women to forego higher education or vocational training when their children are young (Dr. Hanley, at pp. 13-15). Ms. Kanyinda's evidence also details that the resulting lack of access to the workplace leads to dependence on social assistance, limits opportunities to learn the French language, and hinders integration into society as a fully participating and respected individual. One source relied on by Dr. Hanley adds that a lack of access to childcare can also contribute to increased rates of depression in refugee mothers, who are socially isolated and lack assistance with the care of their young children (G. Morantz et al., "Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care" (2013), 18 *Child & Family Social Work* 318, at p. 323). The AGQ has not contradicted Dr. Hanley's findings.

[87] This Court has recognized the "feminization of poverty" as an "entrenched social phenomenon" (*Moge*, at p. 853; *Fraser*, at para. 112). Blocking access to subsidized daycare threatens to reinforce and worsen this economic disadvantage, particularly among a group that is already socio-economically vulnerable. These considerations are like those in *Fraser*, where this Court held that step two of the s. 15(1) test was satisfied because the legislative design perpetuated "a long-standing source of economic disadvantage for women" (para. 113).

[88] Excluding refugee claimants from this provision perpetuates more than economic disadvantage. Indeed, in order for a child of an asylum seeker to attend daycare, their parent must necessarily use non-subsidized daycare services. The price

difference compared to subsidized daycare is considerable. For example, in 2020, the average daily cost of a place in unsubsidized daycare ($38.00) was more than four times higher than that of a place in subsidized daycare ($8.35) (A.R., vol. XI, at p. 72). The refundable tax credit for childcare expenses available to refugee claimants may alleviate, but does not eliminate, the ultimate economic burden on refugee claimant families (R.F., at para. 7).

[89] The exclusion also further marginalizes asylum seekers from Quebec society: by making it difficult to integrate when their support network is already limited; by creating barriers to learning the French language; and by reinforcing stereotypes that refugee claimants come to Canada solely to exploit its social welfare benefits (Dr. Hanley, at pp. 18-20). One refugee claimant's testimonial, included in the expert evidence, spoke to her frustration at having to depend on financial assistance when she would prefer to work:

> I did not have a daycare, not even for my son because refugees don't get daycares, like the subsidized daycares. They no longer give it to refugees, so all refugee children are home. So most refugee moms cannot work . . . . And I'm on welfare. I'm not used to being on welfare. I'm used to working hard to . . . make ends meet. . . . There's nothing I can do right now, 'cause I don't have family here, I don't have daycare . . . . [p. 18]

[90] While this claim is based in sex discrimination, the mix of circumstances unique to a refugee claimant — such as lower socio-economic status, poverty, social exclusion, and stigmatization — reveal that a single dimension often fails to capture

the full complexity and vulnerability of a claimant group's experience. At step two, the analysis must therefore go beyond sex alone to consider the multiple, intersecting forms of disadvantage faced by this group of women. The record makes clear that women refugee claimants face distinct and heightened forms of disadvantage. Their disproportionate responsibility for childcare not only limits their ability to participate in the workforce but also reinforces their social exclusion — disadvantages intensified by their precarious immigration status and marginalized social position (Dr. Hanley, at pp. 12-13).

[91] That the daycare scheme here is ameliorative does not make it immune from s. 15(1) scrutiny, nor does it prevent the state from acting incrementally to remedy disadvantage. While s. 3 of the *RCR* makes many women eligible for the reduced contribution and thus facilitates their access to the workforce, the provision continues to exclude the category of women refugee claimants in a discriminatory fashion. As Abella J. explained in *Centrale*, "[i]t is no defence to a claim of discrimination by one group of women to suggest that another group has had its particular discrimination addressed" (para. 33).

[92] Finally, the disadvantage perpetuated here flows directly from s. 3 of the *RCR*. While the delay in processing refugee applications heightens the disadvantage, the delay is not, as the AGQ claims, the true source of a woman refugee claimant's disadvantage (A.F., at para. 135). Women refugee claimants are disadvantaged because the provision functions to exclude them as a class of parents from subsidized daycare,

regardless of the delay in processing their application. As this Court put it in *Ontario v. G*, "[t]here is no threshold requirement of severity" (para. 64) when assessing if a law imposes burdens or denies a benefit in a manner that reinforces, perpetuates, or exacerbates disadvantage.

[93] I conclude that s. 3 of the *RCR* infringes s. 15(1) of the *Charter* by discriminating based on sex.

(3) <u>The Infringement of Section 15(1) Is Not Justified Under Section 1</u>

[94] Section 1 of the *Charter* guarantees the rights and freedoms within the *Charter*, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". When an infringement of a *Charter* right is found, the onus shifts to the state, which must justify that infringement under s. 1 (*Oakes*, at pp. 136-37).

[95] I add that the relationship between ss. 1 and 33 of the *Charter* is not relevant to this case (Rowe J.'s reasons, at paras. 166-68). The issue was not raised by either party, nor did it factor into either of the lower courts' judgments in this case. Given that the relationship between s. 1 and the notwithstanding clause is an important issue that would benefit from full submissions, it should not be decided here.

[96] The test for justification was established in *Oakes*. First, it must be demonstrated that the objective of the law is sufficiently important, or pressing and substantial, to justify a limitation of *Charter* rights. Second, the law must not disproportionately interfere with the *Charter* right in furthering that objective. Proportionality will be shown if the law is rationally connected to the objective, impairs the right as little as possible, and there is a balance between the benefits of the law and its negative effects (*Oakes*, at pp. 138-40; *Ontario v. G*, at para. 71).

[97] The AGQ argues that the exclusion of refugee claimants from the list of eligible parents under s. 3 of the *RCR* furthers the pressing and substantial objective of limiting daycare subsidies to people with a sufficient link to Quebec (A.F., at para. 139). The Court of Appeal accepted this constituted a pressing and substantial objective (para. 106). Ms. Kanyinda argues that this characterization of the objective is too broad, and that instead the objective of the specific challenged measure must be identified, here the exclusion of refugee claimants from the subsidized contribution. This objective is not, in her view, pressing and substantial and does not satisfy the first stage of the *Oakes* test (R.F., at paras. 134-35).

[98] Properly characterizing the objective of the challenged law is important when undertaking the s. 1 justification test. Defining the objective too broadly risks exaggerating its importance and depriving the proportionality analysis of its use. But defining the objective too narrowly can conflate the means taken by the legislature with the objective itself (see *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1

S.C.R. 3, at para. 46; *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, 2025 SCC 6, at para. 93). In my view, Ms. Kanyinda's characterization of the objective does the latter. The AGQ, for its part, argues that s. 3 of the *RCR* seeks to limit daycare subsidies to those with a sufficient link to Quebec, and that excluding refugee claimants is one way the provision advances that objective. The submission relies on an inference based on the categories set out in s. 3. I note, however, that the record on this point is limited. Although legislative debates or other extrinsic evidence about the specific objectives of a challenged regulation are not critical or decisive (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 46), here the regulation does not refer expressly to sufficient links to Quebec.

[99] I am prepared to assume, for the purposes of this analysis, that the AGQ's stated objective is pressing and substantial. I accept that there are finite resources available to governments, coupled with the long waiting list for a place in subsidized daycare even among those currently eligible. However, I note that this Court has long been cautious about finding an objective to be pressing and substantial based solely on budgetary considerations (see *Martin*, at para. 109; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 281; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709). As Binnie J. explained in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other

pressing government priorities" (para. 72 (emphasis in original); see also *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 147; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 152).

[100] Turning to the rational connection branch of the s. 1 test, the AGQ contends that until refugee status is formally recognized, there is no guarantee that the claimant will remain in Quebec, and there is thus no sufficient link to Quebec. The AGQ points to the fact that between 2017 and 2020, almost half of the applicants had their claims rejected, submitting that this explains why refugee claimants do not receive the full range of benefits available to others (A.F., at paras. 140-41).

[101] I acknowledge that the standard is not onerous and that a rational connection can be established based on reason and logic, rather than concrete proof (*Frank*, at para. 59; *R. v. Ndhlovu*, 2022 SCC 38, [2022] 3 S.C.R. 52, at para. 121). But I agree with Ms. Kanyinda that the AGQ has not shown a rational connection. As the record demonstrates, being a refugee claimant in Quebec does not mean a lack of sufficient links to Quebec.

[102] First, the legal framework establishing the rights of refugee claimants in international law provides such individuals with a legal connection to Quebec. The primary instruments regarding refugees on the international stage are the 1951

Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6, and the 1967 *Protocol Relating to the Status of Refugees*, Can. T.S. 1969 No. 29 — both of which have been ratified by Canada and have been given expression through the *IRPA* (see *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at para. 106; *IRPA*, s. 3(2)(b) and (3)(f)). The principle of *non-refoulement*, enshrined both in Article 33 of the 1951 *Convention* and in the *IRPA* (see ss. 49(2) and 115) ensures that, absent exceptional circumstances, refugee claimants are not expelled or removed from Canada until their claims are determined (*Mason*, at para. 108; C. Sawicki and C. Desloges, *Canadian Immigration and Refugee Law: A Practitioner's Handbook* (4th ed. 2024), at p. 454).

[103] Second, refugee claimants have access to several opportunities and benefits which, through government policy, create a connection with the province (see generally S. Baglay and M. Jones, *Refugee Law* (2nd ed. 2017), at pp. 108-20; Sawicki and Desloges, at pp. 553-54). Like the other groups under s. 3 of the *RCR*, refugee claimants participate in the economic and social life of the province. For example, claimants may apply for work permits to obtain employment and study permits to pursue post-secondary education. Their children are also permitted to attend school at the preschool, primary, and secondary levels (*IRPA*, s. 30(2)). Refugee claimants also have access to healthcare services (see Sawicki and Desloges, at pp. 489-92).

[104] Refugee claimants cannot be rationally regarded as having insufficient links to Quebec — especially considering the way "sufficiency" is construed under s.

3 of the *RCR*. The provision makes several categories of people eligible for the reduced contribution who are residing in Quebec without permanent status when their eligibility is considered. This includes workers with a work permit (s. 3 subpara. 3), foreign students (s. 3 subpara. 4), and holders of temporary resident permits under s. 24 of the *IRPA* (s. 3 subpara. 7). As Ms. Kanyinda points out, if these categories of people are considered sufficiently connected with the province, it is difficult to see how refugee claimants, who wish to establish themselves more permanently in Canada, are not (R.F., at paras. 136-39).

[105] Given these considerations, I agree with the Court of Appeal that there is no rational connection between the exclusion of refugee claimants and the stated objective of the law. The infringement of s. 15(1) of the *Charter* is not saved by s. 1.

(4) <u>Remedy</u>

[106] Ms. Kanyinda submits that s. 3 of the *RCR* be read to extend eligibility to parents who reside in Quebec for the purpose of making a refugee claim (R.F., at paras. 150-51). The AGQ asks that this Court order a suspended declaration of invalidity (A.F., at para. 159).

[107] As this Court held in *Ontario v. G*, suspensions of a declaration of invalidity should be granted only in rare cases (para. 83). Generally, a court will not keep a law in force that is unconstitutional if an alternative is available.

[108] Section 52(1) of the *Constitution Act, 1982*, provides that an unconstitutional law is of no force or effect to the *extent of the inconsistency*. In practical terms, this means, first, defining the extent of the inconsistency between the legislation and the *Charter* and, second, determining the form that the declaration of invalidity should take (*Ontario v. G*, at paras. 108-12). As this Court put it in *Ontario v. G*, "[t]o ensure the public retains the benefit of legislation enacted in accordance with our democratic system, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved" (para. 116). The appropriateness of the tailored remedy of reading in "depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court" (*ibid.*).

[109] Reading in has been used where benefits are underinclusive (see, e.g., *Vriend*, at paras. 155-60 and 167-69; *Miron v. Trudel*, [1995] 2 S.C.R. 418, at paras. 180-81; see also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 142). It will be the "appropriate remedy when the inconsistency with the Constitution can be defined as 'what the statute wrongly <u>excludes</u> rather than what it wrongly <u>includes</u>'" (*Ontario v. G*, at para. 113, quoting *Schachter*, at p. 698 (emphasis in original)).

[110] Reading in is the appropriate remedy. The effect of invalidating the entirety of s. 3 of the *RCR* would be to remove eligibility requirements for accessing the reduced

contribution for all parents. By contrast, reading in refugee claimants as eligible for the reduced contribution would preserve the otherwise constitutional aspects of the legislation. These terms provide a "sufficient degree of precision" and do not require the Court to improperly fill in a large gap in the legislation (*Vriend*, at para. 155).

[111] Unlike the Court of Appeal, I would not read in a requirement that refugee claimants hold a work permit. As the AGQ notes in its factum, the eligibility requirements in s. 3 of the *RCR* largely apply regardless of a parent's ability to work. Only s. 3 subpara. 3 makes a work permit a condition of eligibility. It cannot be fairly concluded that this additional requirement would have been enacted by the government.

[112] I would thus read in that s. 3 of the *RCR* includes all parents residing in Quebec who are refugee claimants.

IV. Conclusion

[113] I would allow the appeal, in part, to vary the Court of Appeal of Quebec's declaration, with costs in this Court payable to the respondent. Section 3 of the *RCR* infringes s. 15(1) of the *Charter*. The infringement is not saved by s. 1. Accordingly, I would declare that s. 3 of the *RCR* is inconsistent with s. 15(1) of the *Charter*, to the extent that it excludes refugee claimants from eligibility for reduced contributions to

daycare services. I would read parents residing in Quebec who are refugee claimants into s. 3 of the *RCR*.

The following are the reasons delivered by

ROWE J. —

I. Overview

[114] I agree with the majority that s. 3 of the *Reduced Contribution Regulation*, CQLR, c. S-4.1.1, r. 1 (“*RCR*”), is discriminatory on the basis of sex, and thus violates s. 15 of the *Canadian Charter of Rights and Freedoms*. I also agree that the infringement is not justified under s. 1.

[115] With respect to s. 15, I agree with my colleague Karakatsanis J.’s general statement of the two-step test, as articulated most recently in *R. v. Sharma*, 2022 SCC 39, [2022] 3 S.C.R. 147. I offer four additional points of clarification, with regard to: the application of s. 15 in the context of ameliorative programs; causation under step one of the two-step test; the perpetuation, reinforcement or exacerbation of disadvantage under the second step; and the notion of intersecting forms of disadvantage.

[116] With respect to s. 1, I come to the same conclusion as my colleagues in the majority, but for substantially different reasons. Rigorous attention must be given to s. 1 in cases of s. 15 claims based on underinclusive benefits. In these cases, it is crucial to give proper effect to s. 1, informed by its historical and philosophical origins.

[117] I conclude that: the appellant has demonstrated that the scheme pursues a pressing and substantial objective; the limit on the s. 15 right is rationally connected to the objective; and the impugned provision is minimally impairing. However, the appellant has not proven that the salutary effects outweigh the deleterious. As such, the infringement is not justified under s. 1.

[118] Because s. 3 of the *RCR* is discriminatory on the basis of sex and is not justified under s. 1, it is not necessary to consider whether it is discriminatory on the basis of citizenship, as pleaded by the respondent. Nor is it necessary to consider or recognize new analogous grounds under s. 15, namely "immigration status" or "refugee claimant status", as the respondent also pleaded.

[119] Nonetheless, the Chief Justice would recognize a new analogous ground of "refugee claimant status". I share Côté J.'s view that refugee claimant status does not constitute an analogous ground because it is not an immutable characteristic. I agree with her that the methodology for recognizing a new analogous ground of discrimination must remain grounded in the concept of immutability as expressed in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

Giving effect to this “central concept” (*Corbiere*, at para. 13) requires courts to distinguish personal characteristics that are truly immutable from those that are not. I therefore adopt Côté J.’s analysis in this respect. Further, I question whether it is appropriate to rely on a hitherto unrecognized analogous ground without first determining that the impugned law or state action does not infringe an enumerated ground or already recognized analogous ground. In the circumstances of this case, it is not necessary to consider or recognize a new analogous ground “to fully and fairly resolve” Ms. Kanyinda’s discrimination claim (*Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 116).

II. Section 15

A. *The Purpose of Section 15 and Ameliorative Programs*

[120] The *Charter*, including s. 15, is to be interpreted using a purposive approach. As Professors P. W. Hogg and W. K. Wright explain, “[e]ach right should be so interpreted as not to reach behaviour that is outside the purpose of the right — behaviour that is not worthy of constitutional protection” (*Constitutional Law of Canada* (5th ed. Supp.), at § 38:3). The meaning of a right must be understood in “light of the interests it was meant to protect”. *Charter* rights are to be given “a generous rather than a legalistic” interpretation, “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection” (*R. v. Big M*

Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344). At the same time, "it is important not to overshoot the actual purpose of the right or freedom in question" (*ibid.*).

[121] The purpose of s. 15 is "to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171). The purpose of s. 15 is not to "impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation" (*Sharma*, at para. 63). Rather, the "evil" against which s. 15 provides a guarantee is "discriminatory measures having the force of law" (*Andrews*, at p. 172).

[122] The negative right to be free from "discriminatory measures having the force of law" may at times require governments to amend their policies so as to extend benefits to excluded members of protected groups. This is because "fair treatment of those who have suffered from inequality in the past often requires that positive steps be taken to redress the balance" (D. Gibson, "Accentuating the Positive and Eliminating the Negative: Remedies for Inequality under the Canadian Charter", in L. Smith et al., eds., *Righting the Balance: Canada's New Equality Rights* (1986), 311, at p. 323). In that limited sense, rather than in a general sense, the s. 15 right has a positive dimension. For example, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, this Court concluded that the province had to provide language interpreters

for deaf individuals seeking medical services. And in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, this Court read in sexual orientation as a protected characteristic under the provincial human rights legislation.

[123] This Court in various decisions has articulated these tensions between the positive and negative dimensions that are inherent in s. 15. The Court has also emphasized, in different ways, that a proper interpretation must strike an appropriate balance between these dimensions. The Court has stated: that "<u>[i]n some contexts</u> it will be proper to characterize s. 15 as providing positive rights" (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 721 (emphasis added)); that "[a]lthough s. 15 of the *Charter* does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality" (*Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at para. 38); and 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" (*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41).

[124] Legislation or policies that govern the availability of benefits may be underinclusive. The doctrine of underinclusiveness "asks whether the law ought to extend a certain benefit to other persons or not" (C.-M. Panaccio, "Section 15 and Distributive Underinclusiveness: Aristotle's Revenge" (2018), 38 *N.J.C.L.* 125, at

p. 133). As noted above, s. 15 does not impose obligations on governments to create programs to provide benefits, but it does impose an obligation on governments to remedy discriminatory underinclusion when they do choose to provide benefits. In response to an employer's claim that excluding pregnancy from its accident and sickness benefits plan was not discriminatory but rather underinclusive, Dickson C.J. stated that "[u]nderinclusion may be simply a backhanded way of permitting discrimination" (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1240).

[125] However, the right to be free from discrimination under s. 15 only applies "once legal rules have been involved in the allocation of a benefit[;] . . . its application is conditional on prior law-making action" (Panaccio, at p. 139). That is why, in discussing *Vriend*, Professor W. Black noted that it was hard to speak of a "neutral silence" or "inaction" regarding the non-protection of sexual orientation as a ground of discrimination, considering that the Alberta Legislature had enacted a scheme for human rights protection that protected several other grounds of discrimination ("*Vriend*, Rights and Democracy" (1996), 7 *Const. Forum* 126, at p. 130).

[126] This brings us to the context of the present appeal. Even though they were not constitutionally bound to do so, federal and provincial governments developed contemporary social welfare policies in the 1960s. These changes arose from a shared political view that government had a role to play in addressing circumstances of disadvantage (H. Orton, "Section 15, Benefits Programs and Other Benefits at Law: the interpretation of Section 15 of the Charter since Andrews" (1990), 19 *Man. L.J.* 288,

at p. 288; W. McKeen, *Money in Their Own Name: The Feminist Voice in Poverty Debate in Canada*, *1970-1995* (2004), at p. 110).

[127] More vulnerable members of society, including women and children, have benefited especially from the increase in the role of the welfare state (P. M. Evans and G. R. Wekerle, "The Shifting Terrain of Women's Welfare: Theory, Discourse, and Activism", in P. M. Evans and G. R. Wekerle, eds., *Women and the Canadian Welfare State: Challenges and Change* (1997), 3, at pp. 5-6). Because of their caretaking role, it is said that women are the "chief consumers" of such services, although they tend to seek services for others, such as their children and elderly members of their family (p. 4).

[128] The development of subsidized daycare programs is an example of welfare state policies (G. M. Olsen, "Toward Global Welfare State Convergence?: Family Policy and Health Care in Sweden, Canada and the United States" (2007), 34:2 *J. Sociol. & Soc. Welf.* 143, at p. 149). As a matter of constitutional law, governments are not obligated to implement such programs, but they have chosen to do so as a matter of decision-making through the democratic process.

[129] The first version of a bill aimed at providing childcare in Quebec was introduced in the Quebec legislature in 1979 (Bill 77, *An Act respecting child day care*, 4th Sess., 31st Leg.). As the Honourable Denis Lazure, the Minister of Social Affairs

at the time, stated, the *Act respecting child day care* had two fundamental objectives. He stated:

> [TRANSLATION] The first is to enable women to better exercise their right to work as well as their right to leisure. These two rights, the right to work and the right to leisure, remain theoretical rights, notional rights, if a society does not provide appropriate day care services.
>
> The second objective is to facilitate the exercise of the right of young children to receive quality day care services.
>
> (National Assembly, Standing Committee on Social Affairs, "Étude du projet de loi no 77 — Loi sur les services de garde à l'enfance", *Journal des débats: commissions parlementaires*, vol. 21, No. 233, 4th Sess., 31st Leg., December 10, 1979, at p. B-11129)

[130] The *Act respecting child day care* was adopted in 1979. In 2005, the modern *Educational Childcare Act*, CQLR, c. S-4.1.1 ("*ECA*"), was adopted with the same objectives as the *Act respecting child day care*. As Karakatsanis J. notes, "[t]he *ECA* aims to 'enhance the quality of the educational services intended for children before their admission to school' while taking into account 'the needs of parents, in order to facilitate the reconciliation of their parental responsibilities with their professional or student responsibilities'" as stated in s. 1 of the *ECA* (para. 29).

[131] This shows that one purpose of the *ECA* was to improve the situation of women. It also aimed to improve the situation of less well-off families, who could not afford private daycare. This is a frequent characteristic of welfare state programs: they tend to benefit those who are disadvantaged. The widening of social service programs

tends to have a disproportionately positive impact on such groups; inversely limiting such services is likely to be "experienced more acutely" by these groups (I.F., Attorney General of Ontario ("AGO"), at para. 28).

[132] Does this mean that every time that a legislature adopts a benefits program, it must include everyone to whom the *Charter* applies? Does it mean that a government is prevented from excluding any members of a protected group from access to benefit programs, such as non-residents of a province or high-income earners? Those are concerns that several attorneys general, intervening, raise (I.F., AGO, at para. 33; I.F., Attorney General of Canada, at paras. 46 et seq.).

[133] These questions must be answered in the negative. Section 15 does not impose a free-standing obligation to remedy social inequality and it leaves open the possibility for governments to act incrementally. In order to avoid transforming s. 15 into a positive obligation to remedy all social inequities, courts are to apply the two-step s. 15 test carefully and methodically, notably as regards ameliorative programs. The overarching goal is to give proper effect to s. 15 without overshooting its purpose. I would make the following observations for courts regarding s. 15 challenges in this context.

[134] First, the question of causation needs to be treated seriously. As my colleague notes, a court must ask whether "the challenged law or state action *creates* [the] distinction" on its face or its impact (Karakatsanis J.'s reasons, at para. 59

(emphasis in original)). Second, special attention should also be given to the question of whether it is the underinclusive program that perpetuates, reinforces or exacerbates the disadvantage. If the program creates a distinction but one that is not discriminatory, there will be no violation of s. 15. Third, there should be serious, meaningful engagement with s. 1, the stage at which governments are provided the opportunity to justify their policy choices. "[I]f there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services", those reasons must be given careful consideration by courts under s. 1 (*Eldridge*, at para. 77).

[135] Public resources are always limited; to govern is to choose. Governments are better placed than courts to assess the benefits and disadvantages of each policy option because of their vastly superior institutional capacity. More fundamentally, they have the legitimacy to make these decisions by virtue of the democratic process through which law-makers are elected. Though it is for courts to make authoritative interpretations of the *Charter*, [TRANSLATION] "it would be wrong to think that the elected representatives of the people, lawmakers, have little to say in the establishment and promotion of freedoms" (Me G. A. Beaudoin, *La Cour suprême et la Charte canadienne des droits et libertés* (1987), at p. 2).

B. *Causation at the First Step*

[136] The respondent has demonstrated that s. 3 of the *RCR* creates a distinction that, in its impact, is based on sex.

[137] The respondent has met the requisite evidentiary burden by demonstrating that the impugned provision disproportionately impacts women as members of the group affected by the exclusion. As noted in *Sharma*, "[e]xpert testimony, case studies, or other qualitative evidence may be sufficient . . . to demonstrate a causal link" (para. 49). The expert report submitted in the court of first instance included a summary of the literature and interviews with refugee claimants. In these interviews, no men answered that they were not working because childcare was too expensive (J. Hanley, *The labour implications of the exclusion of refugee claimants from Quebec's subsidized childcare program* (2020) (reproduced in A.R., vol. II, at pp. 68-90), at p. 17). By contrast, the report reproduces multiple interviews with women who explain that that they could not work *because* they could not access affordable childcare.

[138] To illustrate with an example, a married mother of two explained that she had to stay home to take care of her children, despite wanting to work. She explained that "[she] can't afford the daycare for now because of the price. So [refugee claimants] are not entitled to the subsidized daycare. So that's a challenge for [them] there" (Hanley, at p. 18). The interviewer asked her specifically if she liked "being a stay-at-home mom, or would [she] like to be working?" and she answered, "I'd like to work" (*ibid.*). This evidence is particularly demonstrative of the causal link between s. 3 of

the *RCR* and the lack of access to the workplace experienced disproportionately by women.

[139] Overall, the evidence presented by the respondent at trial meets the burden required by *Sharma*. The limitation of this social program creates a distinction that disproportionately impacts women.

C. *The Reinforcement, Perpetuation or Exacerbation of Disadvantage at the Second Step*

[140] To ensure that s. 15 is not transformed into a positive obligation to remedy all social inequality and that it does not hinder governments' ability to act incrementally, courts should also ensure that claimants have met their burden of demonstrating that the impugned provision not only creates a distinction, but that it is also discriminatory.

[141] My colleague Karakatsanis J. notes that "[t]he broader legislative context may . . . be relevant to the analysis at step two" but that "these considerations are only one aspect of a broader analysis on whether a provision has a discriminatory character" (para. 65). In *Sharma* (at para. 58), the Court emphasized the reasoning of Chief Justice Wagner in *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679:

> Chief Justice Wagner, writing for four members of this Court, explicitly and carefully considered the entire legislative scheme, observing that the *YCJA* is designed to balance multiple goals — not only enhanced

> procedural protections, but also timely intervention and prompt resolution (para. 146). He further explained that an "approach requiring line-by-line parity with the *Criminal Code* without reference to the distinct nature of the underlying scheme of the *YCJA* would indeed be contrary to the contextual approach" (para. 145). In choosing not to provide young persons with an automatic right to appeal, he concluded "Parliament did not discriminate against them, but responded to the reality of their lives" (para. 162). Therefore, step two was not satisfied.

[142] While legislative context may be only one consideration, it is an important one. Lack of access to a benefit may be part of a broader scheme that reflects a tailored response to the distinct circumstances of the group, not a denial of equal treatment.

[143] In this case, I agree with Karakatsanis J. that s. 3 of the *RCR*, in excluding refugee claimants from access to subsidized daycares, reinforces, perpetuates or exacerbates economic and social disadvantage faced by women refugee claimants. Lack of access to daycare "worsen[s] [women's] situation" (*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 37).

[144] I agree with Karakatsanis J. that lack of access to affordable childcare worsens inequality between the genders in the following ways: ". . . by leading to 'deskilling' (or losing skills from lack of use or employer recognition); by creating gaps in work trajectory and thus contributing to a wage distinction between men and women; by reducing savings and long-term income security; and by often forcing women to forego higher education or vocational training when their children are young" (para. 86).

[145] Lack of access to childcare can have profound and long-lasting consequences on the economic situation of women. The distinction created by the *RCR* is discriminatory because it widens the gap between the genders. This is distinct from "[l]eaving the situation of a claimant group unaffected" (*Sharma*, at para. 52).

[146] The projected wait times for asylum seekers when this matter was before the Superior Court was 24 months (Immigration and Refugee Board of Canada, *Wait times (all divisions)*, March 22, 2021 (online)). These are crucial years for the members of the protected group, because they are their first two years in Canada. Being unable to access subsidized daycare may delay integration in Canadian society and, thus, have long-lasting adverse impacts on the lives of refugee claimants who are women.

[147] Subject to the clarifications I will come to below, I agree that it is proper to consider the multiple grounds of disadvantage faced by women refugee claimants and that they face "distinct and heightened forms of disadvantage" (Karakatsanis J.'s reasons, at para. 90) compared to, for example, women who are Canadian citizens. In addition to exacerbating economic disadvantage, the exclusion of women refugee claimants perpetuates other forms of disadvantage, including social isolation and a limited ability to learn French, which is critical to integration into Quebec society (paras. 86 and 89).

D. *Intersecting Forms of Disadvantage*

[148] My colleague Karakatsanis J. refers to the notion of intersecting group membership, intersecting identities and realities and intersecting forms of disadvantage. In this section, I clarify what would be an improper use of these concepts, and then what is a proper use.

[149] First, I disagree with my colleague that, under existing case law, it is appropriate to consider intersecting forms of disadvantage at the first step of the s. 15 framework. This step focuses on whether or not there is a distinction based on *an enumerated or analogous ground*. The focus is on whether the state action or law has a disproportionate impact on a protected group, not on evaluating the disadvantage or discrimination that group experiences.

[150] By inviting courts to take account at this step of "intersecting identities and realities" (Karakatsanis J.'s reasons, at para. 45) — apparently irrespective of whether they relate to protected grounds or instead to "broader characteristics" (para. 40) — my colleague seems to suggest that the protection of s. 15 is not limited to enumerated and analogous grounds, but rather is open to the addition of new "hybridized" grounds defined by the various combinations of multiple forms of disadvantage.

[151] An analysis that incorporates a recognition of multiple forms of disadvantage should not become a disguised way to find discrimination on the basis of previously unrecognized analogous grounds. While courts might, in future, consider new analogous grounds of this nature, such questions must be decided according to the

methodology set out in *Andrews* and subsequent decisions, including *Corbiere*. Improperly incorporating "hybridized" realities at stage one of the test would therefore pose a similar risk to the one Côté J. addresses in her rejection of a multifactorial framework for recognizing new analogous grounds (at paras. 353-54) — both approaches would unmoor s. 15(1) from its purpose of protecting against discrimination on constitutionally protected grounds.

[152] In considering intersecting forms of disadvantage, I agree with the comments of the Attorney General of Canada, intervening, that [TRANSLATION] "taking account of interrelated grounds of discrimination does not make it possible to circumvent the requirement that discrimination be based on an enumerated or analogous ground" in that "contextual factors cannot become the basis for discrimination" (I.F., at para. 69). Section 15 claims are to remain grounded in an enumerated ground or a recognized analogous ground.

[153] Were courts to change the analysis for infringement by adding "hybridized" grounds based on notions of intersectionality, it would constitute a major innovation within our jurisprudence. It would also be a significant methodological error to decide so consequential an issue when doing so is not required to properly resolve the case at hand. In the present case, the issue was not dealt with in the reasons for judgment at trial or on first appeal. I express no view as to whether this Court might, in a future case where the issue has been thoroughly considered by the trial court and the court of appeal, decide in favour of such an approach. My point is simply that the matter

is not a determinative issue in this case; it was not dealt with by the courts below and, therefore, it should not be decided here. Deciding such questions *in abstracto* is in the nature of judicial legislating, rather than adjudication. It involves the Court in deciding important questions without the benefit of the full adversarial process.

[154] What is in accordance with the case law is the notion of intersecting forms of disadvantage as being relevant at two different steps of a s. 15 *Charter* claim: at step two of the two-step s. 15 analysis and in the fourth and final balancing stage of the s. 1 analysis. Indeed, to understand the "full context of the claimant group's situation" and the "actual impact of the law on that situation" (*Withler*, at para. 43), the identity markers of members of the claimant group are relevant. This includes consideration of whether the claimant group could face discrimination on other enumerated or analogous grounds of discrimination, such as race or citizenship. It can also include other factors of vulnerability that are not enumerated or analogous grounds of discrimination, such as poverty. Differently situated members of protected groups (e.g., rich women versus poor women, white women versus non-white women) will experience sex-based discrimination differently.

[155] The fact that the claimant experiences multiple forms of disadvantage is first relevant to the second stage of the test (see, e.g., *Sharma*, stating that the legislative context is to be considered at step two, at paras. 56 et seq.), which focuses on discrimination, and therefore disadvantage. It is at this second step that it is useful to look at the particular situation of the member of the protected group, because the task

is to examine the full "impact of the harm" (*Sharma*, at para. 52 (emphasis deleted), citing *Fraser*, at para. 76) by applying a "contextual" analysis "grounded in the actual situation of the group" (*Sharma*, at para. 52, citing *Withler*, at para. 37). An impugned provision may reinforce, perpetuate, or exacerbate the disadvantage faced by a certain subgroup of women, but not against others. While it may be possible to exclude some individuals from ameliorative legislative schemes, "[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination" (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 72).

[156] Lack of access to a benefit may perpetuate disadvantage for some groups of women, but not others. Women who are also members of other vulnerable groups may face particular forms of disadvantage, which may or may not be perpetuated, exacerbated or reinforced by the impugned provision. "While there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions" (*Sharma*, at para. 30). Adopting an approach based on intersecting forms of disadvantage in step one of the analysis, where the focus must be on the nexus between the impugned law and the claimant's protected ground, would create uncertainty and instability in the analytical framework.

[157] Second, the full extent of the claimant's situation may also be relevant at the final balancing stage of the s. 1 analysis. If it can be shown that the deleterious effects of the law are particularly severe due to intersecting forms of disadvantage the

claimants face, the burden on government to demonstrate salutary effects will be heightened.

[158] To summarize, to recognize that subgroups of women, such as refugee claimant women, can face sex-based discrimination as well as other forms of disadvantage does not amount to the creation of a "free entry to s. 15's protections for to-date unprotected grounds" (I.F., AGO, at para. 33). As long as the analysis remains anchored in an enumerated or recognized analogous ground, attention to the context is relevant at step two of the two-step s. 15 test and in the fourth prong of the s. 1 analysis.

III. Section 1

A. *History of Section 1*

[159] Having found a breach of s. 15, I now turn to s. 1. Section 1 is "arguably the most consequential part of the Charter" (B. Bird and D. Ross, "Rights, Freedoms, and Their Limits: Reimagining Section 1 of the Charter: An Introduction" (2023), 112 *S.C.L.R.* (2d) 1, at p. 1; see also R. J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (7th ed. 2021), at p. 20, calling it "perhaps [the *Charter*'s] most important provision"; and T. Q. Riddell and F. L. Morton, "Reasonable Limitations, Distinct Society and the Canada Clause: Interpretive Clauses and the Competition for Constitutional Advantage" (1998), 31 *C.J.P.S.* 467, at p. 468, arguing it is "the most

important section of the Charter”). “Section 1 applies to laws that infringe s. 15 no less than to laws that infringe other rights” (Hogg and Wright, at § 55:32).

[160] Section 1’s significance resides in the fact that it “provides a means of reconciling the interests in the *Charter* with other fundamental values not specifically enumerated” (J. Hiebert, “The Evolution of the Limitation Clause” (1990), 28 *Osgoode Hall L.J.* 103, at p. 104; see also Sharpe and Roach, at p. 71). It allows us to reconcile individual rights with other interests of the collectivity. Section 1 states the following:

> **1** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[161] The text of s. 1 communicates its two purposes. First, it guarantees the rights enshrined in the *Charter*, which suggests “assurance of fulfillment” (Hon. K. H. Fogarty, *Equality Rights and their Limitations in the Charter* (1987), at p. 95). Second, it sets out the circumstances in which rights can be limited. The *Charter*, including s. 1, was “not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts” (*Big M Drug Mart*, at p. 344).

[162] The decision to include a limitation clause, or “*clause de raisonnabilité*” ([TRANSLATION] “reasonableness clause”), was inspired by other international instruments that existed when the *Charter* was adopted (H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. XII-3.52). The idea for s. 1

"probably came from" the *European Convention on Human Rights*, 213 U.N.T.S. 221, adopted by the Council of Europe in 1950 (see, e.g., Article 10) and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, adopted by the United Nations in 1966 (G. V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 *Can. Bar Rev.* 19, at p. 25; Hogg and Wright, at § 38:1). The inclusion of a limitation clause distinguishes the Canadian *Charter* from the American *Bill of Rights*, which does not contain such a provision (Hogg and Wright, at § 38:1; W. A. Schabas, "Le droit européen des droits de la personne dans la jurisprudence canadienne et québécoise" (1991), 7 *R.Q.D.I.* 198, at p. 200).

[163] The political process that led to the adoption of the *Charter* was marked by a fundamental tension between the pursuit of human rights ideals and the maintenance of parliamentary sovereignty. The final text of s. 1 emerged from a decade-long negotiation between Prime Minister Pierre Trudeau's pro-*Charter* federal government, human rights advocates, and provincial premiers. Broadly speaking, provincial premiers were wary of expanding judicial authority and not enthusiastic about the federal initiative to entrench rights constitutionally (Sharpe and Roach, at p. 20; Hiebert (1990), at p. 107; Riddell and Morton, at p. 470). The limitation clause was subject to this debate, with the proponents of human rights ideals concerned that s. 1 might weaken the *Charter* (Hogg and Wright, at § 38:1; C.-M. Panaccio, "The Justification of Rights Violations: Section 1 of the *Charter*", in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 657, at p. 659).

[164] The penultimate version of the text of s. 1, elaborated during negotiations in 1980, used broad permissive language in "an effort to forestall opposition from the provinces, which had blocked previous efforts" (A. Stone Sweet and J. Mathews, "Proportionality Balancing and Global Constitutionalism" (2008), 47 *Colum. J. Transnat'l L.* 72, at p. 115). The 1980 version of s. 1 stated that rights could be limited by "reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government" (Panaccio (2017), at p. 659). According to Professor Panaccio, "[t]his formula, suggesting that whatever had been decided by parliamentary legislatures or was in line with conventional social morality would be an appropriate limit to constitutional rights, attracted withering criticism" (p. 659 (footnote omitted); see also Stone Sweet and Mathews, at p. 116) In particular, during the Parliamentary hearings on the draft *Charter*, various groups pressed for amendments to s. 1 with a view to limiting the circumstances in which it could be used to justify the limitation of rights (Panaccio (2017), at p. 659; J. L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (1996), at p. 23).

[165] The question of whether provincial agreement was required to amend the Constitution to include the *Charter* was analyzed by this Court in the *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753. A six-judge majority of the Court held that, by convention, "a substantial degree of provincial consent" was required to amend the Canadian Constitution (pp. 904-5). This Court's conclusion that unanimous provincial consent was not required to amend the Constitution pushed provincial governments to arrive at a compromise with Ottawa (D. Sanschagrin, *Le*

nationalisme constitutionnel au Canada (2022), at p. 220; R. Romanow, J. Whyte and H. Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (1984), at p. 257).

[166] Prime Minister Trudeau succeeded in securing the consent of 9 out of the 10 provinces, Quebec being the exception. The language from 1980 was not ultimately included in the *Charter*, despite the provinces' efforts (Hiebert (1990), at p. 127). The more "demanding" language of the final version of s. 1 demonstrated "a shift from a conventional-majoritarian analysis to an ideal-justificatory one" (Panaccio (2017), at p. 659). Indeed, the final version of s. 1 "narrow[ed] the limits that could be placed on the rights and freedoms guaranteed in the Charter" (R. Elliot, "Interpreting the Charter — Use of the Earlier Versions as an Aid", [1982] *U.B.C. L. Rev.* (Charter ed.) 11, at p. 24). Section 1 cannot be understood without understanding the concurrent and responsive historical development of s. 33, the notwithstanding clause. In response to the narrowed language of the limitation clause under s. 1, in the final days of the negotiation of the Patriation, the provinces shifted their focus to the notwithstanding clause (what became s. 33) and the scope of rights to which it would apply (Hiebert (1990), at p. 127). Several premiers, notably Allen Blakeney of Saskatchewan and Peter Lougheed of Alberta, took the position that their support for the *Charter* was contingent on the inclusion of the notwithstanding clause (J. L. Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding", in J. B. Kelly and C. P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (2009), 107, at pp. 115-16). It was clear

from the outset that narrowing the circumstances in which s. 1 could be relied on had the effect of increasing the incentive to invoke s. 33. Sections 1 and 33 are therefore functionally and historically correlated.

[167] While the *Charter* limited the autonomy of all legislatures as it conferred authority on courts to strike down legislation, a common view is that for the National Assembly of Quebec, the *Charter* limited the "institutional autonomy" to "enact laws to protect what makes the province a distinct society" (D. Guénette and F. Mathieu, *Constitutionalism v Diversity: Essays on Federal Democracy* (2023), at p. 180). In Quebec, the *Charter* is seen as having a [TRANSLATION] "homogenizing potential" and leading to the "narrowing of Quebec's leeway to define the policies it wishes to pursue" (S. Grammond, "Louis LeBel et la société distincte" (2016), 57 *C. de D.* 251, at p. 254 (footnote omitted)).

[168] In sum, the wording of s. 1 reflected part of the compromise between provincial premiers on the one hand, and the federal government and human rights advocates on the other, that led to the adoption of the *Charter*. Further, the inclusion of s. 1 reflected and was inspired by international instruments that limited human rights via an express limitation clause, using the concept of proportionality, to which I turn now.

B. *Proportionality Analysis and the Oakes Test*

[169] From a historical point of view, it was understood that while the wording of s. 1 would structure its analysis, its true significance was going to depend on how the courts interpreted and applied it (Riddell and Morton, at p. 474). Provinces, who had favoured the broader language in the original wording of s. 1, continued to advocate for an approach to the *Charter* that limited judicial override of government policies and decisions. Quebec, which had been particularly wary of the *Charter* during the Patriation negotiations, maintained this view in *Charter* litigation, arguing for a "self-restrained interpretation of section 1" (pp. 474 and 481).

[170] The framework for the analysis under s. 1 was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, which continues to be a "canon of Canadian Charter jurisprudence" (C. D. Bredt and A. M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001), 14 *S.C.L.R.* (2d) 175, at p. 176). Dickson C.J. noted that the *raison d'être* of the rights protected in the *Charter* and their limitation are both rooted in the same normative goal: that Canada is to be a free and democratic society (*Oakes*, at p. 136). As such, there is "an 'identity of values' underlying both the rights and their limits" (Hogg and Wright, at § 38:2, citing L. E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988), 10 *S.C.L.R.* 469, at p. 494).

[171] Section 1 and *Oakes* reflect an exercise in proportionality. Dickson C.J. set out two criteria that had to be met to show that a limit was reasonable and demonstrably justified in a free and democratic society. First, the objective pursued by the law must relate to concerns that are "pressing and substantial" (pp. 138-39). Second, the party

invoking s. 1 must show that the "*means chosen* are reasonable and demonstrably justified" (p. 139 (emphasis added)). Dickson C.J. stated that this involves "a form of proportionality test" (*ibid.*).

[172] Proportionality in this context refers to "the idea that larger harms imposed by government should be justified by more weighty reasons" (V. C. Jackson, "Constitutional Law in an Age of Proportionality" (2015), 124 *Yale L.J.* 3094, at p. 3098). This concept is widely reflected in the interpretation of constitutional rights worldwide: "To speak of human rights is to speak of proportionality" (G. Huscroft, B. W. Miller and G. Webber, "Introduction", in G. Huscroft, B. W. Miller and G. Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014), 1, at p. 1; see also L. B. Tremblay, "Le fondement normatif du principe de proportionnalité en théorie constitutionnelle", in L. B. Tremblay and G. C. N. Webber, eds., *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (2009), 77, at p. 86).

[173] In Canadian constitutional law, proportionality is what gives concrete meaning to rights in a free and democratic society. The limitation of rights is the [TRANSLATION] "determination of the true meaning of the rights", without which constitutional rights are "a hollow incantation" (Brun, Tremblay and Brouillet, at para. XII-3.48). In the words of Dickson C.J. in *Oakes*, s. 1 recognizes that "[i]t may become necessary to limit rights and freedoms in circumstances where their exercise

would be inimical to the realization of collective goals of fundamental importance" (p. 136).

[174] The judicial conception of proportionality and individual rights has its origins in Prussian administrative decisions regarding police laws in the late 1800s (Stone Sweet and Mathews, at pp. 97-101). The fundamental idea that underpinned this early jurisprudence was that "the police may invade citizens' freedoms only in the service of lawful goals, and their measures may restrict those freedoms no more than necessary" (p. 99). The concept of proportionality was imported into the interpretation of the modern German constitutional instrument, the German Basic Law of 1949, by the German Federal Constitutional Court (pp. 97 and 110).

[175] Thus, from Germany, the idea of proportionality migrated to courts interpreting the *European Convention on Human Rights*, and to common law jurisdictions, including Canada (Stone Sweet and Mathews, at p. 74). Indeed, "[t]he formula presented in *Oakes* is so close to the German version of [proportionality analysis] that we can presume the Court was familiar with German doctrine" (p. 117). The framing of the test in Germany and in *Oakes* follow a similar structure:

> In essence, both [Canadian and German courts] follow the same path when they apply the proportionality test. Since the test requires a means-ends comparison, both courts start by ascertaining the purpose of the law under review. Only a legitimate purpose can justify a limitation of a fundamental right. The three-step proportionality test follows. While the Canadian Court requires a rational connection between the purpose of the law and the means employed by the legislature to achieve its objective in

> the first step, the German Court asks whether the law is suitable to reach its end. In the second step, the Canadian Court asks whether, in pursuing its end, the law minimally impairs the fundamental right, whereas the German Court asks whether the law is necessary to reach its end or whether a less intrusive means exists that will likewise reach the end. The third step in both countries is a cost-benefit analysis, which requires a balancing between the fundamental rights interests and the good in whose interest the right is limited.
>
> (D. Grimm, "Proportionality in Canadian and German constitutional jurisprudence" (2007), 57 *U.T.L.J.* 383, at p. 387)

[176] What Dickson C.J. wrote in *Oakes* manifests the view that "s. 1 analysis is determinate and objective" and should not be "concerned with the wisdom of legislative policy" (P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987), at p. 66). The *Oakes* test and its incorporation of proportionality flow from the history of s. 1. Section 1 reflects a shared compromise between parliamentary sovereignty and human rights across liberal democracies, and captures the idea that some limitations are necessary for the realization of goals of collective importance. Such limitations must meet a principled justificatory standard.

C. *Scope of Rights and Section 1*

[177] Pursuant to the purposive approach set out in *Big M Drug Mart*, the scope of rights in the *Charter* is to be ascertained by reference to the interests they are meant to protect. This defines the scope of a right, but does not address the circumstances in which it may properly be limited. Section 1 constitutes an external limitation on the

right (Bredt and Dodek, at p. 178), in that its logic operates independently of the right itself.

[178] In the absence of external limitation clauses, courts tend to develop internal limits on rights. An example of a jurisdiction where there is no limitation clause is the United States, where courts by various means give way to the legislative branch in certain circumstances. But in Canada, where there is an explicit limitation clause, the internal limitation and external limitation are two exercises that should remain distinct. The architecture of the *Charter* requires this.

[179] Section 1 and *Oakes* ensure "sober second thought", an analytical framework that must be followed to assess whether the infringement of rights is justified (La Forest, at p. 25). It has been described as "less of a test than it is a methodology which lends a degree of structure and coherence to the courts' inquiry" (P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 444).

[180] Section 1 shapes the methodology for the interpretation of rights. "If the courts give to the guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the court[s] will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right" (*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 191, citing P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 38-6).

[181] The relationship between the scope of rights and the standard for limitation is well illustrated by the different approaches taken by the majority and Arbour J., concurring, in *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769. In that case, the majority concluded that s. 15 was violated, but the measure at issue was saved by s. 1. Arbour J. found that there was no breach of s. 15. She wrote that while her s. 15 approach was narrower, it also meant that it "becomes more difficult, having made a finding of discrimination, to establish that the resulting s. 15(1) violation can be justified" (para. 90). She wrote that it had to be recognized that "[her] reading of s. 15(1) entails an ideological preference for spreading equality rights somewhat less broadly but with much greater substance" (para. 91).

[182] Whether courts adopt a narrow or broad interpretation of rights, paired with a strict or lenient standard of justification, the practical outcome may be similar. But when rights are broadly defined and the justificatory analysis is lenient towards the government, judicial review shifts more deeply into the domain of policy considerations. Under such an approach, the analysis comes to hinge on the justification by the government of its reasons to pursue its objectives, rather than on a demonstration of breach. Being disinclined to this, Professors Hogg and Wright suggest that "the courts should adhere to the strict standard of justification prescribed by *Oakes*, and should give a purposive (rather than a generous) interpretation to the guaranteed rights" (§ 38:3 (footnote omitted)). I share their view.

D. *Application of Section 1 to This Case*

[183] Justification under s. 1 as set out in *Oakes* involves a four-step test. The first step analyzes whether the government has "good ends" — that is, whether the objective it seeks to achieve by the impugned measure is sufficiently important — and the three subsequent stages constitute the proportionality assessment. As noted above, these steps must be understood in light of the historical context in which s. 1 emerged and of its philosophical roots in the concept of proportionality. Section 1 was a contentious provision in the *Charter* and its inclusion was integral to the compromise that led to the provinces' agreement to the entrenchment of rights. The study of the doctrine of proportionality illustrates that s. 1 is what allows rights properly to be realized; without it, rights remain "a hollow incantation".

[184] The first step relates to the government's "pressing and substantial" objective (*Oakes*, at pp. 138-39). The fact that "respect for cultural and group identity" was recognized as a value "essential to a free and democratic society" (p. 136) indicates that s. 1 could be used "to enable the national norms of the Charter to accommodate at least some of the diversity that it is the role of the federal system to permit" (Hogg and Wright, at § 38:14 (footnote omitted)).

[185] According to the appellant, the objective pursued by s. 3 of the *RCR* is to give financial support to individuals who have a sufficient connection with Quebec (A.F., at para. 139). The appellant's record demonstrates that, as of December 31, 2019, there were limited spots in subsidized daycares (235,535) and in non-subsidized daycares (70,349) (A.R., vol. II, at p. 66). In Quebec, as of December 31, 2018, there

were 42,000 children on the waitlist for daycare spots, including subsidized and non-subsidized daycares, or family daycare providers (*ibid.*). There is thus a gap between the demand in the population and the resources available to meet that demand.

[186] As the Quebec Court of Appeal noted, courts are usually deferential at this first stage of the *Oakes* test and will object to the stated goals in [TRANSLATION] "the most patently extravagant" cases (Brun, Tremblay and Brouillet, at para. XII-3.78). The choice of which goals to pursue is an exercise that is [TRANSLATION] "so political" that courts should avoid intervening in these questions (*ibid.*).

[187] The goal stated by the government is not "patently extravagant". The desire to prioritize public spending on those who have a sufficient connection with Quebec is a pressing and substantial objective; it reflects an objective to fairly allocate limited public resources.

[188] When assessing whether there is a pressing and substantial objective, courts should not be dismissive as to matters of public finance. I would adopt Binnie J.'s statement in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, that "financial considerations wrapped up with other public policy considerations *could* qualify as sufficiently important objectives under s. 1" (para. 69 (emphasis in original)). Binnie J. in *N.A.P.E.*, stated that "a measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1" (para. 63 (emphasis deleted), quoting *Reference re Remuneration of Judges of the*

Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3, at para. 284). In other words, while "[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1", they are nonetheless relevant (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 109). In this case, the government's objective to allocate limited public resources for subsidized child care based on the parents' connection with Quebec is pressing and substantial.

[189] This Court has noted that "[i]n a system of divided legislative authority", the principle of federalism has to be borne in mind in interpreting the *Charter* (*R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, at para. 275). Courts should be cognizant of "where the members of the federation differ in their cultural and historical experiences" (*ibid.*). The *Charter* should be — and has been — interpreted by this Court to give effect to provincial diversity, including Quebec's unique circumstances (see, e.g., Grammond).

[190] The second step asks whether there is a rational connection between the impugned provision and the infringement (*Oakes*, at pp. 141-42). I agree with my colleague Karakatsanis J. that this standard is not onerous (para. 101). The goal of this stage "is aimed at preventing limits being imposed on rights arbitrarily" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48). As per this Court in *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 59:

> The rational connection step requires that the measure not be "arbitrary, unfair, or based on irrational considerations" (*Oakes*, at p. 139). Essentially, the government must show that there is a causal connection between the limit and the intended purpose (*RJR-MacDonald*, at para. 153). In cases in which a causal connection is not scientifically measurable, one can be made out on the basis of reason or logic, as opposed to concrete proof (*RJR-MacDonald*, at para. 154; *Toronto Star*, at para. 25). [Emphasis added.]

[191] I disagree with the majority's conclusion on this prong of the *Oakes* test. It is logical to exclude refugee claimants from access to subsidized childcare when the objective is to give financial support to individuals who have a sufficient connection with Quebec. While it is true that refugee claimants can access other public benefits (Karakatsanis J.'s reasons, at para. 104), this does not change the fact that the status of a refugee claimant is temporary. While some refugee claimants will go on to live in Quebec long term, others will not. In these circumstances, there is a rational connection between limiting access to individuals who hold a temporary status and the objective pursued.

[192] As it relates to others who have access to daycare under s. 3 of the *RCR*, temporary work permit holders (s. 3 subpara. (3)) immigrate to Quebec after a study has demonstrated the necessity of their presence for the efficient functioning of the economy in Quebec. Foreign students (s. 3 subpara. (4)) and holders of temporary resident permits under s. 24 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (s. 3 subpara. (7)) are also selected via programs of the Quebec government. In other words, those who are eligible for subsidized daycare and have temporary status

in Quebec are selected by the provincial government as a result of a specific demonstrated link with the province (A.F., at paras. 146-48).

[193] With respect to my colleague Karakatsanis J.'s recourse to international law, I agree that for the purposes of the *non-refoulement* principle under the 1951 *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6, as reflected in the *Immigration and Refugee Protection Act*, refugee claimants have a right to stay in Canada until their claims are determined (para. 102). But, respectfully, this is not relevant to this prong of the *Oakes* test.

[194] The "rational connection" requirement seeks to assess whether the violation of the right is rationally connected to the objective of the law. This inquiry is part of the proportionality analysis, which assesses the relationship between the harms imposed and the reasons proposed as justification by the government (Jackson, at p. 3098). Here, the government objective is to give those who have a sufficient connection with Quebec financial support, and the harm is the discriminatory distinction against women who are refugee claimants that is created by s. 3 of the *RCR*. Whether there is a right to stay in Canada under the immigration law regime does not bear on this analysis.

[195] The third step asks if the provision "impair[s] 'as little as possible' the right or freedom in question" (*Oakes*, at p. 139). If there are "alternative, less harmful means of achieving the government's objective 'in a real and substantial manner'", the law is

not minimally impairing (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 70). Nevertheless, the alternative means considered must achieve the same government objective (*Hutterian Brethren*, at para. 54). The government is accorded a "margin of appreciation", since it is nearly impossible to ascertain if other possible laws would be equally as effective or equally as minimally impairing (*N.A.P.E.*, at paras. 83-84). This step "recognizes that in certain types of decisions there may be no obviously correct or obviously wrong solution, but a range of options each with its advantages and disadvantages" (para. 83).

[196] Section 3 of the *RCR* is "tailored to minimally impair rights in the context of the problem it confronted" (*N.A.P.E.*, at para. 97). Faced with a situation of surplus demand for access to daycare spaces, the provincial government must make choices. The choice to exclude refugee claimants, whose link with Quebec is tenuous, is impairing "as little as is reasonably possible" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772).

[197] Finally, the last step of the test asks if there is a "proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'" (*Oakes*, at p. 139 (emphasis deleted)). This stage requires "both that the underlying objective of a measure and the salutary effects that actually result from its implementation are proportional to the deleterious effects the measure has on

fundamental rights and freedoms" (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 887 (emphasis deleted)).

[198] As noted, financial considerations may be one of the policy considerations that form the basis of the pressing and substantial objective; as well, costs may be relevant in the final balancing stage. Government budgets are necessarily always limited: as a result, more funds allocated for one purpose result in less funds for another purpose. The salutary effects of allocating funds to others under a given legislative scheme or another program or service may outweigh the deleterious effects on the affected group who are excluded from a benefit program, especially if the costs are high and the benefits are modest. The reverse is so if the costs in question are relatively small, but the benefits are considerable. These are considerations that are properly part of the balancing exercise.

[199] This stage is unique relative to the three that precede it, in that "the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'" (*Hutterian Brethren*, at para. 76). Indeed, if the lack of access to a benefit has a severe effect on the affected group, this will weigh especially heavily in the balancing exercise.

[200] The appellant has not met its burden at this stage. The deleterious effects on the affected women outweigh the salutary effects as described by the Attorney

General of Quebec. The deleterious impacts are severe, as illustrated at paras. 27 et seq. of these reasons. Section 3 of the *RCR* disproportionately impacts women refugee claimants and exacerbates their economic disadvantage. It limits their ability to integrate in the country they seek to make their home. Being prevented from working for up to two years can have immense consequences on the lives of these women. These include the loss of income, inability to pursue French classes and to attend work-related training, as well as social isolation which can lead to feelings of depression and despair. Refugee claimant women are a particularly vulnerable subgroup of women and the harms that this exclusion creates are both economic and social. The deleterious effects are, unquestionably, severe.

[201] On the other hand, the appellant does not raise nor demonstrate any of the "salutary effects that actually result from [the] implementation [of s. 3 of the *RCR*]" (*Dagenais*, at p. 887). The alleged salutary effect is that it [TRANSLATION] "avoids extending a benefit to persons whose presence in Canada rests on uncertain foundations" (A.F., at para. 157 (footnote omitted)). This is simply a repetition of the exclusion and not an explanation of the salutary effects that flow from the exclusion. Similarly, while the appellant alleges that to include refugee claimants in s. 3 of the *RCR* could have the effect of [TRANSLATION] "jeopardizing the sustainability of the services offered by the state" (*ibid.*), no evidence was presented in support of this. While the deleterious effects of the law are supported by the evidence, the beneficial effects are speculative and marginal. Any benefits arising from the exclusion of refugee

claimants from access to subsidized daycares are greatly outweighed by the severe adverse impacts on the lives of the affected women.

[202] In these circumstances, the *Charter* infringement is "too high a price to pay for the benefit that actually results from the law" (Hogg and Wright, at § 38:22). The infringement is not justified under s. 1.

[203] While my reasons differ from those of Karakatsanis J., I agree with her in the result.

English version of the reasons delivered by

THE CHIEF JUSTICE —

I. Introduction

[204] A refugee claimant is a person who has sought refugee protection in Canada pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). A person is considered to be a refugee claimant from the date their claim is filed. The person ceases to be a refugee claimant when an officer determines that the claim is ineligible or, if it is determined to be eligible, when a final decision is made on the claim — either accepting or rejecting it — by the Refugee Protection Division or, as the case may be, by the Refugee Appeal Division (ss. 95 to 115 of the *IRPA*).

[205] The respondent was a refugee claimant for more than two years. She made a claim for refugee protection in October 2018 and was granted refugee status in January 2021.

[206] During those years, the respondent was denied the opportunity to send her children to a subsidized childcare facility. Refugee claimants are not among the parents eligible for the reduced contribution under s. 3 of the *Reduced Contribution Regulation*, CQLR, c. S-4.1.1, r. 1 ("*RCR*"). As a result, the only childcare facilities to which the respondent could send her children were those that were not state-subsidized.

[207] This appeal concerns the constitutionality of s. 3 of the *RCR* under s. 15 of the *Canadian Charter of Rights and Freedoms*. The question is whether the ineligibility of refugee claimants for the reduced contribution infringes the respondent's right to equality.

[208] I have read my colleagues' reasons, and I agree with them that s. 3 of the *RCR* infringes s. 15 of the *Charter*. I also acknowledge that this case could have been decided on the ground of discrimination based on sex, as my colleague Karakatsanis J. demonstrates in well-constructed reasons. I am writing separately because it seems to me that direct discrimination based on refugee claimant status is the main pathway to decide this appeal. It is the analytical perspective that most naturally applies in light of the factual and legal context.

[209] By excluding refugee claimants, s. 3 of the *RCR*, on its face, creates a distinction based on an analogous ground — refugee claimant status. This distinction is discriminatory, because it denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage suffered by refugee claimants. It has not been shown that the infringement is justified under s. 1 of the *Charter*. In the circumstances, the appropriate constitutional remedy is reading in.

II. Analysis

A. *There Is an Infringement of the Right Protected by Section 15 of the Charter*

(1) First Step of the Test Under Section 15 of the *Charter*

[210] At the first step of the s. 15 test, the claimant must demonstrate that the impugned provision, on its face or in its impact, creates a distinction based on a protected ground (*R. v. Sharma*, 2022 SCC 39, [2022] 3 S.C.R. 147, at para. 28).

[211] This step itself has two parts. First, the claimant must establish that a distinction is created *by* the impugned provision. Second, the claimant must prove that the distinction is based on a protected ground (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at §§ 55:22-55:23 and 55:25).

[212] The first step is satisfied in this case. It has been shown (1) that s. 3 of the *RCR*, on its face, creates a distinction, and (2) that the distinction is based on a *Charter*-protected ground.

(a) *Section 3 of the RCR, on its Face, Creates a Distinction*

[213] The respondent has argued at every level of court, including this one, that s. 3 of the *RCR*, on its face, creates a distinction because it excludes refugee claimants (2022 QCCS 1887, at para. 5; 2024 QCCA 144, at para. 76; R.F., at paras. 79 et seq.). The appellant concedes this point. He acknowledges that, by excluding refugee claimants, s. 3 of the *RCR*, on its face, creates a distinction (A.F., at paras. 47 and 94).

[214] I agree. This is an exclusion by omission and therefore a direct distinction (*Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 76, 80 and 98). Section 3 of the *RCR* sets out a closed list of categories of persons eligible for the reduced contribution. Refugee claimants are not on this list and cannot be considered part of any of the categories expressly listed. They are therefore ineligible. The "silence" and "underinclusiveness" of s. 3 of the *RCR* mean that refugee claimants do not have "formal equality with reference to [eligible persons]" (paras. 80-81; see paras. 76 and 87).

[215] I note that it is, of course, not necessary that *all* members of the group be "equally mistreated" by the provision in question for the provision to be considered

discriminatory (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 76; see *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 354-55, per Abella J., dissenting in the result; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, at paras. 72-75). In this case, refugee claimants are not all affected in the same way by s. 3 of the *RCR*. The distinction in fact affects only refugee claimant parents with a child of childcare age. This follows by necessary implication from the legislative context of the *Educational Childcare Act*, CQLR, c. S-4.1.1 ("*Childcare Act*"), and from the wording of s. 3 of the *RCR* specifying that a person "eligible for the reduced contribution" *must* be a "parent residing in Québec". However, as this Court has established, "[t]he fact that discrimination is only partial does not convert it into non-discrimination" (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1248, quoting J. MacPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), 1 *C.H.R.R.* C/7, at p. C/11; *Fraser*, at paras. 72-75).

(b) *The Distinction Created by Section 3 of the RCR Is Based on a Protected Ground*

[216] In my view, s. 15 of the *Charter* protects refugee claimant status as an analogous ground. This status is "of a kind similar" to the enumerated grounds, in that it shares "many similarities" with them (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 195, per La Forest J.). It is a ground that "s. 15 of the *Charter* is designed to protect" (*R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333). This conclusion

flows from a generous approach to the right to equality that reflects "the 'continuing framework' of the constitution and the need for 'the unremitting protection' of equality rights" (*Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 145, per McLachlin J., as she then was, quoting *Andrews*, at p. 175, per McIntyre J., dissenting in part, but not on this point). This inquiry takes into account the dual purpose assured by s. 15, that is, protecting human dignity and building a society in which everyone is recognized as being worthy of respect and consideration (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 5). Recognizing every person's right to dignity and freedom to lead the life they want, in keeping with their full potential and in a manner respectful of collective interests, implies a duty to counter the disadvantages imposed on certain members of society on the basis of stereotyping and prejudice (*ibid.*; *Miron*, at paras. 145-46).

[217] Over time, this Court has developed a number of criteria and indicators that can be used to identify an analogous ground and screen out claims "having nothing to do with substantive equality", in order to "keep the focus on equality for groups that are disadvantaged in the larger social and economic context" (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 19, and *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at para. 193, both quoting L. Smith and W. Black, "The Equality Rights" (2013), 62 *S.C.L.R.* (2d) 301, at p. 336). On this non-exhaustive list, the violation of human dignity and freedom resulting from a distinction based on a stereotype, rather than on individual capacity, worth or circumstances, is a first indicator (*Miron*, at para. 148). Next, the fact that a group has suffered historical

disadvantage (*ibid.*; *Andrews*, at p. 152; *Turpin*, at pp. 1331-32) or that it represents a "discrete and insular minority" (*Miron*, at para. 148, quoting *Andrews*, at p. 152, per Wilson J., and at p. 183, per McIntyre J.) may also be a relevant factor. The vulnerability and marginalization of a group within society are other indicators. In addition, the "immutable" nature of an individual's personal characteristics, including those that are "constructively immutable", that is, changeable only at an unacceptable cost to personal identity, such as religion or citizenship (*Corbiere*, at para. 13; *Dickson*, at para. 193), is generally a common denominator for all analogous grounds. Lastly, recognition by legislators and jurists that a ground is discriminatory is another helpful indicator for determining whether it is analogous to the enumerated grounds.

[218] Côté J. notes in her reasons that some of the indicators set out and adopted in our jurisprudence are not relevant to the analysis, notably because they are unrelated to the central criterion of immutability (paras. 355-58). With respect, I am of the view that consideration of all of these factors not only assists in identifying the groups that the *Charter* is meant to protect but also favours a more flexible and progressive approach in the application of s. 15, one that is capable of recognizing contemporary forms of discrimination, beyond only its historical manifestations (*Miron*, at para. 149; D. Gibson, "Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing" (1991), 29 *Alta. L. Rev.* 772, at p. 788; J. Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013), 10 *J.L. & Equality* 37, at pp. 52-55).

[219] In the present case, an analysis of these criteria leads to the conclusion that refugee claimant status is an analogous ground.

[220] First, a distinction based on refugee claimant status may violate the dignity of the members of this group, because this migration status is apt to give rise to "stereotypical reasoning" and "distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual" (*Miron*, at para. 149). This is a first indicator, even the "unifying principle", for identifying an analogous ground (*ibid.*). I must acknowledge that there is a great deal of prejudice against people who enter Canada in the hope of finding refuge here from persecution. Refugee claimants are accused of being cheats and queue-jumpers and of trying to take advantage of the generosity of Canadians by making fraudulent claims (*Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267, at paras. 13 and 837; Dr. J. Hanley, *The labour implications of the exclusion of refugee claimants from Quebec's subsidized childcare program* (2020) (reproduced in A.R., vol. II, at pp. 68-90), at para. 54). Refugee claimant status thus shares this common denominator; it may "serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual" (*Miron*, at para. 147; see also *Corbiere*, at para. 13).

[221] I emphasize the similarity that can be observed between, on the one hand, the ground of refugee claimant status and, on the other, the grounds of non-citizenship, race and national or ethnic origin. Like discrimination on the basis of non-citizenship, discrimination on the basis of refugee claimant status is a "companion of discrimination on the basis of race and national or ethnic origin, which are listed in s. 15" (*Andrews*, at p. 195, per La Forest J.; see T. Rahimian, "Parental Undocumented Status as an Analogous Ground of Discrimination" (2020), 16 *J.L. & Equality* 93, at pp. 125-26). The application of a distinction based on refugee claimant status — for example to deny a person a right or benefit — may lead the person to have a sense of inferiority regarding their place in the community. Judging a person on the basis of an administrative or migration status, rather than according to their merit or attributes, could well negate the person's dignity and worth. A distinction based on refugee claimant status may therefore be incompatible with the respect owed to all human beings *for who they are* and may violate the fundamental principles of individual recognition and equality that every democratic society must guarantee. These points confirm the similarity between refugee claimant status and the grounds currently protected by s. 15.

[222] Second, another characteristic associated with analogous grounds is the immutability of the group members' personal characteristics. In this case, I am of the view that refugee claimant status is an immutable characteristic because it is a situation that, like citizenship, is "not within the control of the individual", as it is "not alterable by conscious action" by the individual (*Andrews*, at p. 195, per La Forest J.). In *Miron*,

McLachlin J., as she then was, found that the ground of marital status is an immutable characteristic because it "often lies beyond the individual's effective control" and because the individual "exercises limited but not exclusive control over the designation" (para. 153). Here, a refugee claimant does not have exclusive control over the status of their claim (Hogg and Wright, at § 55:26). They cannot alter this status on their own initiative by conscious unilateral action. The exercise of state power is what can change a refugee claimant's situation. Moreover, it is important to note that a refugee claimant's decision to flee their country of origin is, in principle, not a choice made by that person, but rather a constraint imposed upon them (see, by analogy, *Taypotat*, at para. 26). A person waiting for refugee status exercises no control over the potential risk to their life or freedom in their country of origin. The person is also in limbo from the time their claim for refugee protection is filed (R.F., at paras. 100-103; I.F., Association québécoise des avocats et avocates en droit de l'immigration, at paras. 36-39; I.F., FCJ Refugee Centre and Madhu Verma Migrant Justice Centre, at para. 23). Finally, the transitory nature of migration status does not prevent this status from being considered an immutable characteristic for the purposes of analysis, just like the ground of discrimination on the basis of age. It is one of those characteristics that, "while they last", are "considered beyond the individual's conscious control" (Gibson, at p. 786; see also Sealy-Harrington, at pp. 54-55).

[223] My colleague Côté J. notes that the mere fact that a status depends on a government decision does not suffice to make it immutable. In her view, this logic could lead to the recognition of analogous protection for anyone who has submitted an

application to the state, regardless of the nature of the application. However, the proposed analogy seems to stray from the realities faced by refugee claimants. These realities can be better grasped by considering a set of contextual factors when identifying a new analogous group. Rejecting a formalistic analysis in fact helps to prevent the discrimination inquiry from resting on artificial distinctions.

[224] Third, refugee claimants are a historically disadvantaged group. They have experienced considerable historical disadvantage, stereotyping, marginalization and stigmatization in Canadian society (R.F., at paras. 98 and 117; I.F., Canadian Association of Black Lawyers and Black Legal Action Centre, at paras. 21-25; I.F., FCJ Refugee Centre and Madhu Verma Migrant Justice Centre, at paras. 17-21; see also L. Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" (2015), 60 *McGill L.J.* 333, at pp. 361-64; Rahimian, at pp. 125-26; Sealy-Harrington, at pp. 55-56; A. Neve and T. Russell, "Hysteria and Discrimination: Canada's harsh response to refugees and migrants who arrive by sea" (2011), 62 *U.N.B.L.J.* 37). Similarly, refugee claimants form a "'discrete and insular minority' who come within the protection of s. 15" (*Andrews*, at p. 183, per McIntyre J., quoting *Graham v. Richardson*, 403 U.S. 365 (1971), at p. 372; see pp. 151-53, per Wilson J.; R.F., at para. 98). They are "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated" (*Andrews*, at p. 152, per Wilson J.; see also p. 195, per La Forest J.; R.F., at para. 98; see also Rahimian, at p. 119).

[225] Fourth, refugee claimants are a vulnerable and marginalized group in society (R.F., at paras. 98-99 and 117; I.F., Canadian Civil Liberties Association, at para. 8; see also Rahimian, at pp. 120-24; Sealy-Harrington, at p. 56). A number of factors contribute to increasing their vulnerability, including: the situation of poverty or economic precarity in which they find themselves; mental and physical health issues related to exile, to integration difficulties or to uncertainty around their migration status and their future; the language barrier; isolation and the lack of a family or support network; and difficulty accessing the labour market and social services (see N. Dolan and C. Sherlock, "Family Support through Childcare Services: Meeting the Needs of Asylum-seeking and Refugee Families" (2010), 16 *Child Care in Practice* 147; G. Morantz et al., "Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care" (2013), 18 *Child & Family Social Work* 318). All of these factors act as barriers to their integration into Canadian society.

[226] Fifth, international instruments and international organizations support the conclusion that refugee claimant status should be identified as an analogous ground. For example, the United Nations Committee on Economic, Social and Cultural Rights expressly noted in its *General Comment No. 20* that "[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers . . ., regardless of legal status and documentation" (*General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/20, July 2, 2009, at para. 30). Similarly, the United Nations Committee on the Elimination of Racial

Discrimination stated, in its *General recommendation XXX*, that "differential treatment based on citizenship or immigration status will constitute discrimination" and that states parties must "[e]nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status" (*General recommendation XXX on discrimination against non-citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3, August 5, 2004, Articles 4 and 7).

[227] As my colleague Côté J. rightly points out, these international instruments are, of course, not binding in themselves, but they may play a persuasive role in the interpretation of *Charter* rights. The *Charter*'s provisions and principles often bear similarities to those of international human rights instruments, which makes such instruments relevant interpretive tools for clarifying the meaning to be given to our own norms, drafted in general language (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at pp. 348-49, per Dickson C.J., dissenting). As this Court recently reaffirmed, the use of non-binding international sources remains legitimate and instructive (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at paras. 35-38). Here, without being determinative, these sources provide support for my analysis on the existence of a new analogous ground, in light of the other factors examined.

[228] All of these considerations, taken cumulatively, confirm that refugee claimant status should be recognized as an analogous ground. It is among the "jurisprudential markers for suspect distinctions" and "constant markers of suspect

decision making or potential discrimination" (*Corbiere*, at paras. 8 and 11). Refugee claimants are a group that is "disadvantaged in the larger social and economic context" (*Taypotat*, at para. 19, quoting Smith and Black, at p. 336; see also *Corbiere*, at para. 8). This conclusion takes into account the "context of the law which is subject to challenge" as well as the arguments made and evidence adduced concerning "the place of the group [of refugee claimants] in the entire social, political and legal fabric of our society" (*Andrews*, at p. 152; see also p. 154; *Turpin*, at pp. 1331-33; *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497, at paras. 29 and 93). Recognizing refugee claimant status as an analogous ground therefore serves "to advance the fundamental purpose of s. 15(1)" (*Law*, at para. 93).

[229] The first step of the test is satisfied. Section 3 of the *RCR*, on its face, creates a distinction based on the analogous ground of refugee claimant status.

(2) Second Step of the Test Under Section 15 of the *Charter*

[230] At the second step of the s. 15 test, the claimant must demonstrate that the impugned provision imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage suffered by the members of the protected group (*Taypotat*, at para. 20; *Sharma*, at paras. 28 and 51; *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at para. 141, per Wagner C.J., concurring).

[231] This step itself has two parts. First, the claimant must establish that the distinction imposes a burden or denies a benefit. Second, the claimant must prove that the burden is imposed, or the benefit denied, in a discriminatory manner, that is, in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage (Hogg and Wright, at §§ 55:22 and 55:27-55:30.20).

[232] The second step is satisfied in this case. It has been shown (1) that the distinction created by s. 3 of the *RCR* denies a benefit, and (2) that this benefit is denied in a discriminatory manner.

(c) *The Distinction Created by Section 3 of the RCR Denies a Benefit*

[233] As I stated above, the claimant must establish that the distinction imposes a burden or denies a benefit. A distinction *imposes a burden* when it "has the effect of imposing burdens, obligations, or disadvantages on [an] individual or group not imposed upon others" (*Andrews*, at p. 174, per McIntyre J.; see, e.g., p. 151, per Wilson J., and p. 183, per McIntyre J.). Further, a distinction *denies a benefit* when it "withholds or limits access to opportunities, benefits, and advantages available to other members of society" (p. 174, per McIntyre J., dissenting, but not on this point; see also *Vriend*, at para. 89, quoting *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 131).

[234] In the present case, s. 3 of the *RCR* creates a distinction that denies a benefit to refugee claimants. This provision deprives them of financial relief by excluding them

from being eligible for the reduced contribution — an opportunity, benefit or advantage that is, however, available to other members of society.

[235] It is now well settled that "[t]he requirement that a challenged law create a distinction that imposes a burden or denies a benefit operates to weed out s. 15 challenges involving distinctions that do not have a *negative* impact on the claimant" (Hogg and Wright, at § 55:27 (underlining added), citing *Quebec v. A*, at para. 151; see also *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 243, per Bastarache J.; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 37).

[236] In this case, the distinction has a negative and adverse impact. For a refugee claimant's child to be able to attend a childcare facility, the child's parent must necessarily resort to non-subsidized childcare. The price difference between subsidized childcare and non-subsidized childcare is considerable. For example, in 2020 in Quebec, the average daily cost of a non-subsidized childcare space ($38) was more than four times higher than that of a subsidized childcare space ($8.35) (A.R., vol. XI, at p. 72). The refundable tax credit for childcare expenses (at pp. 56-72) does not offset the impact of the distinction, because the credit does not cover the entire cost difference and cannot be paid in advance to refugee claimants, who must pay these particularly high childcare expenses as soon as they use the services (R.F., at para. 7; see, *contra*, *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at pp. 701-4, per Cory and Iacobucci JJ., concurring; see also p. 641, per Sopinka J., and pp. 689-98, per Gonthier J.; Hogg and

Wright, at § 55:27). The distinction therefore retains its "prohibitive character". The distinction created by s. 3 of the *RCR* is discriminatory.

[237] The analysis at this step must take into account the content of s. 3 of the *RCR* and the *Childcare Act*, as well as their purposes and their impact on eligible and ineligible persons (*Andrews*, at p. 168, per McIntyre J.). The impact may be economic, political or social; it may take the form of economic disadvantage or exclusion, physical or psychological harm or social or political exclusion (*Sharma*, at para. 52, quoting *Fraser*, at para. 76).

[238] The primary purpose of the *Childcare Act* is to advance the interests of children (s. 1 para. 1) and their parents (s. 1 para. 2). Consideration of the legislative history and context reveals, first, an intention to offer accessible, high-quality childcare services and, second, a desire to enable parents to participate in the labour market if they so wish. The establishment of the childcare system is characterized by an expansion of the service supply throughout Quebec, at costs that are more affordable. There are laudable objectives underlying these measures: to promote women's access to the labour market; to maximize equality of opportunity; to enhance and improve the education given to children; to recognize the important place occupied by the family as an institution in society; to facilitate the reconciliation of work, family and leisure; to eliminate barriers to parents' economic participation and self-fulfilment; and to reduce poverty (I.F., Centrale des syndicats du Québec, at paras. 7-32, 38-39 and 53; I.F., Canadian Council for Refugees, at para. 5).

[239] The *Childcare Act* provides, however, that the benefit of paying the reduced contribution *may* not be available to *all* parents residing in Quebec. It states that the right of every child "to quality personalized educational childcare services" must be exercised "having regard to the rules set out in this Act relating to access to educational childcare services . . . and the rules relating to subsidies" (s. 2). The *Childcare Act* gives the government the power to determine, by regulation, the cost of and conditions of eligibility for the reduced contribution. In the exercise of its prerogative, the government adopted the *RCR*, s. 3 of which sets out the conditions of eligibility for the reduced contribution. Although the government previously interpreted s. 3 of the *RCR* as including refugee claimants, this is no longer the case — the provision is now interpreted as excluding refugee claimants (A.R., vol. X, at pp. 121-23). This interpretation has been confirmed by the Quebec Court of Appeal and is not being challenged before this Court (C.A. reasons, at paras. 62-67).

[240] There seems at first glance to be a certain discrepancy between, on the one hand, the objectives underlying the establishment of the childcare service supply in Quebec and, on the other, the exclusion of refugee claimants from payment of the reduced contribution (I.F., Centrale des syndicats du Québec, at para. 43; see paras. 33 and 53-54; I.F., Canadian Council for Refugees, at para. 6). Let us take a closer look.

[241] The ineligibility of refugee claimants for the reduced contribution is a "selective exclusion of one group" (*Vriend*, at para. 96). Refugee claimants are excluded "by . . . omission" (para. 98). The impugned provision is an "[u]nderinclusive

ameliorative [provision] that excludes from its scope the members of a historically disadvantaged group" (*Law*, at para. 72). Such provisions "will rarely escape the charge of discrimination" (*ibid.* (emphasis added); see also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 100, per L'Heureux-Dubé J., dissenting, but not on this point). Indeed, this Court warned in *Brooks* that a provision's underinclusiveness "may be simply a backhanded way of permitting discrimination" (p. 1240). What is the situation here?

[242] In my view, the distinction created by s. 3 of the *RCR* is discriminatory. Denying refugee claimants the benefit of paying the reduced contribution has the effect of reinforcing, perpetuating or exacerbating a disadvantage.

[243] Section 3 of the *RCR* "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it" (*Quebec v. A*, at para. 332, per Abella J., dissenting in the result). This provision reinforces, perpetuates or exacerbates their marginalization and their cycle of precarity or exclusion. Refugee claimants are persons "who may well" need to have access to the reduced contribution (*Vriend*, at para. 98). They are among those who are the least advantaged and who have the greatest needs (*Law*, at para. 72). Inability to access subsidized childcare deprives many refugee claimants of the opportunity to integrate fully into society and reach their full potential, for example by holding employment, learning French or pursuing training. Overall, refugee claimants' ineligibility hurts their employment prospects, leads to dependence on social assistance, contributes to their isolation and

stigmatization, undermines their sense of belonging and hinders their integration in Quebec (Dr. Hanley, at paras. 20-21 and 30-58; Morantz et al.; Dolan and Sherlock; R.F., at paras. 117-21; I.F., FCJ Refugee Centre and Madhu Verma Migrant Justice Centre, at paras. 30-31; I.F., Income Security Advocacy Centre, at paras. 21-27; I.F., Canadian Council for Refugees, at para. 26).

[244] Section 3 of the *RCR* sends the message that refugee claimants and their children "[are] inferior and less deserving of benefits" (*Egan*, at para. 161, per Cory and Iacobucci JJ., dissenting). This provision reinforces negative attitudes and perpetuates prejudice and stereotyping to the effect that refugee claimants are financial burdens, queue-jumpers whose claims for refugee protection are mostly bogus, and individuals who have come to take advantage of Quebec's hospitality, generosity and social assistance (see *Canadian Doctors for Refugee Care*, at paras. 835 and 837-38; *Y.Z. v. Canada (Citizenship and Immigration)*, 2015 FC 892, [2016] 1 F.C.R. 575, at paras. 124 and 128; *Feher v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335, [2019] 3 F.C.R. 207, at paras. 254 and 256). Finding that s. 3 of the *RCR* is discriminatory serves not only to counter this bleak message but also to denounce and convey disapproval of such treatment of a disempowered group (T. Skolnik, "Expanding Equality" (2024), 47 *Dal. L.J.* 195, at pp. 217-18).

(b) *Conclusion on the Second Step of the Section 15 Test*

[245] I am of the view that s. 3 of the *RCR* denies a benefit in a discriminatory manner. It treats the respondent as if she were subordinate, inferior, less worthy or undeserving because of her status as a refugee claimant. It has the effect of "withholding or limiting access to opportunities, benefits, and advantages available to other members of society, solely on the ground that the [respondent] is a member of a particular group deemed to be less able or meritorious than others" (*Miron*, at para. 146). The respondent is denied "the right to realize . . . her potential and to live in the freedom accorded to others, solely because of the group to which [she] belongs" (*ibid.*).

[246] The respondent has therefore shown that s. 3 of the *RCR* infringes her right protected by s. 15 of the *Charter*. The two steps of the test are satisfied.

B. *The Infringement of the Right Protected by Section 15 of the Charter Is Not Justified Under Section 1*

[247] At the first step of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103, it is necessary to identify the objective of the infringing measure (here, the exclusion of refugee claimants) and then determine whether it is an objective that is "pressing and substantial" and "of sufficient importance" (pp. 138-39; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at para. 45; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 352, per Dickson C.J., and at p. 361, per Wilson J.).

[248] The appellant argues that the exclusion of refugee claimants is "part of the means chosen to further the objective of the specific provision in question" (*M. v. H.*, [1999] 2 S.C.R. 3, at para. 101; see para. 100). The objective of s. 3 of the *RCR* is [TRANSLATION] "to provide financial assistance to persons who have a sufficient connection with Quebec" (A.F., at para. 139 (footnote omitted)). It can therefore be inferred from this objective, according to the appellant, that parents who are eligible under s. 3 of the *RCR* have a "sufficient connection with Quebec" but that refugee claimant parents do not have such a connection, which means that the ineligibility of these persons helps further the objective of s. 3 of the *RCR* (paras. 139, 149, 154 and 157).

[249] Respectfully, I have some reservations about the possibility that the objective described by the appellant is "properly stated" (*Frank v. Canada (Attorney General*), 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46) and is actually "of value" for the purposes of considering its "pressing and substantial" nature, the rational connection and minimal impairment (*R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374, at para. 116, quoting *Frank*, at para. 46; see also *Frank*, at para. 38).

[250] However, it is unnecessary to decide these questions, despite their importance, because the appellant fails in any event at the last step of the *Oakes* test. I agree with my colleague Rowe J. that the deleterious effects of the infringing measure outweigh its salutary effects.

[251] The respondent rightly points out that [TRANSLATION] "[t]he deleterious effects of the exclusion of persons claiming refugee protection are profound, serious and numerous, not only for these persons and their children, but also for society in general" (R.F., at para. 145; see para. 146; see also C.A. reasons, at para. 115).

[252] The appellant, for his part, struggles to identify any salutary effects. He writes, without providing further explanations, that including refugee claimants in s. 3 of the *RCR* could [TRANSLATION] "jeopardiz[e] the sustainability of the services offered by the state" (A.F., at para. 157).

[253] The appellant's position is unconvincing. It is not supported by any evidence. Nor did the appellant see fit to expand this point further. The consequences of refugee claimants being eligible are therefore, to say the least, speculative. It is true that their inclusion will increase the total number of persons eligible for the reduced contribution. However, including them [TRANSLATION] "does not force [the state in Quebec] to disburse on an immediate basis . . . additional sums . . . by creating . . . additional spaces right away" (2024 QCCA 346, at para. 19; see I.F., Canadian Civil Liberties Association, at para. 23). The reality is that a person who is eligible for the reduced contribution is not assured of a subsidized childcare space. As the Quebec Court of Appeal explained, refugee claimants [TRANSLATION] "will not have automatic access to the reduced contribution, but rather a <u>possibility</u> of accessing it" (C.A. reasons, at para. 120 (emphasis added)).

[254] The appellant has therefore not established that the salutary effects of the omission of refugee claimants (the infringing measure) outweigh the deleterious effects. I am rather of the view that "the impact of the rights infringement is disproportionate to the likely benefits of the impugned [measure]" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 76). The infringement of the respondent's right is not justified under s. 1.

C. *The Appropriate Remedy Is to Read Into Section 3 of the RCR*

[255] My colleague Karakatsanis J. proposes to read eligibility for the reduced contribution into s. 3 of the *RCR* for all parents residing in Quebec who are awaiting a decision on their claim for refugee protection made under the *IRPA* (paras. 111-12). This remedy would, for all practical purposes, amount to adding a ninth subparagraph to s. 3 of the *RCR*.

[256] I agree with my colleague. This solution has "sufficient . . . precision to justify the remedy of reading in" (*Vriend*, at para. 159; see also paras. 155-58). Section 3 of the *RCR* is only "peripherally problematic" (*R. v. Bissonnette*, 2022 SCC 23, [2022] 1 S.C.R. 597, at para. 127, quoting *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 111). Its constitutional defect can be precisely targeted (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at paras. 113-16). As well, refugee claimants are a "smaller" group in comparison with all of the parents already eligible (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 712; see also *Vriend*, at para. 161).

[257] This remedy also has the advantage of preserving the benefits that s. 3 of the *RCR* already provides to parents who are currently eligible (see *Vriend*, at paras. 146, 150, 153, 161 and 169; *Miron*, at para. 178; see also I.F., Canadian Association of Black Lawyers and Black Legal Action Centre, at paras. 32-33). The preservation of benefits promotes the rule of law (*Ontario v. G*, at paras. 111-12 and 116). It is difficult to believe that the government would prefer to "sacrifice" the eight existing categories of eligibility (*Vriend*, at para. 169; *Ontario v. G*, at para. 114). Striking down s. 3 of the *RCR* could "undermine" the objectives of the *RCR* and the *Childcare Act* (see *Sharpe*, at para. 122; *Ontario v. G*, at para. 114). Such a drastic remedy "would be a much more profound intrusion" into the legislative domain (D. Pothier, "*Charter* Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993), 19 *Queen's L.J.* 261, at p. 298). More fundamentally, one might even ask "why should the court/tribunal take the responsibility of removing benefits where there is no constitutional objection to the provision of benefits as such" (pp. 303-4). One of the advantages of reading in is precisely the fact that it favours "equal vineyards" over "equal graveyards" (*Schachter*, at pp. 701-2). Depriving *all* parents of such a benefit is a kind of "equality with a vengeance" (p. 702; see also R. Leckey, "Remedial Practice Beyond Constitutional Text" (2016), 64 *Am. J. Comp. L.* 1, at pp. 14-15).

[258] As I explained in *Bissonnette*, the remedy of reading in "allows a court to extend the reach of a statute so that it includes what was wrongly excluded from it" (para. 126). I then gave the example of an underinclusive statute: ". . . where a statute unconstitutionally excludes a group of individuals, a court may find that the statute

includes the group rather than striking it down” (*ibid.*; see, e.g., *Miron*). In my view, the appropriate remedy in this case is to read in the refugee claimants that s. 3 of the *RCR* “wrongly excludes” (*Schachter*, at p. 698 (emphasis deleted); see I.F., Canadian Association of Black Lawyers and Black Legal Action Centre, at para. 31; I.F., Canadian Civil Liberties Association, at para. 25).

[259] The remedy granted by the Quebec Court of Appeal is more limited than the one proposed by my colleague Karakatsanis J. The Court of Appeal held that the appropriate remedy was to read [TRANSLATION] “parents who reside in Quebec for the purpose of a claim for refugee protection <u>while holding a work permit</u>” into s. 3 subpara. 3 of the *RCR* (C.A. reasons, at paras. 9, 120 and 125 (emphasis added)).

[260] At first glance, the remedy granted by the Quebec Court of Appeal is defensible. From 2015 to 2018, the government broadly interpreted s. 3 subpara. 3 of the *RCR* as making all refugee claimants with an “open” work permit eligible for the reduced contribution. That interpretation departed from the text of the provision, since the refugee claimants were not staying temporarily in Quebec “primarily for work purposes” and did not hold a “closed” work permit (A.R., vol. X, at pp. 121-23). However, in 2018, the government stopped giving this broad interpretation to s. 3 subpara. 3 of the *RCR*. In a letter sent to managers of subsidized daycare centres, it stated that refugee claimants do not fall within any category of eligibility set out in s. 3 of the *RCR* — not even in s. 3 subpara. 3 or 5 of the *RCR* — and that they are therefore

excluded from the benefit of paying the reduced contribution (p. 121). The Quebec Court of Appeal has confirmed the validity of this interpretation (paras. 61-67).

[261] Given this history, one might be led to believe that if the government had known this provision would be found unconstitutional, it would have made the necessary changes to *once again* include refugee claimants who hold a work permit. Indeed, the broad interpretation that the government gave to s. 3 of the *RCR* between 2015 and 2018 is an "indication" or "evidence" of what it may decide to do to remedy the constitutional defect in s. 3 of the *RCR* (*Miron*, at para. 177; see also para. 180). This is why the Quebec Court of Appeal's solution makes some sense.

[262] However, and with all due respect to the Quebec Court of Appeal, I cannot agree with its proposed solution. The remedy granted does not go far enough to protect the rights of refugee claimants in Quebec. More specifically, it is not coextensive with the nature, scope and breadth of the *Charter* infringement (*Ontario v. G*, at paras. 108, 112 and 116). This is the case because the requirement that refugee claimants hold a work permit — even an "open" one — does not take into account *all* of the disadvantage suffered by refugee claimants and reinforced, perpetuated or exacerbated by their ineligibility. It is true, in fairness to the Quebec Court of Appeal, that the question of immediate participation in the labour market does not arise in the case of a refugee claimant who does not hold a work permit — such a parent is not authorized to work. Section 3 of the *RCR* is not what prevents the parent from doing so. However, the disadvantage suffered goes beyond this. Access to affordable childcare makes it

possible, among other things, for refugee claimants to learn French, go to school and take training — all important tools for integrating into society, ending marginalization and breaking a cycle of precarity or poverty. I also note that, apart from s. 3 subpara. 3 of the *RCR* (temporary workers), no category of eligibility requires that a parent hold an "open" or "closed" work permit (A.F., at paras. 43, 144 and 146). For all these reasons, I am of the view that the remedy proposed by my colleague Karakatsanis J. is preferable to the one granted by the Quebec Court of Appeal.

[263] In this case, it is clear that the government would have included refugee claimants in s. 3 of the *RCR* if it had been aware of the constitutional problem posed by their exclusion (*Bissonnette*, at para. 128, quoting *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 51; see also *Ontario v. G*, at para. 114).

[264] Courts must exercise great caution in determining in the abstract what a legislature or government *would do*. In some cases, courts will have received an "express invitation" to modify the provision in a specific manner (*Vriend*, at para. 171; see also *Miron*, at para. 177). In other cases, it will be clear that the legislature or government would not have adopted the provision in the form contemplated, since the modifications would undermine the objective sought (see, e.g., *Bissonnette*, at paras. 130-33; *Schachter*, at pp. 707-9). Finally, in other situations, it will not be clear that the government or legislature *would have* adopted the provision in the form contemplated. This will be the case, for example, where a court is required to make "*ad hoc* choices from a variety of options" that comply with the Constitution (*Ontario v. G*, at para. 115,

quoting *Schachter*, at p. 707; see *Schachter*, at pp. 705-6; see also, e.g., *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 168-69; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 252-53). In such cases, the appropriate remedy is a declaration of invalidity. It is not for a court to make these choices — it must refrain from making "a speculative foray into legislative policy for which judges are ill-equipped" (A. Sangiuliano, "A Kick in the Caboose: Recovering the Judicial Horizontality of Constitutional Equality Rights" (2025), 33:4 *Const. Forum* 31, at p. 37). If a court has to make "*ad hoc* choices from a variety of options" in order to read something into a problematic provision (*Schachter*, at p. 707; *Ontario v. G*, at para. 115), this is a sign that the modification raises "definitional and policy questions" that are best left to the legislature or government (N. Duclos and K. Roach, "Constitutional Remedies as 'Constitutional Hints': A Comment on *R.* v. *Schachter*" (1991), 36 *McGill L.J.* 1, at p. 19, fn. 64, quoting *Califano v. Westcott*, 443 U.S. 76 (1979), at p. 92).

[265] In the present case, it cannot be said that no option "was pointed to with sufficient precision by the interaction between the statute [and the regulation] in question and the requirements of the Constitution" (*Schachter*, at p. 707; see also *Ontario v. G*, at para. 115). On the contrary, one solution emerges: including refugee claimants in s. 3 of the *RCR* as a ninth category of eligibility. I doubt that adding other criteria (e.g., holding a work permit) is a solution that complies with the Constitution. Furthermore, requiring refugee claimants to hold the selection certificate referred to in s. 3 subparas. 5 to 8 of the *RCR* could distort the legislative and regulatory regime in force, since such a requirement is not entirely transposable to the situation of a parent

waiting for a decision to be rendered on their claim for refugee protection (see *Québec Immigration Regulation*, CQLR, c. I-0.2.1, r. 3, ss. 21 and 22; see also A.F., at paras. 2, 41, fn. 33, 103 and 148). Accordingly, given the nature, scope and breadth of the *Charter* infringement, the solution "pointed to with sufficient precision by the interaction between the statute [and the regulation] in question and the requirements of the Constitution" (*Schachter*, at p. 707; see *Ontario v. G*, at para. 115) is to include refugee claimants as a ninth category. Given that reading in is the appropriate remedy in this case, there is no need for a declaration of invalidity (*R. v. Albashir*, 2021 SCC 48, [2021] 3 S.C.R. 531, at para. 46; *Ontario v. G*, at para. 163).

[266] The government is free to amend the *RCR* at a later date if it deems this expedient. This Court "should not lose sight of the fact that its word will very likely not be the last one" (Pothier, at p. 303). The government "can always subsequently intervene on matters of detail that are not dictated by the Constitution" (*Vriend*, at para. 159, quoting K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at p. 14-64.1). Indeed, it is "*always* free to alter any judicially-imposed Charter remedy (whether extension or invalidation or something else), as long as it remains within the bounds of the courts' interpretation of what is constitutionally required" (N. Duclos, "A Remedy for the Nineties: *Schachter* v. *R.* and *Haig & Birch* v. *Canada*" (1992), 4 *Const. Forum* 22, at p. 26 (emphasis in original)). This is especially so given the fact that governments "are not bound to the dichotomous choice of extending or invalidating that seems to constrain judges" (Duclos and Roach, at p. 19). However, unless and until the legislature intervenes, reading in is the solution that must prevail.

D. *Conclusion*

[267] I would allow the appeal in part, varying the Quebec Court of Appeal's declaration. Section 3 of the *RCR* infringes s. 15 of the *Charter*. In excluding by omission parents who reside in Quebec for the purposes of a claim for refugee protection, s. 3 of the *RCR* creates a distinction based on a protected ground — refugee claimant status. This distinction constitutes direct discrimination. Such discrimination is, however, not justified under s. 1. In the circumstances, refugee claimants should be read into s. 3 of the *RCR* as a ninth category of eligible parents. With costs in this Court to the respondent.

English version of the reasons delivered by

CÔTÉ J. —

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APPENDIX

I. Introduction

[268] Discrimination based on sex, as a particularly unjust form of differentiation, calls for clear and continual denunciation. For a long time now, women have been fighting steadily to assert their right to equality before the law, in a society where they still too often remain disadvantaged (*Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.), at para. 16; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 ("*Alliance*")). I am therefore in complete agreement with this Court's observations to the effect that women are disadvantaged in the labour market because of their parental responsibilities (*Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 103).

[269] To remedy these historical injustices, the National Assembly of Quebec has taken a pioneering approach to childcare services. The objective in establishing the first provincial network of state-subsidized educational childcare facilities was to enhance the quality of the educational services intended for children and to facilitate

the reconciliation of parental and professional responsibilities. Thus, this scheme is also intended to provide support especially to women in accessing the labour market. By meeting parents' childcare needs at a reduced cost, this scheme helps to eliminate a major barrier to women's full participation in the labour market and to their economic independence.

[270] Where an ameliorative scheme is in issue, the first step of the analysis under s. 15(1) of the *Canadian Charter of Rights and Freedoms* requires focusing particular attention on causation. The mere fact that the excluded group includes certain members of the protected group who, of necessity, have no access to the said *ameliorations* is not enough to find that the first step of the s. 15(1) test is satisfied. Otherwise, this would lead to circular reasoning that would have the effect of discouraging governments from putting in place any program to redress social inequalities. With great respect, I am of the view that a conclusion to the contrary is the product of such reasoning.

[271] The differentiation provided for in the *Reduced Contribution Regulation*, CQLR, c. S-4.1.1, r. 1 ("*RCR*") (see Appendix), s. 3 of which is being challenged by the respondent, Bijou Cibuabua Kanyinda, is based on refugee claimant status, not on sex. In other words, the distinction found in s. 3 of the *RCR* is based not on being a woman, but on being a refugee claimant. In addition, even if one were to accept that s. 3 of the *RCR*, in its impact, creates a distinction based on being a woman, the evidence does not support a finding that there is a disproportionate impact on women as a result.

In this case, I am of the opinion that the evidence does not establish that the first step of the s. 15(1) test is satisfied on the basis of the enumerated ground of sex, and, for this reason, s. 3 does not infringe the right to equality.

[272] In addition, the second step of the s. 15(1) test requires that it be shown that the law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating the protected group's disadvantage. In my view, this has not been shown. Even if one were to accept that s. 3 of the *RCR* denies a benefit to women refugee claimants, it does not follow that the provision reinforces, perpetuates or exacerbates the protected group's disadvantage. Indeed, the non-inclusion of women refugee claimants in s. 3 of the *RCR* simply leaves untouched, without worsening, the pre-existing disadvantage between men and women, that is, the increased difficulty that women have in entering the labour market.

[273] Moreover, even if one were to assume — without accepting — that there is an infringement of the right to equality on the basis of sex, the infringement would be justified under s. 1 of the *Canadian Charter*. The state is pursuing the pressing and substantial objective of limiting access to the reduced contribution to persons who have a sufficient connection with Quebec. The salutary effects of this measure, that is, ensuring the sustainability of the services offered by the state, outweigh the deleterious effects that allegedly result from the infringement of the right to equality, given that the respondent's evidence is unpersuasive as regards the number and proportion of women refugee claimants affected by the measure.

[274] Further, if there were an infringement of s. 15 that was not justified under s. 1, the remedy could not be to give all refugee claimants access to the reduced contribution. In light of the legislature's intention to address the increased difficulty that women have in entering the labour market, and the law's purpose of facilitating the reconciliation of parental responsibilities with professional or student responsibilities, it cannot be inferred that the legislature would amend the regulation to include all refugee claimants without exception. Indeed, the legislature would limit itself to giving access to the reduced contribution only to refugee claimants who hold a work permit or study permit. To conclude otherwise amounts to overriding the legislature's parliamentary sovereignty.

[275] Finally, given that the *RCR* creates a distinction based on refugee claimant status, it must be determined whether this distinction is prohibited. In my opinion, it is not. Refugee claimant status cannot be recognized as an analogous ground mainly because it is above all temporary rather than immutable in nature, and, moreover, the evidence in this case does not allow the consequences and implications of such recognition to be assessed. There would be a significant impact both on the immigration system and on much social legislation across the country.

[276] Even if I accepted — which I do not — that refugee claimant status is an analogous ground, it does not follow that the non-inclusion of refugee claimants in s. 3 of the *RCR* reinforces, perpetuates or exacerbates a disadvantage. Indeed, the evidence shows that they are granted a tax credit for the expenses incurred for a non-subsidized

childcare space and that the difference between the cost of such a space and the cost of a subsidized childcare space is minimal. The distinction would therefore not be discriminatory.

[277] Even if one were to assume — without accepting — that there is an infringement of the right to equality based on the analogous ground of being a refugee claimant, the infringement would be justified under s. 1. The salutary effects of the non-inclusion of refugee claimants in s. 3 of the *RCR*, that is, ensuring the sustainability of the services offered by the state, outweigh the deleterious effects that allegedly result from the infringement of their right to equality. In fact, the harm in the present case is especially limited given the uncertain number of refugee claimants affected by the measure and the fact that they can claim a tax credit, as mentioned above. As well, for the same reasons as in the case of discrimination based on sex, the tailored remedy in this case would again be to grant access to the reduced contribution only to refugee claimants with a work permit or study permit, rather than to all refugee claimants without exception.

[278] For these reasons, I am of the view that this appeal should be allowed.

II. Analysis

A. *Section 3 of the RCR Does Not Infringe the Right to Equality on the Basis of the Enumerated Ground of Sex*

[279] To reiterate, the s. 15(1) framework involves two steps. The first step is to consider whether the impugned law, on its face or in its impact, creates a distinction based on a protected ground; the impact must fall disproportionately on the claimant group. The second step seeks to determine whether this impact imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage (*R. v. Sharma*, 2022 SCC 39, [2022] 3 S.C.R. 147, at para. 31; *Fraser*, at para. 27).

[280] Here, I cannot conclude that the respondent has discharged her evidentiary burden at each of these steps and thus that the right to equality has been infringed.

(1) The First Step of the Section 15(1) Test Is Not Satisfied on the Basis of the Enumerated Ground of Sex

[281] The first step of the s. 15(1) test is not satisfied on the basis of the enumerated ground of sex. Section 3 of the *RCR* does not create a distinction based on the enumerated ground of sex and, if such a distinction does exist, it causes no disproportionate impact.

(a) *Causation in the Case of Ameliorative Legislation*

[282] The first step of the s. 15(1) test is focused particularly on causation and the comparative exercise. At this stage, the claimant "must present sufficient evidence to prove the impugned law, in its impact, *creates or contributes to* a disproportionate

impact on the basis of a protected ground" (*Sharma*, at para. 42 (emphasis in original), citing *Fraser*, at para. 60; see also *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at para. 34; *Alliance,* at para. 26; *Symes v. Canada*, [1993] 4 S.C.R. 695, at pp. 764-65). *Sharma* did not alter the first step of s. 15(1) test, but rather clarified the standard by which courts must assess the impact of the law on the excluded group. Below I review the law as set out in *Sharma* with regard to the first step of the test.

[283] *Sharma* emphasized in particular that "[c]ausation" is a "central issue" (para. 42; see also *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 64). It follows that the analysis is concerned first and foremost with the impugned legislative measure. Indeed, it must be considered whether the measure has a disparate impact on the members of the protected group in order to determine whether the state intervention has the effect of "widen[ing] the gap between the historically disadvantaged group and the rest of society rather than narrowing it" *(Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 332, per Abella J., dissenting in the result).

[284] Relying on *Symes*, my colleagues Brown and Rowe JJ. noted that a distinction must be maintained between the adverse effects *caused* — in whole or in part — by the impugned legislative measure and the effects that *exist independently* of that measure (*Sharma*, at para. 44, quoting *Symes*, at p. 765). While general evidence of the disadvantage suffered by a group may be relevant at both steps of the analysis,

such evidence is incapable on its own of demonstrating that a distinction created by a law has a disproportionate impact (*Sharma*, at para. 71). Rather, the evidence must establish a sufficient link between the distinction made by the legislative measure and the disproportionate impact it has on the members of the group.

[285] Thus, when applied correctly, the first step of the analysis cannot require the state to redress all social inequalities. Incrementalism, a principle deeply grounded in this Court's jurisprudence, ensures that the state can "be given reasonable leeway" in order to deal incrementally with social inequalities (*Sharma*, at para. 65, quoting *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 317):

> Incrementalism is deeply grounded in *Charter* jurisprudence. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, the Court accepted that the state may implement reforms "<u>one step at a time</u>, addressing itself to the phase of the problem which seems most acute to the legislative mind" (p. 772 (emphasis added)). Expanding on the passage in *Edwards Books*, La Forest J. confirmed in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, that a legislature "must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety" (p. 317). He also emphasized that, generally, courts "should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality" (p. 318). See also *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; and *Auton*, at paras. 61-62.

[286] My colleague Rowe J. is therefore correct in stating that "the legislature is under no obligation to create a particular benefit" (para. 124, quoting *Auton (Guardian*

ad litem of) v. British Columbia (Attorney General), 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41). However, I would express certain reservations about his comment that s. 15(1) "does impose an obligation on governments to remedy discriminatory underinclusion when they do choose to provide benefits" (para. 125). It is true that this Court has asserted on several occasions that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner" (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 73, citing *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, *Haig v. Canada (Chief Electoral Officer*), [1993] 2 S.C.R. 995, at pp. 1041-42, *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at p. 655, and *Miron v. Trudel*, [1995] 2 S.C.R. 418). However, it is clear that, when read together with *Sharma*, such an assertion must be tempered in the context of an ameliorative law in order to avoid circular reasoning leading to an automatic finding of discrimination.

[287] Indeed, where a legislature specially enacts a law for the purpose of redressing social inequalities suffered by a historically disadvantaged group, the causation requirement is particularly important. Without this requirement, any legislative measure aimed at improving the lot of a protected group will inevitably lead to the conclusion that the first step is satisfied if not all of the members of the protected group are covered by the measure. Here is what such circular reasoning looks like:

- There is a situation of inequality in society between a protected group, women, and an unprotected group, men;

- The state decides to act incrementally to remedy the situation and enacts a law to improve the lot of only one part of the protected group, namely women with characteristic X;

- The members of the protected group who are also part of the group excluded from the benefit of the law, namely women with characteristic Y, remain in a situation of inequality in relation to the comparable members of the unprotected group, namely men with characteristic Y, because the ameliorative law does not apply to them;

- Since they remain in the initial situation of inequality, the ameliorative law thus creates a distinction between the members of the unprotected group, men with characteristic Y, and the members of the protected group who are also part of the group excluded from the benefit of the law, women with characteristic Y.

[288] This circular reasoning also continues at the second step of the s. 15 analysis, which involves determining whether the distinction created by the law is discriminatory. The only possible conclusion will be that the ameliorative law "denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating [the] disadvantage" (*Sharma*, at para. 28, citing, among others, *Fraser*, at para. 27) that already exists between the protected group and the unprotected group. This is the case because the ameliorative law does not alleviate this disadvantage for the members of

the group excluded from its benefit and the comparable members of the protected group. In other words, to reuse the above example, the ameliorative law is discriminatory because it reinforces, perpetuates or exacerbates the pre-existing disadvantage between women with characteristic Y and men with characteristic Y.

[289] Thus, in the context of an ameliorative law, imposing an obligation on the state to provide any benefit in a non-discriminatory manner could paradoxically discourage state initiatives aimed at reducing inequalities, because the *Canadian Charter* would then impose a sort of "all or nothing" burden.

[290] Moreover, such an approach means that grounds for exclusion from the benefit of an ameliorative law that are unrelated to a protected ground become analogous grounds without having been recognized as such. Indeed, because this approach prevents the state from excluding any member of a protected group from the benefit of an ameliorative law, any other ground of exclusion that is unrelated to a protected ground, like income, immigration status or place of residence, becomes *de facto* an analogous ground. This in itself amounts to doing what Rowe J. wants to avoid under the s. 15 framework: using multiple forms of disadvantage as a disguised way to find discrimination on the basis of an unrecognized analogous ground (para. 153).

[291] Let me be very clear: the legislature could not decide to enact an ameliorative law to address the inequalities suffered by women while excluding — directly or indirectly — homosexual women, for example. However, it can exclude

certain groups in society that include women by making distinctions that are based not on a protected ground, but on grounds like income, immigration status or place of residence. These distinctions will necessarily exclude some women, but the resulting exclusion is not sufficient in itself to satisfy the first step of the analysis.

[292] Finally, with respect, my reading of *Eldridge* differs from that given to it by my colleagues Karakatsanis and Rowe JJ. in support of their reasons. *Eldridge* involved a law that created health care and hospitalization schemes for the public. The province did not, however, provide sign language interpreters for deaf persons, even though it had been established that effective communication was an indispensable component of the delivery of medical services for such persons. The *Canadian Charter* infringement therefore stemmed from "a failure to ensure that [these persons] benefit equally from a service offered to everyone" (para. 66). In light of this, the Court then wrote that "this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons" (para. 73).

[293] That case recognized that, when the state offers a service, the persons *covered* by that service are entitled to non-discriminatory access to the service and, therefore, that the state must act accordingly and provide accommodation if necessary. This is what is meant by the words of s. 15: "Every individual . . . has the right to the . . . equal benefit of the law . . . ." However, if a law does not apply to a person because of a ground not protected by s. 15 — like income or place of residence, for example — that person cannot claim the benefit of the law. In other words, *Eldridge* did not

recognize that, when the state decides to offer a service, it must offer it to everyone who would like to receive it. Such an interpretation would be completely at odds with the idea that s. 15 does not impose a positive obligation on the state to remedy the inequalities that exist in our society.

(b) *Causation Has Not Been Established in This Case on the Basis of the Enumerated Ground of Sex*

[294] This therefore brings us to the application of these principles to the case before us. Respectfully, my colleagues Karakatsanis and Rowe JJ. do not place sufficient emphasis on causation and rely unduly on the intersectional nature of the respondent's claim to find that the first step of the analysis is satisfied. When properly applied, this first step leads to the conclusion that the respondent has not established a causal link between the impugned legislative measure and the disproportionate impact suffered by women. Reaching a different conclusion is contrary to the principles enunciated by this Court in *Sharma*. Here is my explanation.

[295] The mere fact that some women are affected by the exclusion set out in s. 3 of the *RCR* is not sufficient to establish that this provision causes or has contributed to the disproportionate impact. As stated at the outset, it is not a matter of calling into question the systemic inequalities between men and women when it comes to parental responsibilities and the resulting economic disadvantages. It was in fact to respond to this reality that the legislature introduced an ameliorative scheme: the *Educational*

Childcare Act, CQLR, c. S-4.1.1 ("*Act*"). This statute gives the Minister the power to determine, by regulation, the conditions of eligibility for the reduced contribution (s. 106). Its objective is clear: to encourage women's participation in the labour market and promote a more egalitarian society (s. 1). It is therefore not surprising that the group of excluded persons — in this case refugee claimants — includes women, even though they are members of a protected group.

[296] To illustrate the foregoing, let us take the example of s. 3 subpara. 1 of the *RCR*, which applies to women who are Canadian citizens, and s. 3 subpara. 2 of the *RCR*, which applies to women who are permanent residents. In contrast, women refugee claimants are excluded by operation of s. 3 of the *RCR*. It follows that that this section does not create a distinction between men and women in general, but rather between different groups of women. Thus, women are disadvantaged not because of their sex, but because they are refugee claimants. Sex is therefore not the source of the distinction under s. 3 of the *RCR*; rather, the distinction is based on refugee claimant status.

[297] However, as I explained, the non-inclusion of certain segments of the population cannot be unconstitutional in its impact given the principle of incrementalism, which requires that s. 15 not "undermine the state's ability to act incrementally in addressing systemic inequality" (*Alliance*, at para. 42). In light of this principle, the Minister may choose to limit the categories of persons eligible for the reduced contribution on the basis of criteria that are not protected by s. 15(1) of the

Canadian Charter. In this regard, the Minister thus chose, by regulation, to remedy certain inequalities between men and women, but without addressing all of them — which this Court's jurisprudence expressly allows the Minister to do. For the categories of persons not included in s. 3 of the *RCR* — such as refugee claimants — it is clear that the Minister decided not to take action on existing inequalities between the sexes. That choice is certainly open to criticism from a political standpoint or from the standpoint of societal evolution; however, this does not allow a court to find that the requirements of the first step of s. 15(1) are met.

[298] Moreover, in addition to the fact that distinguishing between different groups of women on the basis of refugee claimant status is lawful, s. 3 of the *RCR* does not infringe s. 15(1) by leaving a disadvantage between *men* refugee claimants and *women* refugee claimants unaffected. The Court made this clear in *Sharma*: ". . . leaving a gap between a protected group and non-group members unaffected does not infringe s. 15(1)" (para. 40 (emphasis deleted)). Thus, leaving such a disadvantage unaffected in this way is not enough to satisfy the first step of the s. 15(1) test.

[299] I add that there is a distinction to be made between the legislative measure in this case and the one at issue in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. *Vriend* concerned an Alberta law that prohibited discrimination in several areas of public life and established the Human Rights Commission to deal with complaints of discrimination. Although the law listed a number of prohibited grounds of discrimination, sexual orientation was not included among them as a separate ground.

Vriend indicates that where a law provides for exclusions, their effects must be understood in the context of the nature and purpose of the law (para. 94). Thus, in *Vriend*, this Court took into account the fact that the legislature had established a comprehensive scheme to address discrimination in a broad sense, not a specific type of discrimination. In that context, the selective exclusion of a particular group from the comprehensive protection provided for in the law had a very different effect. Added to this were the difficulties associated with the denial of an effective legal recourse, that is, making a formal complaint and seeking a remedy based on this separate ground of exclusion.

[300] In this case, s. 2 and s. 106 para. 1(26) of the *Act* expressly contemplate limits on access to subsidized childcare services. The Minister determines these limits by regulation:

> **106.** The Government may, by regulation, for part or all of Québec,
>
> . . .
>
> (26) determine the terms and conditions for payment of the parental contribution set by the Government and define the cases in which a parent may be fully or partially exempted from paying that contribution for all or some services, as specified;

[301] We are therefore not dealing with a measure as broad or generous as the one at issue in *Vriend*. Furthermore, s. 2 of the *Act* states that a child's right "to quality personalized educational childcare services" (para. 1) must "be exercised having regard to . . . the rules relating to subsidies, including those concerning the allocation of

subsidized childcare spaces" (para. 2). It follows that a child does not have an absolute right to a subsidized space: access to these services is in fact limited.

[302] In this context, it cannot be asserted that the measure provided for in s. 3 of the *RCR* to improve the lot of women creates a distinction based on sex. Such an assertion disregards the real basis for the causal link between the impugned provisions and their impact, that is, refugee claimant status.

[303] This conclusion would suffice to dispose of the issue of discrimination based on sex in this case. That being said, I will proceed with my analysis anyway, because, even assuming that the distinction at issue is based on the enumerated ground of sex and that causation has been shown, I am of the view that it has not been established that the impact of the provision is disproportionate.

(c) *Comparative Exercise Required at the First Step of the Section 15(1) Test*

[304] As I indicated at the outset, the first step of the s. 15(1) test also has a comparative aspect, in that the impact of the legislative measure must in fact be "disproportionate" (*Sharma*, at para. 41; see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164). All laws have, to varying degrees, an "impact" on people. It must therefore be shown that the legislative measure has a *disproportionate* impact "on a protected group, as compared to non-group members" (*Sharma*, at para. 40). As this Court noted in *Andrews*, "the main consideration must

be <u>the impact of the law</u> on the individual or the group concerned" (p. 165 (emphasis added)).

[305] Two types of evidence will assist in showing that the impugned law has a disproportionate impact: (1) evidence about the "full context of the claimant group's situation" (*Sharma*, at para. 49, and *Fraser*, at para. 57, both quoting *Withler*, at para. 43); and (2) evidence about "the outcomes that the impugned law or policy . . . has produced in practice" (*Sharma*, at para. 49, quoting *Fraser*, at para. 58). Ideally, both of these types of evidence should be used to establish such a disproportionate impact.

(d) *The Comparative Exercise Required at the First Step of the Section 15(1) Test Does Not Lead to the Conclusion That Section 3 of the RCR Has a Disproportionate Impact*

[306] In my view, the evidence adduced in this case by the respondent does not show that s. 3 of the *RCR* creates a distinction by having a disproportionate impact.

[307] With regard to the protected group's situation, I agree with the Attorney General of Quebec that the Court of Appeal confined itself to noting the historical disadvantage suffered by women, without conducting a true comparative exercise before finding a distinction based on sex. Indeed, at this step, the Court of Appeal does not seem to have carried out a thorough analysis: it simply quoted an excerpt from *Fraser*, stating that "women bear a disproportionate share of the child care burden in Canada", and cited the expert evidence adduced by the respondent before concluding

that these elements were sufficient to establish that s. 3 of the *RCR* creates a distinction based on sex by excluding refugee claimants who hold a work permit from the subsidized daycare program (2024 QCCA 144, at para. 99, quoting *Fraser*, at para. 103). Thus, the Court of Appeal was of the view that the first part of the test was satisfied solely on the basis of these two elements.

[308] With respect, I disagree with that approach. While evidence of historical disadvantage can be considered at the first step, it is not sufficient on its own to satisfy this step. Otherwise, establishing that members of a historically disadvantaged group are among the persons not included in the legislative measure would be enough to find that the eligibility criterion has a disproportionate impact on them. This was clearly stated by the majority of the Court in *Sharma* (para. 71):

> To recall, the focus at the first step is on a disproportionate impact, not historic or systemic disadvantage. The Court of Appeal addressed the wrong question at step one, focusing on the link between colonial policies and overincarceration of Indigenous peoples. While the situation of the claimant group is relevant at step one (see *Fraser*, at paras. 56-57), it is not sufficient on its own to establish disproportionate impact. Nor is it enough to show that the law restricts an ameliorative program. [Emphasis added.]

[309] *Fraser* cannot be interpreted as establishing that evidence of historical disadvantage is sufficient on its own to demonstrate a disproportionate impact at the first step of the analysis (Karakatsanis J.'s reasons, at para. 78). In *Fraser*, in addition to the evidence of historical disadvantage suffered by women, Abella J., writing for the majority, considered statistical evidence showing that all of the persons working

reduced hours through the job-sharing program were women and that most of them had cited childcare as their reason for doing so (para. 97). Abella J. added that these statistics *were* “<u>bolstered</u>” by evidence about “the disadvantages women face as a group in balancing professional and domestic work” (para. 98 (emphasis added)).

[310] In the present case, determining whether the impugned provision has such a disproportionate impact requires a comparison with the situation of men refugee claimants in the excluded group, “given the inherently comparative nature of s. 15” (*Fraser*, at para. 184, per Brown and Rowe JJ., dissenting). Thus, contrary to what the Court of Appeal held, the analysis could not be based solely on the mere fact that women refugee claimants will be disproportionately impacted by the application of the provision because they are women, who suffer historical and systemic economic disadvantage related to their family responsibilities. A true comparative exercise was required to determine whether Ms. Kanyinda had shown that she suffered an adverse impact — not imposed on men refugee claimants — as a result of the impugned provision (see, e.g., *Yao v. The King*, 2024 TCC 19, 2024 DTC 1024, at paras. 96-97; *Fair Change v. Ontario (Attorney General)*, 2024 ONSC 1895, 170 O.R. (3d) 561, at paras. 371 and 384).

[311] To demonstrate “the outcomes that the impugned law or policy . . . has produced in practice” (*Sharma*, at para. 192, quoting *Fraser*, at para. 58), Ms. Kanyinda filed a report by Dr. Jill Hanley, a professor at McGill University’s School of Social Work, entitled *The labour implications of the exclusion of refugee claimants from*

Quebec's subsidized childcare program (2020) (reproduced in A.R., vol. II, at pp. 68-90) ("Hanley Report"). Despite the Superior Court's finding that this evidence was not conclusive so as to satisfy the first step of the analysis — a finding that should be afforded deference unless a palpable and overriding error is shown — the Court of Appeal concluded from the report that all of the persons who said they were unable to work because of an exclusion based on their refugee claimant status were women, which in its view was [TRANSLATION] "convincing" evidence (para. 89).

[312] The Attorney General of Quebec reiterates before this Court that this evidence fails to establish that women awaiting refugee status are disproportionately impacted as a result of s. 3 of the *RCR*. In my view, the Court of Appeal did not identify any palpable and overriding error that would justify revisiting the trial judge's finding as to the probative nature of this evidence.

[313] The principles relating to the use of statistical data to establish the disproportionate impact of a provision were clarified by this Court in *Fraser*. It was established that where a disproportionate impact is shown through statistical data, the evidence in question must reveal a clear and consistent disparity that is not a product of mere coincidence (para. 62; *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, 422 D.L.R. (4th) 1, at paras. 89-92). More specifically, the evidence must establish "a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance" (*Fraser*, at para. 59, quoting C. Sheppard, "Grounds of Discrimination: Towards an

Inclusive and Contextual Approach" (2001), 80 *Can. Bar Rev.* 893, at p. 546). Otherwise, the evidence shows only that the provision in question simply *maintains* pre-existing inequalities, which s. 15(1) of the *Canadian Charter* does not require the government to remedy.

[314] Moreover, evidence based on statistical data may have significant shortcomings, thereby compromising the reliability of the results obtained (*Fraser*, at para. 60; see also *Grenon v. Minister of National Revenue*, 2016 FCA 4, 482 N.R. 310, at para. 38). The evidence may also be framed too broadly, without showing that the distinction created by the law has a disproportionate impact on a protected group (*Dor v. Canada (Citizenship and Immigration)*, 2021 FC 892, [2022] 1 F.C.R. 413, at paras. 71-75). The probative value of statistical data will therefore depend on "their quality and methodology" (*Fraser*, at para. 59). Thus, where allegations of discrimination rest on statistical data, it is not enough to show that the group of persons excluded by the legislative provision includes members of the protected group. Such evidence is insufficient to establish that there is a disproportionate impact (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 55; *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158, [2014] 4 F.C.R. 709, at para. 59).

[315] In this case, even though Ms. Kanyinda was not required to adduce statistical evidence to show the disproportionate impact of the impugned measure, she still had to adduce evidence. In my view, the evidence in the record is incomplete, since it has significant shortcomings that prevent it from yielding reliable results.

[316] My colleague Karakatsanis J. accepts Dr. Hanley's findings based on various statistics that Dr. Hanley compiled in her report, without considering the reliability of those statistics. However, such a step cannot be bypassed. I will explain why and how this influences the result in this case.

[317] The Hanley Report states, among other things, that 54.5% of unemployed refugee claimants had children under the age of six. A quarter of them indicated that the cost of childcare was a barrier to their entry into the labour market, and 100% of these persons were women (para. 44). More than half of these women were also single mothers (para. 44). The relevant excerpts from the report are as follows:

> 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 who were 0-5 years old and therefore of the age for childcare.
> - 57.5% of the 174 respondents with children in Quebec did not have a spouse in Quebec and so were, in regard to providing direct care for their children, single parents.
>
> 44. Among those not working, most of them had children under 6 years old (54.5%). A quarter of unemployed respondents with children under 6 say that they are not working because childcare is too expensive. Of these, 100% are women, and 61% are single parents.
>
> . . .
>
> 46. The following table makes clear the negative relationship between employment, gender, being a single parent or parent of young children for the participants in our study:

Table 2: Relationship between employment, gender and parent status

	All respondents	Women	Single Parents	Have children under 6 years old
Currently working	48.6%	31.0%	32%	37.7%
Unemployed but looking for work	23.4%	27.9%	30.0%	20.5%
Unemployed and not looking for work	28.0%	41.1%	38.0%	41.8%
Total	100%	100%	100%	100%

[Emphasis deleted; footnote omitted.]

[318] In my opinion, a number of shortcomings that compromise the probative value of these data are worthy of note and cannot simply be ignored. Here, the report states that a quarter of the 54.5% of refugee claimants with children under the age of six were not working because of the cost of childcare and that 100% of these persons were women. With the information given in the report, it is possible to conclude that there are only 15 or 16 such women out of the sample of 325 refugee claimants interviewed. Here is what the report reveals to arrive at this number:

- The initial sample is 325 respondents;

- 53.5% of the 325 respondents have children, that is, 174 respondents (para. 43);

- 57% of these 174 respondents have children under the age of six (para. 43), that is, 100 respondents;

- Of these 100 respondents with a child under the age of six, 38 are employed, 20 are unemployed but looking for work, and 42 are unemployed and not looking for work (para. 46);

- The unemployed respondents with a child under the age of six, whether they are looking for work (20 persons) or not (42 persons), therefore represent 62 persons;

- A quarter of the unemployed respondents with a child under the age of six say that they are not working because daycare is too expensive (para. 44).

This quarter of the respondents thus represents about 15 or 16 persons and, since 100% of this quarter of the respondents are women, these 15 or 16 persons are all women. With respect, I doubt that such a sample of 15 or 16 persons is sufficient to support the inference that this situation is caused by s. 3 of the *RCR*, or, if it is, this is certainly not a disproportionate impact.

[319] Relying on *Fraser*, the Ontario Court of Appeal, in *Ontario Teacher Candidates' Council v. Ontario (Education)*, 2023 ONCA 788, 168 O.R. (3d) 721,

found that statistical evidence involving a very small number of participants could not meet the reliability criteria set out in *Fraser* (para. 71). This was particularly true in the case of results expressed in percentage terms, like those presented in the Hanley Report, because slight variations in the raw data could then lead to significant fluctuations in rates (*Teacher Candidates' Council*, at para. 71). The Ontario Court of Appeal therefore emphasized the importance of exercising caution before drawing conclusions where a sample is very small, given the risk that misinterpreted statistical data will lead to erroneous conclusions.

[320] The evidence also has other shortcomings that cannot be ignored either. First, the evidence does not reveal the method used by the expert to identify the 325 refugee claimants who participated in the study. At most, the Hanley Report states that the sample of refugee claimants "parallels the profile of the overall population of refugee claimants in Quebec", without specifying the proportion of men and women involved (para. 40). Moreover, even though it is possible to infer from the data provided in the report that about 15 women say they are affected by their non-inclusion in s. 3 of the *RCR*, the report does not reveal the sex of the respondents in each of the categories listed. This omission is important because, as I said, establishing a disproportionate impact on the basis of sex requires a comparison between men and women. The fact that the sex of the respondents is not mentioned prevents such a comparison from being made.

[321] In *Fraser*, it was precisely the fact that, for a certain period of time, all of the persons excluded because of their participation in a job-sharing program were *women* that allowed Abella J. to find that they were disproportionately impacted. I agree that *Fraser* did not require that the entire excluded group be composed exclusively of members of the protected group in the context of statistical evidence. Nonetheless, the fact remains that the sex of the persons in the excluded group had to be identified in order for Abella J. to find that the impugned measure had a disproportionate impact on the protected group. It follows, in my view, that the absence of precise data on the exact number of women in each category in the Hanley Report undermines the possibility of identifying a statistical disparity that is clear, consistent and significant rather than anecdotal. This undeniably affects the probative value of this report with respect to the question of whether s. 3 of the *RCR* has a disproportionate impact on the basis of sex.

[322] In my view, given the shortcomings found in the statistical evidence presented in the Hanley Report, the respondent provided incomplete data concerning the claimant group's situation, which means that the first step of the analysis could not be satisfied (see, e.g., *Taypotat*, at para. 27). In this context, the Quebec Court of Appeal should have deferred to the trial judge's finding that [TRANSLATION] "the figures of [Ms. Kanyinda's] expert are not conclusive" (2022 QCCS 1887, at para. 43). This finding involved no palpable and overriding error that warranted the Court of Appeal's intervention (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[323] At best, the data in the Hanley Report simply established that members of a protected group — women — are among the persons not included in s. 3 of the *RCR*, without demonstrating that this provision has a disproportionate impact on them. But this is not enough to satisfy the first step of the s. 15(1) test. Such evidence must go beyond the mere fact that there are members of the protected group in the non-included group. Absent such a demonstration, as the Attorney General of Ontario rightly points out, the evidence merely shows that, by not including refugee claimants in the list of parents eligible for the reduced contribution, Quebec has left untouched the pre-existing inequality between women and men refugee claimants when it comes to the burden of childcare, without worsening it or creating it (I.F., at para. 38). I reiterate: this cannot be an infringement of s. 15(1) of the *Canadian Charter*.

(2) The Second Step of the Section 15(1) Test Is Not Satisfied on the Basis of the Enumerated Ground of Sex

[324] The second step of the s. 15(1) test requires the claimant to show that the impugned law denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage suffered by the affected group. In the present case, even if one were to accept that s. 3 of the *RCR* creates a distinction based on the enumerated ground of sex, this distinction is not discriminatory because it does not have the effect of reinforcing, perpetuating or exacerbating the disadvantage suffered by women refugee claimants.

[325] I note once again that s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or to enact remedial legislation (*Sharma*, at para. 63, citing *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at para. 37; *Eldridge*, at para. 73). When the state does legislate to address such inequalities, it can do so incrementally (*Sharma*, at para. 64, quoting *Alliance*, at para. 42). The corollary of these principles is that, at this second step, a negative impact or worsened situation is required to find that a distinction is discriminatory (*Sharma*, at para. 52; *Withler*, at para. 37).

[326] In this case, one of the disadvantages addressed by the *Act* was the increased difficulty that women had in accessing the labour market because of their parental responsibilities (National Assembly, Standing Committee on Social Affairs, "Étude du projet de loi no 77 — Loi sur les services de garde à l'enfance", *Journal des débats: commissions parlementaires*, vol. 21, No. 233, 4th Sess., 31st Leg., December 10, 1979, at p. B-11129). However, to this day, the non-inclusion of women refugee claimants in s. 3 of the *RCR* does not make the disadvantage they face in accessing the labour market any more difficult than before. It leaves it untouched, without worsening it.

[327] It should be noted that the evidence in the Hanley Report indicates, without specifying the sex of these persons, that among the respondents with a child under the age of six, that is, about 100 persons, 41.8 percent are unemployed and not looking for work, while 20.5 percent are unemployed and looking for work. From these figures, it

can be inferred that a certain number of women refugee claimants would not avail themselves of the reduced contribution even if they were entitled to it, because they are not looking for work. Thus, since some women refugee claimants are not interested in entering the labour market, it cannot be said that they are disadvantaged by their non-inclusion in s. 3 of the *RCR*.

[328] Furthermore, it is important to stress that even where women refugee claimants do not have access to the reduced contribution, they can receive a tax credit for almost all of the expenses incurred for a non-subsidized childcare space. The evidence shows that, for a single-parent family with only one child and an income of $27,500 in 2020, the net cost of a subsidized childcare space was $8.35 per day. A non-subsidized childcare space with a gross cost of $38 per day had a net cost of $9.66 per day after the tax credit (A.R., vol. XI, at p. 72). Given this difference of just $1.31 per day between the respective net costs of a subsidized childcare space and a non-subsidized childcare space, the non-inclusion of refugee claimants in s. 3 of the *RCR* cannot be viewed as perpetuating an economic disadvantage. Moreover, even though the tax credit is not paid to refugee claimants in advance, the fact remains that the non-inclusion of women refugee claimants in s. 3 of the *RCR* does not deprive them of affordable options for access to a daycare facility.

[329] In short, if it is accepted that s. 3 of the *RCR* creates a distinction based on the enumerated ground of sex, the distinction is not discriminatory.

(3) The Infringement of the Right to Equality on the Basis of Sex Is Justified Under Section 1

[330] While there is no need for me to address the issue given the result I reach under s. 15(1), I would like to make some comments on the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. With respect, I disagree that the infringement of s. 15(1) based on the enumerated ground of sex is not justified. Therefore, if I found that s. 15(1) were infringed, the infringement would, in my view, be justified under s. 1. Let me explain.

[331] I essentially agree with the observations made by my colleague Rowe J. concerning s. 1, and I also agree with the result he reaches under the first three branches of the *Oakes* test. Where I differ from him, however, is on the proportionality between the effects of s. 3 of the *RCR* and the objective recognized as being pressing and substantial.

[332] The proportionality stage requires that "the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms" (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 887 (emphasis deleted)).

[333] In this case, limiting access to the reduced contribution to persons who have a sufficient connection with Quebec has the salutary effect of ensuring the sustainability of the services offered by the state. This salutary effect is particularly

important in light of the shortage of subsidized childcare spaces (not only for refugee claimants but for the Quebec population in general). In addition, the evidence shows that the number of new refugee claimants in Quebec kept increasing and reached tens of thousands from 2018 to 2020 (A.R., vol. XI, at pp. 1 et seq.). This is all the more true given that the Quebec state exercises no control over refugee claimants' access to its territory and that about 40 to 45 percent of claimants do not meet the requirements for obtaining refugee status (at p. 51) and will therefore not settle in the province.

[334] In contrast, as I explained earlier, the respondent's evidence has shortcomings, particularly the fact that the sex of the survey respondents in each of the categories listed is not mentioned. This shortcoming also means that the evidence fails to demonstrate the extent of the deleterious effects of the state measure. While this evidence sets out deleterious effects on women refugee claimants that result from their non-inclusion in the list of persons eligible for the benefit of subsidized daycare, it does not indicate the number and proportion of women refugee claimants affected by this exclusion. It is therefore impossible to determine whether these deleterious effects outweigh the salutary effects flowing from the state measure that involves not granting all refugee claimants, men and women alike, the benefit of subsidized daycare.

[335] For example, let us assume that women refugee claimants represent only 1,000 of the 10,000 refugee claimants who would avail themselves of the reduced contribution if access to it were possible. It would then be difficult to find that the deleterious effects of the non-inclusion of these 1,000 women refugee claimants

outweigh the salutary effects of the measure, that is, ensuring the sustainability of subsidized daycare services through the exclusion of these 10,000 refugee claimants.

[336] Moreover, the harm suffered by women refugee claimants is greatly alleviated because of the tax credit that makes a non-subsidized childcare space nearly as affordable as a subsidized space. As already mentioned, the evidence shows that, for a single-parent family with only one child and an income of $27,500 in 2020, a subsidized childcare space cost $8.35 per day, while a non-subsidized childcare space with a gross cost of $38 per day came to $9.66 per day after the tax credit (A.R., vol. XI, at p. 72).

[337] Therefore, at the proportionality stage, the evidence does not support a finding that the deleterious effects of the state's objective on women refugee claimants' right to equality outweigh its salutary effects. The infringement of the right to equality, if there were one, would therefore be justified.

[338] It should also be noted that declaring the *RCR* invalid seems particularly unfair to Quebec. Certainly, the processing of claims for refugee protection is the exclusive prerogative of the federal government, and it must ensure that processing times for these claims are not too long. However, the evidence shows that, in 2017, the federal government processed only 20 percent of claims for refugee protection within the time limits specified in its own regulations and that it now takes two years to obtain a decision, that is, about 12 times longer than the specified time limit of 60 days (Office

of the Auditor General of Canada, *2019 Spring Reports of the Auditor General of Canada to the Parliament of Canada: Report 2 — Processing of Asylum Claims* (2019), at para. 2.25). Without such administrative delays, the question at issue here would not arise, and the constitutional validity of the *RCR* would not be in dispute. This situation seems even more unfair if one considers the fact that Quebec, along with Ontario, takes in most of the refugee claimants in the country (A.R., vol. XI, at pp. 1-41).

(4) The Tailored Remedy Must Be Limited to the Inclusion of Refugee Claimants Who Hold a Work Permit or Study Permit

[339] The proposed remedy involves reading an entitlement to the reduced contribution into s. 3 of the *RCR* for all refugee claimants. In my respectful view, however, reading in this entitlement is inconsistent with the objective of the *Act*, under which the regulation was made.

[340] In *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, my colleague Karakatsanis J., writing for the majority, noted that a tailored constitutional remedy granted under s. 52(1) of the *Constitution Act, 1982* must not intrude on the legislative sphere (para. 114; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 50). Indeed, "[i]f it appears unlikely that the legislature would have enacted the tailored version of the statute, tailoring the remedy would not conform to its policy choice and would therefore undermine parliamentary sovereignty" (*Ontario v. G*, at para. 114, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 705-6). Thus,

when a tailored remedy is being crafted, it is important to be mindful of "whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court" (*Ontario v. G*, at para. 116).

[341] In this case, as I have already noted, one of the disadvantages addressed by the *Act* is the increased difficulty that women have in accessing the job market (*Journal des débats*, at p. B-11129). Indeed, s. 1 para. 2 of the *Act* indicates that one of its two main purposes is "to foster the harmonious development of an educational childcare service supply that is sustainable and that takes into account the needs of parents, in order to facilitate <u>the reconciliation of their parental responsibilities with their professional or student responsibilities</u>".

[342] The proposed reading in therefore goes beyond the purposes of the law by allowing every refugee claimant to have access to subsidized daycare. Surely, in light of the purpose of the law, the legislature's intention is such that a court can fairly conclude that it would amend the regulation to include only refugee claimants who hold a work permit or study permit. In this manner, the law would pursue the objective of ensuring that women, and specifically women refugee claimants, are able to enter the labour market, either by studying first or simply by working, despite their parental responsibilities.

[343] Moreover, I explained that such an approach involves circular reasoning that becomes a disguised way to find discrimination on the basis of an unrecognized

analogous ground, in this case refugee status. Here, such an approach, by granting the reduced contribution to all refugee claimants when the discrimination at issue is based on sex, confirms this observation because the analysis based on sex is merely a pretext for remedying an exclusion based on the unrecognized analogous ground of refugee claimant status.

[344] In short, the proposed remedy encroaches on the legislature's parliamentary sovereignty and, if there were to be a remedy, it should, in my view, be limited to the inclusion of refugee claimants who hold a work permit or study permit.

B. *Section 3 of the RCR Does Not Infringe the Right to Equality on the Basis of the Ground of Refugee Claimant Status*

(1) Refugee Claimant Status Should Not Be Recognized as an Analogous Ground

[345] I turn now to the question of whether refugee claimant status should be recognized as an analogous ground on the basis that s. 3 of the *RCR* unjustifiably infringes refugee claimants' right to equality by preventing them from availing themselves of the benefit of the reduced contribution.

[346] With great respect for the contrary view, I am of the opinion that refugee claimant status cannot be an analogous ground, essentially because it is not an

immutable characteristic. Moreover, the evidence in this case does not allow the implications of such recognition to be assessed.

(a) *Principles Applicable to the Recognition of a New Analogous Ground*

[347] Section 15(1) of the *Canadian Charter* prohibits the state from discriminating against individuals on the basis of certain enumerated grounds, namely "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". In addition to these enumerated grounds, a number of analogous grounds have been recognized, on the basis of which the state is also prohibited from discriminating. This Court has thus recognized non-citizenship (*Andrews*), marital status (*Miron*), sexual orientation (*Egan v. Canada*, [1995] 2 S.C.R. 513), Aboriginality-residence in the case of a member of an Indian band living off-reserve (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203) and non-resident status in a self-governing Indigenous community (*Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10).

[348] *Corbiere* established that determining whether a ground of distinction can constitute an analogous ground requires that the ground be similar to the grounds enumerated in s. 15. In this regard, the majority in *Corbiere* stated that what the enumerated grounds of distinction have in common is that they are based on a characteristic that is either (1) immutable or unchangeable, or (2) changeable only at an unacceptable cost to personal identity, such that the government has no legitimate

interest in expecting a person to change the characteristic in order to receive equal treatment under the law. Even though these two categories of characteristics are said to be immutable, category (2) is not actually immutable, but rather constructively immutable (paras. 13-14; *Dickson*, at para. 193).

[349] The majority in *Corbiere* proposed certain indicators that could "be seen to flow from the central concept of immutable or constructively immutable personal characteristics" (para. 13). The majority identified, as an indicator, the fact that the group in question forms a "discrete and insular minority" or "has been historically discriminated against" (para. 13; *Andrews*, at p. 183; *Egan*, at para. 171, per Cory and Iacobucci JJ., dissenting).

[350] The respondent and some of the interveners urge this Court to replace the *Corbiere* framework, which is focused mainly on immutability, with a multifactorial vulnerability framework (R.F., at paras. 89-92; I.F., Canadian Civil Liberties Association, at para. 10; I.F., Association québécoise des avocats et avocates en droit de l'immigration, at para. 35) that would facilitate the recognition of new analogous grounds (J. Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013), 10 *J.L. & Equality* 37, at pp. 61-62).

[351] Thus, the respondent and some of the interveners invite us to treat immutability in the same way as certain other factors, namely the violation of human

dignity and freedom, the historical disadvantage suffered by a group, the group's vulnerability within society, and recognition by legislators and jurists that a ground is discriminatory. With great respect, I cannot accept such an invitation; in my view, doing so is problematic in three respects.

[352] First, the recognition of a new analogous ground is a judicial act fraught with consequences, because, once identified, the ground stands as a "constant marker of potential legislative discrimination" (*Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, at para. 2; see also *Dickson*, at para. 198, quoting *Corbiere*, at para. 8).

[353] Second, adopting the proposed multifactorial analysis is contrary to this Court's teachings in *Corbiere*. In that case, the Court made immutability the cornerstone of the framework for recognizing a new analogous ground. Indeed, it stated that "what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made . . . on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" (para. 13). In the present case, the multifactorial approach differs from the *Corbiere* framework in that it treats immutability just like any other factor taken into consideration.

[354] Third, the indicators used for recognizing an analogous ground must themselves "flow from the central concept of immutable or constructively immutable personal characteristics" (*Corbiere*, at para. 13). The criteria of violation of human dignity and freedom through stereotyping, vulnerability and marginalization of a group

within society and recognition by legislators and jurists that a ground is discriminatory are unrelated, or only remotely related, to the concept of immutability.

[355] To begin with, preventing violations of dignity and freedom through stereotyping is not in itself a criterion, but rather the purpose of s. 15 (*Corbiere*, at para. 58, per L'Heureux-Dubé J., concurring, quoting *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 51). Thus, it must first be established that a group deserves protection on the basis of an immutable characteristic before it can be argued that there is a need to prevent the group's dignity and freedom from being violated because of that characteristic. Otherwise, such a criterion would result in an arbitrary selection of the groups that deserve protection under s. 15.

[356] Next, the vulnerability and marginalization of a group within society are also unrelated to the concept of immutability. Surely, some groups may be characterized by a high level of vulnerability without the characteristic shared by their members being itself immutable. This is the case, for example, of a group made up of low-income individuals. Many members of this group may eventually escape marginalization by earning a higher income. There is therefore no reason to rely on such a criterion, which, moreover, greatly overlaps with two criteria that do involve immutability, namely that a group forms a discrete and insular minority and that the group is historically disadvantaged.

[357] Lastly, recognition by legislators and jurists that a ground is discriminatory does not attest to the ground's immutability. Perhaps a criterion like this attests to the social acceptability of a new ground. And again, in such a case, the opinion of jurists does not have the same weight as that of legislators. Furthermore, another part of our jurisprudence suggests that this criterion is unrelated to immutability. Although *Miron* proposed such a criterion in the recognition of a new analogous ground (at para. 148), the majority in *Corbiere* did not mention it when making the concept of immutability the cornerstone of such recognition (para. 13). It can therefore be inferred that the majority in *Corbiere* did not consider such a criterion relevant to this new framework.

[358] In my view, the adoption of such a multifactorial test is unnecessary and underestimates the flexibility of the current test. In *Corbiere*, the majority in fact said that the immutability test is "a set of guidelines and not a formalistic straitjacket" (para. 12), and the majority did not call into question the immutability in attenuated form recognized in *Andrews* for the analogous ground of citizenship and in *Miron* for the analogous ground of marital status. In addition, there is no basis for finding that contemporary forms of discrimination are different than the forms of discrimination that existed at the time the immutability test was adopted in *Corbiere* and, as a result, that the test must be made even more flexible than it is already.

(b) *The Evidence in the Record, Even When Analyzed on the Basis of a Multifactorial Test, Does Not Support the Recognition of Refugee Claimant Status as an Analogous Ground*

(i) Analysis Based on a Multifactorial Test

[359] First, what can be said of the criterion of violation of human dignity and freedom because of a distinction based on a stereotype, namely that refugee claimants are foreigners and, sometimes, racialized persons or persons with certain national origins? It is important to note that s. 15 already protects refugee claimants from discrimination based on such stereotypes. The question is whether refugee claimants are stereotyped because they are refugee claimants rather than, for example, foreigners of a certain national origin or non-citizens. If the answer is yes, this will weigh in favour of recognizing refugee claimants as a group protected by s. 15. If the answer is no, it will weigh against such recognition.

[360] In my opinion, the evidence in this case does not show that refugee claimants are stereotyped on the basis of their refugee claimant status. My reading of *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, [2015] 2 F.C.R. 267, supports this conclusion. In that case, the orders in council at issue provided refugee claimants from certain countries known as non-designated countries with more extensive public health care coverage than other refugee claimants from so-called designated countries (paras. 61-64). In that context, the trial judge found that refugee claimants from designated countries were stereotyped and, by extension, discriminated against because of their national origin, not their refugee claimant status. In addition, the Hanley Report indicates that there is a concern — although it is not clarified whether it is the author's concern or that of the refugee claimants interviewed

for the preparation of the report — about how "the exclusion from subsidized childcare, and subsequent reliance on public assistance (welfare), feeds into public perceptions that refugee claimants are somehow taking advantage of the welfare state" (para. 54). However, a concern about being stereotyped is not sufficient to establish that such stereotyping actually exists. In short, in my view, the judgment in question does not support the assertion that there is prejudice against refugee claimants because of their status.

[361] Second, what can be said about the immutability of refugee claimant status? As we will see below in applying the *Corbiere* framework, I am of the view that refugee claimant status is not an immutable characteristic, nor is it constructively immutable.

[362] Third, it must be asked whether refugee claimants form a historically disadvantaged group because, among other things, they are a discrete and insular minority. This combines two indicators, namely that a group is historically disadvantaged and that it constitutes a discrete and insular minority. However, these two indicators, which flow from the concept of immutability, must be analyzed separately (*Corbiere*, at para. 13; *Miron*, at paras. 91 and 93, per L'Heureux-Dubé J., and at paras. 148-49 and 152, per McLachlin J. (as she then was); *Thibaudeau*, at paras. 207-9, per McLachlin J. (as she then was), dissenting; *Egan*, at paras. 171-73, per Cory and Iacobucci JJ., dissenting). Again, the question is whether refugee claimants are a discrete and insular minority or a historically disadvantaged group because they are

refugee claimants rather than, for example, foreigners of a certain national origin or non-citizens, given that s. 15 already affords protection against discrimination based on the latter two grounds.

[363] In this case, refugee claimants are part of the discrete and insular minority and historically disadvantaged group formed by non-citizens (*Andrews*, at p. 152, per Wilson J., at pp. 182-83, per McIntyre J., dissenting, but not on this point, and at p. 195, per La Forest J.). Nevertheless, there is no evidence indicating that they form a discrete and insular minority and a historically disadvantaged group because of their status as refugee claimants rather than as non-citizens. Without such evidence, this criterion does not weigh in favour of recognizing refugee claimant status as an analogous ground.

[364] Fourth, the respondent asks the Court to take judicial notice of the fact that refugee claimants form a vulnerable and marginalized group in society (R.F., at para. 99). It should be noted that the threshold for judicial notice is strict (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48) and, given that the question is close to the centre of the controversy between the parties, the evidentiary requirements are higher (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at paras. 58-61).

[365] With respect, while I acknowledge that some refugee claimants in Canada may be in a vulnerable position because, for example, of their national origin or their non-citizenship, I do not think that the evidence presented is sufficient to show that

they are, as a group, marginalized because of their specific migration status. In the present case, the respondent relies on the Hanley Report, which refers, among other things, to a publication dealing with the situation of asylum seekers when it comes to childcare services in Ireland, not in Canada (R.F., at para. 60; Hanley Report, at para. 56, citing N. Dolan and C. Sherlock, "Family Support through Childcare Services: Meeting the Needs of Asylum-seeking and Refugee Families" (2010), 16 *Child Care in Practice* 147). However, there is no reason to assume that their situation is the same in these two countries.

[366] The respondent also relies on a second publication that deals with the difficulties that refugee claimants in Canada have in accessing childcare (R.F., at para. 99, quoting G. Morantz et al., "Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care" (2013), 18 *Child & Family Social Work* 318, at p. 319). While this study shows the barriers faced by refugee claimants with respect to childcare, it does not justify concluding, on this basis alone, that they form a vulnerable and marginalized group within society. Therefore, in light of the evidence in the record, it cannot be concluded that refugee claimants form a vulnerable and marginalized group within society solely because of this status.

[367] Fifth, with regard to the criterion relating to recognition of a ground by legislators and jurists, the intervener Amnistie internationale Canada francophone suggests relying on the observations and recommendations of two United Nations committees responsible for monitoring the implementation of human rights treaties

(I.F., at para. 18). It is important to note at the outset that these observations and recommendations in no way reflect the recognition of an analogous ground by legislators. While Canada has ratified the international instruments that gave rise to these two United Nations committees, these sources have no mandatory effect and are therefore not binding on Canada (*Optional Protocol to the International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, Article 5(4); *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 2922 U.N.T.S. 29, Article 9(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28, Article 9(1)). In short, the sources proposed reflect only the opinion of a few jurists, and their persuasiveness is particularly limited.

[368] It bears noting that the criterion of the intention of legislators instead supports the position that refugee claimant status should not be recognized as an analogous ground. Neither Parliament nor the provincial and territorial legislatures recognize refugee claimant status as a prohibited ground of discrimination in their respective human rights legislation (*Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 2; *Charter of human rights and freedoms*, CQLR, c. C-12, s. 10; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5; *The Human Rights Code*, C.C.S.M., c. H175, s. 9(2); *Human Rights Code*, R.S.B.C. 1996, c. 210; *Human Rights Code*, R.S.O. 1990, c. H.19; *The Saskatchewan Human Rights Code, 2018*, S.S. 2018, c. S-24.2, s. 2 "prohibited ground"; *Human Rights Act*, R.S.N.B. 2011, c. 171, s. 2.1; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d) "discrimination"; *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 5; *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 9; *Human Rights*

Act, R.S.Y. 2002, c. 116, s. 7; *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 5; *Human Rights Act*, C.S.Nu., c. H-70, s. 7). In these circumstances, the intention of legislators does not weigh in favour of such recognition under the *Canadian Charter*.

[369] In short, in light of the criteria used in the analysis based on a multifactorial test, the evidence in the record does not support the recognition of refugee claimant status as an analogous ground.

(ii) Refugee Claimant Status Is Not an Immutable Characteristic Within the Meaning of *Corbiere* so as to Be Recognized as an Analogous Ground

[370] I now turn my attention to the question of whether refugee claimant status is an immutable characteristic. With respect, I do not think so, and I will explain why.

[371] Refugee claimant status is not, in the strict sense, "immutable or unchangeable". Indeed, it is a characteristic that is inherently temporary. While the evidence shows that the processing time to obtain a decision on a claim for refugee protection is now approximately two years, refugee claimant status is merely a transitional step toward refugee status or another status. The temporary nature of this status therefore prevents it from being characterized as immutable (*Irshad (Litigation guardian of) v. Ontario (Ministry of Health)* (2001), 55 O.R. (3d) 43 (C.A.), at paras. 134-35; *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, [2013] 1 F.C.R. 374, at para. 99; *Almadhoun v. The Queen*, 2018 FCA 112, 2018 DTC 5066, at para. 28; *Brink v. Canada*, 2024 FCA 43, 490 D.L.R. (4th) 552, at para. 100).

[372] Refugee claimant status is not constructively immutable either.

[373] To begin with, this status is not changeable only at an unacceptable cost to personal identity, as it quite simply has little impact on an individual's personal identity. It certainly does not define individuals in terms of personal identity as strongly as do other enumerated or analogous grounds, such as religion or citizenship. In the case of citizenship, La Forest J. stated that it "serves a highly important symbolic function as a badge identifying people as members of the Canadian polity" (*Andrews*, at p. 196). As for religion, it involves "freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment" (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 39). Such a grounding in identity does not accompany refugee claimant status.

[374] The following example serves to illustrate this point. If a law were to force an individual to renounce their religion or relinquish citizenship in order to avoid discrimination, the impact in terms of personal identity would be far greater than in the case of a law that forced an individual to change their refugee claimant status to a different immigration status, even though such a change in status may have significant practical consequences in a person's life.

[375] Next, the fact that the change in status depends on a government decision is also not a basis for finding the status to be constructively immutable. Indeed, to

conclude that this is the case would mean that all persons who have submitted an application to the government, whether for a licence, a benefit or a legal status, sometimes without even meeting the conditions for the application to be granted, could constitute a protected group given that they have no control over their application while it is being processed. However, even if some situations are beyond the full control of individuals, this does not make their situation immutable and automatically deserving of protection under s. 15.

[376] I pause to note that a multifactorial framework exacerbates the risk of analogous grounds being recognized on the basis of transitory statuses that are dependent on a government decision. Thus, it would be enough for members of one group to combine the fact that they are awaiting a government decision on a change in status with some other indicator specified by the framework in order to easily obtain a finding that an analogous ground exists. However, such an approach could have a significant impact on the principle that recognition of an analogous ground is an act with serious consequences.

[377] Moreover, unlike in the case of marital status and citizenship, the state has a legitimate interest in having a claim for refugee protection decided in order to determine whether the person meets the criteria for the recognition of refugee status and, if so, to grant the person the protection to which they are entitled. Thus, the state can legitimately expect the characteristic to change (*Corbiere*, at para. 13).

[378] Quite often, of course, a refugee claimant's decision to flee their country of origin is, in essence, not a choice, but rather a decision made under constraint. However, care must be taken not to conflate the legal status of refugee with that of refugee claimant. While it is true that, in many cases, refugee claimants fled their country because they were constrained to do so, it cannot automatically be assumed that everyone who claims refugee protection in Canada comes here for that reason. Indeed, the analysis of the claim and the eventual granting of refugee status are what support the conclusion that a refugee claimant left their country because they were constrained to do so rather than for another reason. This is particularly so given the fact that, according to the evidence, on average only a little more than half of claimants were granted refugee status from 2013 to 2020 (A.R., vol. XI, at p. 51). It is therefore possible to conclude that at least some of the persons who come to Canada as refugee claimants do so by choice rather than solely as a result of constraint.

[379] Should an analogy be drawn between a claim for refugee protection and age, an enumerated ground, to support the proposition that a characteristic can be both immutable and transitory? I do not think so. Unlike a claim for refugee protection over which a person has no control, but only for a limited time, a person never, in their entire life, has any control over their age. This is why age is an immutable characteristic, which is not the case for refugee claimant status.

[380] The respondent relies on *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703, at para. 53, where this Court

found that temporary physical disability is immutable because it is a characteristic that is unchangeable for its duration and entirely outside the control of the individual in question. By analogy, the respondent explains that refugee claimant status is also immutable because it is unchangeable for its duration and entirely outside the individual's control.

[381] This argument must be rejected because, in *Granovsky*, the Court was not seeking to determine whether purely temporary characteristics, such as temporary disability or refugee claimant status, were themselves analogous grounds. Rather, it was seeking to determine whether a purely temporary characteristic, temporary disability, fell within an enumerated category, namely mental or physical disability.

[382] This distinction is important, because temporary disability is only one part of the broader spectrum of distinctions prohibited by the enumerated ground of disability. In this sense, a true form of immutability imbues this ground, and it is logical to infer that temporary disability is a temporary version of this immutability. Thus, it is not possible to rely on an analogy between temporary disability and refugee claimant status, given that this status does not fall within a broader ground that includes characteristics that are wholly immutable like certain types of disabilities. Relying on this analogy would be tantamount to recognizing any kind of characteristics that are only temporary as analogous grounds and would not be in keeping with the immutability test set out in *Corbiere*.

[383] In short, refuge claimant status is neither immutable nor constructively immutable. It therefore cannot be recognized as a new analogous ground.

[384] As a final comment, the evidence in this case does not allow the consequences of such recognition to be assessed. It is in fact clear that such recognition would have a significant impact on the laws in force across the country, particularly in the area of immigration, but also in relation to many social services.

[385] First of all, it should be noted that the recognition of refugee claimant status as an analogous ground on the proposed bases would throw open the door to the recognition of most other immigration statuses on the same footing. Eventually, such recognitions could lead to immigration status being *de facto* an analogous ground.

[386] Indeed, the arguments relied upon by the respondent, which I do not accept, are equally applicable to refugee claimants and to other classes of immigrants. To begin with, by combining the effects of discrimination based on non-citizenship, race and national origin with distinctions based on refugee claimant status, persons with most immigration statuses would form a discrete and insular minority, a historically disadvantaged group and a class of vulnerable, marginalized and stereotyped persons. Moreover, whether a status continues or changes to a permanent status or to citizenship always depends on the rules imposed by the state, which, according to the respondent, makes it an immutable characteristic. Thus, the bases invoked for the recognition of

refugee claimant status as an analogous ground would set a low threshold for the recognition of other immigration statuses.

[387] For example, in reliance on these bases, it would be difficult not to recognize refugee status as an analogous ground, given that the main difference between refugees and refugee claimants is that it is established that the former fled persecution. Other temporary immigration statuses, such as being the holder of a work permit, particularly a closed one, or the holder of a study permit, could also be more readily recognized as analogous grounds.

[388] In themselves, these individual recognitions could eventually lead to immigration status being *de facto* an analogous ground. In that case, the state could no longer create distinctions between different classes of immigrants without justification, given that it can already no longer do so on the basis of non-citizenship.

[389] However, this would unduly impede the state's ability to act, especially in immigration matters. Indeed, distinguishing between different classes of immigrants is at the very heart of the federal statutory scheme for immigration, as this Court explained in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 59:

> . . . the [Immigration] Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. <u>It is an important aspect of the statutory scheme that these</u>

> different categories of individuals are treated differently, with appropriate adjustments to the varying rights and contexts of individuals in these groups. [Emphasis added.]

The *de facto* existence or formal recognition of immigration status as an analogous ground would thus call into question the very foundations of the federal statutory scheme for immigration and the state's right to make the freedom to enter and remain in Canada conditional on the immigration statuses it creates (*Canadian Charter*, s. 6; *Constitution Act, 1867*, s. 91(25); *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at pp. 733-34). It would also undermine cooperation between the provincial governments and the federal government in this area.

[390] In addition to having significant implications from an immigration standpoint, recognition of the analogous ground of refugee claimant status or any other immigration status would obviously affect much social legislation across the country. For example, refugee claimants do not have access to the health care systems of many provinces, including Ontario, British Columbia and Quebec (*Health Insurance Act*, R.S.O. 1990, c. H.6, s. 10; *Health Insurance Act Regulation*, R.R.O. 1990, Reg. 552, s. 1.4; *Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 7; *Medical and Health Care Services Regulation*, B.C. Reg. 426/97, s. 2; *Health Insurance Act*, CQLR, c. A-29, s. 5; *Regulation respecting eligibility and registration of persons in respect of the Régie de l'assurance maladie du Québec*, CQLR, c. A-29, r. 1, s. 2). Provincial public health systems would thus be particularly affected by such a measure. There should therefore

have been more extensive evidence in the record concerning the impact of such recognition.

[391] In these circumstances, I am of the view that caution should be exercised in the recognition of analogous grounds related to specific immigration statuses or to immigration status in general.

(2) The Distinction Created by Section 3 of the *RCR* Does Not Discriminate Against Refugee Claimants

[392] I agree with the Chief Justice that s. 3 of the *RCR* creates a distinction based on refugee claimant status and that this distinction denies a benefit to the persons in question, namely access to subsidized daycare.

[393] With respect, however, this distinction is not discriminatory. Surely, rejecting the premise that refugee claimants form a discrete and insular minority and a historically disadvantaged group means that there is no disadvantage suffered by refugee claimants that would be reinforced, perpetuated or exacerbated by the distinction created by s. 3 of the *RCR*.

[394] Furthermore, as I have already noted, even when refugee claimants do not have access to the reduced contribution, they can receive a tax credit for almost all of the expenses incurred for a non-subsidized childcare space. The evidence shows that, for a single-parent family with only one child and an income of $27,500 in 2020, the

net cost of a subsidized childcare space was $8.35 per day. As for a non-subsidized childcare space with a gross cost of $38 per day, it had a net cost of $9.66 per day after the tax credit (A.R., vol. XI, at p. 72). Even though the tax credit is not payable to refugee claimants in advance, the fact remains that their non-inclusion in s. 3 of the *RCR* does not deprive them of affordable options for access to a daycare facility. In these circumstances, if there were a disadvantage suffered by refugee claimants, it would not be reinforced, perpetuated or exacerbated by s. 3 of the *RCR*.

[395] Accordingly, the second step of s. 15(1) is not satisfied with respect to refugee claimant status.

(3) The Infringement of the Right to Equality on the Basis of the Ground of Refugee Claimant Status Is Justified Under Section 1

[396] With regard to the analysis under s. 1 of the *Canadian Charter*, the observations made by Rowe J. remain relevant in the case of an infringement of the right to equality on the basis of the ground of refugee claimant status. I again agree with the result he reaches under the first three branches of the *Oakes* test. However, I am of the view that the salutary effects of limiting access to the reduced contribution to persons who have a sufficient connection with Quebec in order to ensure the sustainability of the services offered by the state are proportional to the deleterious effects that result from not including refugee claimants in the list of persons with access to the reduced contribution.

[397] As I explain above, limiting access to the reduced contribution to persons who have a sufficient connection with Quebec has the salutary effect of ensuring the sustainability of the services offered by the state. This salutary effect is particularly important. In contrast, the respondent's evidence is once again deficient as regards the extent of the deleterious effects caused by the exclusion of refugee claimants from s. 3 of the *RCR*. While the expert report submitted by the respondent emphasizes the individual effects of this exclusion on refugee claimants, it gives no indication of the number of refugee claimants affected by this measure. In addition, the harm suffered by refugee claimants is greatly alleviated because of the tax credit that makes a non-subsidized childcare space nearly as affordable as a subsidized childcare space, since the difference between the net costs of these two spaces is only a little more than a dollar a day (A.R., vol. XI, at p. 72). In these circumstances, it cannot be assumed that the deleterious effects of this exclusion outweigh the preservation of the sustainability of the services offered by the state.

[398] Moreover, the fact that persons eligible for the reduced contribution are not guaranteed a subsidized childcare space does not diminish the impact that the inclusion of refugee claimants would have on the sustainability of the subsidized childcare system. The fact is that there would be detrimental pressure on the system in any event, whether because some refugee claimants would avail themselves of the reduced contribution or because waiting lists would become longer.

[399] In sum, if s. 3 of the *RCR* infringes the right to equality on the basis of refugee claimant status, the infringement is justified.

(4) <u>In the Alternative, the Tailored Remedy for an Infringement of the Right to Equality on the Basis of Refugee Claimant Status Must Be Limited to the Inclusion of Refugee Claimants Who Hold a Work Permit or Study Permit</u>

[400] As in the case of an infringement of s. 15 because of discrimination based on sex, and for essentially the same reasons, the tailored remedy in this case — if a remedy is to be granted, of course — is to amend the regulation to include only refugee claimants who hold a work permit or study permit.

[401] At the risk of repeating myself, the disadvantage addressed by the *Act* is the increased difficulty that women have in accessing the job market, and one of the *Act*'s purposes is to facilitate the reconciliation of parental responsibilities and professional or student responsibilities. In light of this disadvantage and this purpose, it is doubtful that the legislature would include all refugee claimants in order to remedy the unconstitutionality of s. 3 of the *RCR*. Indeed, this conclusion is reinforced by the fact that, from 2015 to 2018, the government broadly interpreted s. 3 subpara. 3 of the *RCR* as granting eligibility for the reduced contribution to refugee claimants who held an open work permit, rather than to every refugee claimant. Including all refugee claimants without exception in s. 3 of the *RCR* would therefore be contrary to parliamentary sovereignty. Furthermore, in my view, the remedy must be tailored to the infringement in issue, not tailored to improve a group's overall position in society.

The legislature can always, if it wishes, act incrementally to address the social inequalities suffered by a group.

III. Conclusion

[402] There is no doubt that discrimination based on sex unfortunately continues to exist in our society and can affect both women who are citizens and women who are immigrants. In the circumstances, the *RCR* does not create a distinction based on this ground, but rather on the ground of refugee claimant status. However, the distinction is a lawful one because refugee claimant status is not and cannot be recognized as a new analogous ground.

[403] For these reasons, I would allow the appeal, set aside the judgments of the courts below and dismiss the respondent's application for judicial review, with costs in this Court.

APPENDIX

Relevant Legislative Provisions

Educational Childcare Act, CQLR, c. S-4.1.1

1. The object of this Act is to enhance the quality of the educational services intended for children before their admission to school so as to ensure the health and safety of the children to whom childcare services are provided, particularly those with special needs or who live in a precarious socio-economic situation, foster their development, educational success and well-being and provide them with equality of opportunity.

A further object of this Act is to foster the harmonious development of an educational childcare service supply that is sustainable and that takes into account the needs of parents, in order to facilitate the reconciliation of their parental responsibilities with their professional or student responsibilities, as well as their right to choose the educational childcare provider.

3. In this Act, unless otherwise required by the context,

(1) the person who has de facto custody of a child is considered to be a parent of the child, except if the person having parental authority objects;

(2) a person is related to another person if that other person is

(a) subject to section 93.3, the person's spouse or child, the child of the person's spouse, or the person's mother, father or parent, aunt, uncle, brother or sister or their spouse;

(b) the person's partner or the partnership in which the person is a partner;

(c) a legal person controlled by the person or by a person referred to in subparagraph *a*;

(d) a legal person in which the person, directly or indirectly, holds 10% or more of all voting rights attached to issued shares or 10% or more of all issued shares;

(e) a legal person of which the person is a director or officer; or

(f) a person, other than a financial institution, who directly or indirectly grants the person a security, a loan or any other economic benefit in relation to the establishment of a day care centre delivering subsidized childcare or the funding of its activities;

(3) a natural person who, directly or indirectly, holds voting shares of a legal person not listed on a Canadian stock exchange is a shareholder.

Reduced Contribution Regulation, CQLR, c. S-4.1.1, r. 1

3. A parent residing in Québec who meets any of the following conditions is eligible for the reduced contribution:

(1) the parent is a Canadian citizen;

(2) the parent is a permanent resident within the meaning of the Immigration and Refugee Protection Act (S.C. 2001, c. 27);

(3) the parent is staying in Québec primarily for work purposes and holds a work permit issued under the Immigration and Refugee Protection Act or is exempted from holding such a permit under that Act;

(4) the parent is a foreign student holding a certificate of acceptance issued under the Québec Immigration Act (chapter I-0.2.1) and is receiving a scholarship from the Government of Québec pursuant to the policy applying to foreign students in Québec colleges and universities;

(5) the parent is recognized by a court in Canada of competent jurisdiction as a refugee or protected person within the meaning of the Immigration and Refugee Protection Act and holds a selection certificate issued under section 3.1 of the Québec Immigration Act;

(6) the Minister of Citizenship and Immigration has granted protection to the parent under the Immigration and Refugee Protection Act and the parent holds the selection certificate referred to in paragraph 5;

(7) the parent holds a temporary resident permit issued under section 24 of the Immigration and Refugee Protection Act in view of the granting of permanent residence and holds the selection certificate referred to in paragraph 5; or

(8) the parent is authorized to file in Canada an application for permanent residence under the Immigration and Refugee Protection Act or the Immigration and Refugee Protection Regulations (SOR/02-227) and holds the selection certificate referred to in paragraph 5.

Appeal allowed in part with costs to the respondent, CÔTÉ J. *dissenting.*

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