English translation of the judgment of the Court by SOQUIJ

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| Procureur général du Québec c. Kanyinda | | | | | 2024 QCCA 144 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-09-030116-222 | | | | |
| (500-17-108083-190) | | | | | |
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| DATE: | February 7, 2024 | | | | |
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| CORAM: | | THE HONOURABLE | | JULIE DUTIL J.A.  ROBERT M. MAINVILLE, J.A.  BENOÎT MOORE, J.A. | |
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| ATTORNEY GENERAL OF QUEBEC | | | | | |
| APPELLANT/INCIDENTAL RESPONDENT – Defendant | | | | | |
| v. | | | | | |
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| BIJOU CIBUABUA KANYINDA | | | | | |
| RESPONDENT/INCIDENTAL APPELLANT – Plaintiff | | | | | |
| And | | | | | |
| COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE | | | | | |
| IMPLEADED PARTY/INCIDENTAL APPELLANT – Intervener | | | | | |
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| JUDGMENT | | | | | |
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1. The appellant appeals from a judgment rendered on May 25, 2022, by the Superior Court, District of Montreal (the Honourable Marc St-Pierre), granting in part the respondent’s amended application for judicial review, declaring that section 3 of the *Reduced Contribution Regulation* is *ultra vires* the government’s regulatory powers and that the respondent was entitled to subsidized childcare services.
2. The respondent and the impleaded party have brought an incidental appeal and argue that part of section 3 of the *Regulation* is unconstitutional under section 15 of the *Canadian Charter of Rights and Freedoms* and section 10 of the *Charter of Human Rights and Freedoms*.
3. For the reasons of Dutil, J.A., with which Mainville and Moore, JJ.A. agree, **THE COURT:**
4. **ALLOWS** in part the principal appeal for the sole purpose of setting aside paragraph 82 of the trial judgment;
5. **SETS ASIDE** paragraph 82 of the trial judgment;
6. **ALLOWS** in part the incidental appeal of the respondent – incidental appellant;
7. **DECLARES** that the exclusion, in section 3 of the *Reduced Contribution Regulation* (CQLR, c. S-4.1.1, r.1), of parents who are refugee claimants staying in Quebec who hold a work permit constitutes discrimination based on sex that infringes section 15 of the *Canadian Charter of Rights and Freedoms*;
8. **DECLARES** that this infringement is not justified under section 1 of the *Canadian Charter of Rights and Freedoms*;
9. **DECLARES** that section 3(3) of the *Reduced Contribution Regulation* (CQLR, c. S-4.1.1, r.1) must henceforth be read as making parents who reside in Quebec for the purpose of a claim for refugee protection while holding a work permit eligible for the reduced contribution;
10. **DISMISSES** the incidental appeal of the impleaded party – incidental appellant;
11. **THE WHOLE** without legal costs on appeal given the mixed outcome of the appeals.

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|  | | JULIE DUTIL J.A. |
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|  | | ROBERT M. MAINVILLE, J.A. |
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|  | | BENOÎT MOORE, J.A. |
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| Mtre Manuel Klein  Mtre Christophe Achdjian | | |
| bernard, roy (justice – québec) | | |
| For the appellant – incidental respondent | | |
|  | | |
| Mtre Sibel Ataogul  Mtre Guillaume Grenier | | |
| mmgc | | |
| For the respondent – incidental appellant | | |
|  | | |
| Mtre Justine St-Jacques  Mtre Christine Campbell | | |
| bitzakidis, clément-majors, fournier | | |
| For the impleaded party ­– incidental appellant | | |
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| Date of hearing: | November 2, 2023 | |

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| REASONS OF DUTIL J.A. |
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1. The three appeals before the Court are to determine whether refugee claimants staying in Quebec who hold a work permit may be excluded from the subsidized childcare program for their children.
2. The principal appeal of the Attorney General of Quebec (“AGQ”) concerns the validity of section 3 of the *Reduced Contribution Regulation* (“*RCR*”)[[1]](#footnote-1) from an administrative law perspective since the trial judge declared it void and *ultra vires*.
3. The incidental appeal of the respondent – incidental appellant, Ms. Kanyinda, argues that section 3 of the *RCR* is unconstitutional within the meaning of section 15 of the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”), while the appeal of the impleaded party – incidental appellant, the Commission des droits de la personne et des droits de la jeunesse (“CDPDJ”), also concerns the unconstitutionality of this provision, but under section 10 of the *Charter of Human Rights and Freedoms* (“*Quebec Charter*”).

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## Background

1. The facts useful to consider the appeal are simple and undisputed.
2. Ms. Kanyinda is from the Democratic Republic of Congo. After a stay in the United States, she entered Quebec on or around October 9, 2018, through the point of entry known as “Roxham Road”, since closed following an agreement between the governments of Canada and the United States. She is the mother of three children who accompanied her to Quebec and were 5, 4, and 2 years old at the time the proceeding was filed.
3. As soon as she arrived in Quebec, Ms. Kanyinda made a claim for refugee protection under the *Immigration and Refugee Protection Act* (“*IRPA*”).[[2]](#footnote-2) Although this type of claim should have been processed quickly, according to the applicable legislation,[[3]](#footnote-3) the periods required to determine refugee status are often very long. In this case, Ms. Kanyinda had not yet been granted refugee status on November 26, 2019, at the time of the AGQ’s pre-trial examination. However, she had that status at the trial on April 21 and 22, 2022.
4. After she filed her claim and while waiting for the federal authorities to grant her refugee status, Ms. Kanyinda obtained a work permit allowing her to hold employment in Quebec. She also contacted three daycares to find subsidized spaces for her children. She was refused access to this service at each daycare, however, because she was excluded from subsidized childcare services, which are available to people who have been officially recognized as refugees by the federal authorities, not those waiting for the federal authorities’ decision on refugee status.
5. On May 31, 2019, Ms. Kanyinda filed an application for judicial review, which was amended on August 16, 2019. This application has three components that she describes as follows in her appeal brief:

[translation]

1. an interpretative and declaratory component (under article 142 of the *Code of Civil Procedure*) seeking recognition that a refugee claimant staying in Quebec who holds a work permit is eligible for the reduced contribution under the existing provisions of the *Educational Childcare Act* (the “*ECA*”) and the *RCR*;
2. an administrative law component alleging that section 3 of the *RCR* is void and illegal, either because the *ECA* does not grant the government any power to enact a regulation defining the eligibility conditions for the reduced contribution, such that section 3 of the *RCR* was enacted without valid statutory authorization, or because if there was valid statutory authorization, it did not authorize the creation of distinctions or categories of people limiting the right to the reduced contribution (discrimination in the administrative law sense);
3. a constitutional component alleging that the exclusion of refugee claimants staying in Quebec who hold a work permit from the right to the reduced contribution is unconstitutional because it unjustly infringes on the right to equality guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms* (the “*Canadian Charter*”) and by section 10 of the *Charter of human rights and freedoms* (the “*Quebec Charter*”), constitutes cruel and unusual treatment within the meaning of section 12 of the *Canadian Charter,* and interferes with the right to dignity of the person guaranteed by section 4 of the *Quebec Charter*.
4. The CDPDJ intervened on September 20, 2019.
5. On May 25, 2022, the trial judge granted in part the application for judicial review concerning the administrative component. He concluded that section 3 of the *RCR* was enacted without statutory authorization and is therefore *ultra vires* and void. However, the judge rejected Ms. Kanyinda’s arguments on the interpretative and constitutional components.[[4]](#footnote-4)
6. The three parties appeal the trial judgment.

## The judgment under appeal

1. The judge first examined the usefulness of ruling on the dispute given that Ms. Kanyinda had been granted refugee status since filing her application for judicial review and was now eligible for reduced contributions in subsidized daycares. He found that the issue was serious and that it was useful to determine it.[[5]](#footnote-5)
2. The judge then discussed the interpretation to be given to section 3 of the *RCR*. In his view, this provision excludes refugee claimants from the categories of people eligible for reduced contributions; he therefore rejected the reading in advocated by Ms. Kanyinda.[[6]](#footnote-6)
3. Furthermore, the judge found that the government was not empowered to enact section 3 of the *RCR* because the *ECA* did not expressly grant this regulatory power. At the same time, he rejected the application of the doctrine of indirect authorization as the *ECA* does not identify the holder of this authorization power. He therefore declared this *RCR* provision void and *ultra vires*.[[7]](#footnote-7)
4. With respect to the constitutional component, the judge concluded that section 3 of the *RCR* is not discriminatory within the meaning of section 15 of the *Canadian Charter*. There is no discrimination based on sex because there is nothing to determine in what proportion women refugee claimants pay the additional childcare expenses for their children.[[8]](#footnote-8) He also rejected the argument that there is discrimination based on citizenship because section 3 of the *RCR* applies to both Canadian citizens and non-citizens.[[9]](#footnote-9) Last, according to the judge, the ground of immigration status is not sufficiently immutable to be recognized as an analogous ground of discrimination.[[10]](#footnote-10)
5. The judge also rejected the constitutional argument based on section 12 of the *Canadian Charter* that guarantees each person the right to protection against cruel and unusual treatment or punishment.Nothing proves that the *RCR* was enacted to exclude [translation] “bogus refugees”. However, the terms “cruel and unusual” should be interpreted according to their ordinary meaning and not to allow the judiciary to take the place of elected officials.[[11]](#footnote-11)
6. The judge then ruled on the arguments based on the *Quebec Charter*. He found that section 3 of the *RCR* does not violate sections 10 and 12 and therefore rejected the arguments based on sex, ethnic origin, or social condition. He held that section 12 does not apply to regulatory texts, which are not included in the expression “make a juridical act”.[[12]](#footnote-12)
7. The judge held that considering refugee claimants as ineligible for the reduced contribution does not violate section 4 of the *Quebec Charter*, which enshrines the right of every person to the safeguard of their dignity, honour, and reputation.[[13]](#footnote-13)
8. Thus, the judge accepted only the ground of lack of statutory authorization to grant Ms. Kanyinda’s application for judicial review in part.

## Issues

1. The appeals raise several issues that may be grouped as follows:

AGQ’s principal appeal

* Did the trial judge err in concluding that section 3 of the *RCR* was enacted without valid statutory authorization?
* Are the distinctions relating to immigration status, introduced by section 3 of the *RCR*, rationally justified under the rules of administrative law in light of the enabling provision and the legislative objective?

Ms. Kayinda’s incidental appeal

* Did the trial judge err in concluding that section 3 of the *RCR* did not infringe the right to equality protected by section 15 of the *Canadian Charter*?

CDPDJ’s incidental appeal

* Did the trial judge err in law in concluding at paragraphs 21 to 27 of his judgment that section 3 of the *RCR* is clear and excludes refugee claimants?
* Did the trial judge err at paragraphs 63 to 71 of his judgment in concluding that the exclusion of refugee claimants from the reduced contribution is not discrimination within the meaning of sections 10 and 12 of the *Quebec Charter*?

#### Analysis

1. I will begin by dealing with the issues related to the validity of the *RCR*, its interpretation, and the fact that it might be discriminatory in the administrative law sense. I will then continue my analysis in order to determine whether section 3 of the *RCR* infringes the right to equality protected by section 15 of the *Canadian Charter* and by sections 10 and 12 of the *Quebec Charter*.

*Statutory authorization*

1. In the principal appeal, the AGQ argues that the judge erred in concluding that section 3 of the *RCR* was enacted without valid statutory authorization. In the AGQ’s view, the *ECA*, read as a whole, and more particularly taking into account its sections 87, 42(4) and 106(26), empowers the Quebec government to establish the cases and conditions of eligibility for the reduced contribution. The *ECA* provisions in fact reveal that the legislature decided to grant the government all the regulatory powers likely to have a major social and financial impact on childcare services. These broad powers include the power to determine the eligibility conditions for the reduced contribution.
2. Ms. Kanyinda submits that no enabling provision grants the government the power to establish in a regulation eligibility for the reduced contribution. Section 106 *ECA* exhaustively lists the regulatory powers granted to the government. It has no direct power to determine the eligibility conditions. Nor is this power granted under section 84 of the *ECA*, reiterated in section 106(26), because it concerns something other than the determination of eligibility conditions for the reduced contribution.
3. According to Ms. Kanyinda, the *ECA*’s general scheme with respect to regulatory powers indicates that each time the legislature refers to regulatory standards, without granting a regulatory power to a clearly specified holder, it confirms its existence and grants it to the holder identified in section 106, that is, the government. This authorization technique used systematically by the legislature in the *ECA* is not used in section 42(4), which means that it contains no indirect authorization. The reference to a regulation in section 87 of the *ECA* concerns the contribution set by regulation. This provision does not grant any regulatory power to determine the eligibility conditions for the reduced contribution.
4. The judge stated the following on this issue:

[translation]

[29] The Attorney General referred to sections 84 and subparagraph (26) of section 106 which, if *interpreted using a* *broad and purposive approach,* would authorize the government to identify the eligible persons:

84. The Government may, by regulation, determine conditions of payment of the parental contribution for a day or half day of childcare, and cases in which full or partial exemption from the contribution is granted for the services determined by the Government.

2005, c. 47, s. 84; 2015, c. 8, s. 165; 2020, c. 5, s. 11.

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;

which clearly concerns something else; had the legislature wanted these provisions to apply to the categories of persons eligible for the reduced contribution, it would have written it using those exact or similar words.

[30] The Attorney General also relies on the doctrine of indirect authorization such that the Court should accept that section 3 of the *RCR* is legal based on the provision in the *ECA* that refers to the eligibility conditions of parents for the reduced contribution determined by regulation, that is, subparagraph (4) of the first paragraph of section 42 of the *ECA*, which reads:

42. A home educational childcare coordinating office has the following functions in the territory assigned to it:

(4)  to determine, according to the cases and conditions determined by regulation, a parent’s eligibility for payment of the contribution set by the Government under section 82;

[31] Based on this provision, the Attorney General argues that the *ECA* clearly provides for a regulation on eligibility and thus allows the categories of persons who could benefit from the reduced contribution to be determined; the Court agrees with this position.

[32] However, in the scholarly commentary raised by the plaintiff, Garant, as well as Issaly and Lemieux, writes, in reference to indirect authorization, that the power holder (of authorization) must at least be identified; the Attorney General does not question this determination by the authors.

[33] The Attorney General instead argues that the authority to enact the eligibility requirements for the contribution in a regulation clearly arises from the wording of the *ECA* and that the only other holder of the right to enact regulations under the *ECA*, the Minister, has been granted the power to enact a regulation within a very limited area unrelated to the contribution (section 107 of the *ECA*).

[34] For the undersigned, however, even were this logical (that the government has the authority), this would add something not found in the teaching to be drawn from the scholarly commentary; to accept the AGQ’s proposal that the Court itself identifies the holder of statutory authorization, when it must be the *ECA*.

[35] In the circumstances, the Court is of the view that the government does not have the authority to enact section 3 of the *RCR* determining the categories of persons who could benefit from the reduced contribution; section 3 of the *Regulation* will therefore be declared *ultra vires*.[[14]](#footnote-14)

[Emphasis in the original; references omitted]

1. The judge concluded that section 106(26) of the *ECA* does not empower the government to make a regulation determining the eligibility conditions for the reduced contribution. Nor did he find indirect statutory authorization in section 42(4).
2. In my view, the judge made a reviewable error in declaring section 3 of the *RCR* *ultra vires*.
3. Section 3 of the *RCR* states which parents residing in Quebec are eligible for the reduced contribution to access subsidized childcare services for their children:

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| **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. | **3.** Est admissible au paiement de la contribution réduite, le parent qui réside au Québec et qui satisfait à l’une des conditions suivantes :  1° il est citoyen canadien;  2° il est résident permanent au sens de la Loi sur l’immigration et la protection des réfugiés (L.C. 2001, c. 27);  3° il séjourne au Québec principalement afin d’y travailler et il est titulaire d’un permis de travail délivré conformément à la Loi sur l’immigration et la protection des réfugiés ou est exempté de l’obligation d’être titulaire d’un tel permis en vertu de cette loi;  4° il est un étudiant étranger, titulaire d’un certificat d’acceptation délivré en vertu de la Loi sur l’immigration au Québec (chapitre I-0.2.1) et récipiendaire d’une bourse d’études du gouvernement du Québec en application de la politique relative aux étudiants étrangers dans les collèges et universités du Québec;  5° il est reconnu, par le tribunal canadien compétent, comme réfugié ou personne à protéger au sens de Loi sur l’immigration et la protection des réfugiés et il est titulaire d’un certificat de sélection délivré en vertu de l’article 3.1 de la Loi sur l’immigration au Québec;  6° le ministre de la Citoyenneté et de l’Immigration lui a accordé la protection en vertu de la Loi sur l’immigration et la protection des réfugiés et il est titulaire du certificat de sélection visé au paragraphe 5;  7° il est titulaire d’un permis de séjour temporaire délivré en vertu de l’article 24 de la Loi sur l’immigration et la protection des réfugiés en vue de l’octroi éventuel de la résidence permanente et du certificat de sélection visé au paragraphe 5;  8° il est autorisé à soumettre au Canada une demande de résidence permanente en vertu de la Loi sur l’immigration et la protection des réfugiés ou du Règlement sur l’immigration et la protection des réfugiés (DORS/02-227) et il est titulaire du certificat de sélection visé au paragraphe 5. |

1. The trial judge did not rule on the standard of review to apply to the legality of regulations. Much has been written on this subject in recent years and the Supreme Court will reconsider it shortly.[[15]](#footnote-15) Indeed, since *Dunsmuir v. New Brunswick*,[[16]](#footnote-16) rendered in 2008, followed by *Vavilov*,[[17]](#footnote-17) there has been some confusion about the applicable standard of review. Montmigny J.A., now chief justice of the Federal Court of Appeal, aptly summarized the current arguments in this regard in *International Air Transport Association*:

[186] Prior to Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190 [Dunsmuir], the analytical framework for the judicial review of delegated legislation was firmly established, and rested on the ultra vires doctrine. When the validity of delegated legislation was challenged, reviewing courts interpreted the statutory grant of authority to determine whether, correctly interpreted, it fell within or outside its ambit. This was essentially an exercise of statutory interpretation, with no deference to the delegate’s interpretation.

[187] In the years following Dunsmuir, some confusion arose in the highest court on this issue, no doubt because that decision was focused on the judicial review of decisions of adjudicative tribunals and not on delegated legislation. In some cases, the Court applied the judicial review framework (see Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, [2012] 1 S.C.R. 5; Green v. Law Society of Manitoba, 2017 SCC 20, [2017] 1 S.C.R. 360; West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal), 2018 SCC 22, [2018] 1 S.C.R. 635), whereas in other cases the Court reverted to the vires analysis (see for example, Katz Group Canada Inc. v. Ontario (Health and Long-Term Care), 2013 SCC 64, [2013] 3 S.C.R. 810 [Katz]; Canadian National Railway Co. v. Canada (Attorney General), 2014 SCC 40, [2014] 2 S.C.R. 135 at para. 51; Donald Brown & John Evans, Judicial Review of Administrative Action in Canada (Toronto: Thomson Reuters Canada Ltd., 2022), Chap. 2021, at section 2021:5(ii)(3)).

[188] Unfortunately, Vavilov did not bring much clarity to that confusion. Because the Supreme Court purported to adopt the reasonableness standard as the default standard of review to all administrative actions, most intermediate appeal courts adopted the view that delegated legislation would henceforth be reviewed against that standard: see, for example, 1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176 at paras. 48-59; Portnov v. Canada (Attorney General), 2021 FCA 171; Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration), 2020 FCA 196 [2021] 1 F.C.R. 271; Paul Daly, “Regulations and Reasonableness Review” (January 29, 2021), online (blog): Administrative Law Matters <https://www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/and the cases cited therein>.

[189] This approach, however, has not been followed unanimously: see, for example, Hudson’s Bay Company ULC v. Ontario (Attorney General), 2020 ONSC 8046, 154 O.R. (3d) 103; Friends of Simcoe Forest Inc. v. Minister of Municipal Affairs and Housing, 2021 ONSC 3813 at para. 25. Indeed, the reasonableness standard review is fraught with difficulties, not the least of which is that it assumes the body or person that has been granted the power to adopt delegated legislation has also been vested with the power to decide questions of law and to determine the proper interpretation of the habilitating statute; yet, this is obviously not always the case: see John M. Evans, “Reviewing Delegated Legislation After Vavilov: Vires or Reasonableness?” (2021) 34:1 Can. J. Admin. L.& P. 1.

[190] More recently, the Supreme Court has brought grist to the mill of those who support the view that the Vavilov judicial review framework does not apply to delegated legislation. In References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, 455 D.L.R. (4th) 1 [Ref re Greenhouse Gas], the Court reviewed the validity of the regulations at issue on the basis of its own interpretation of the enabling statute, without expressing any deference to Cabinet on the interpretative issue. It is true that the majority (in contrast to the dissenting opinion of Rowe J.) made no mention of the ultra vires doctrine, but neither did it refer to Vavilov nor to reasonableness review. On the contrary, the majority took it upon itself to interpret the scope of the regulation-making powers found in the Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12. While this is clearly not the last word on the subject, it signals at the very least that the issue is far from settled.[[18]](#footnote-18)

1. I see no need for the Court to rule on this controversy. Section 3 of the *RCR* is not *ultra vires*, whether pursuant to the teachings in *Katz*,[[19]](#footnote-19) which favours a stricter standard, or according to the reasonableness standard set out in *Vavilov*.
2. Professor Garant defines a regulation as a [translation] “normative instrument, under an express statutory authorization, that disposes in a general and impersonal manner, under an express statutory authorization”.[[20]](#footnote-20) Any analysis of its validity is therefore conducted by [translation] “carefully reading the words chosen by the legislature to grant the authority to make regulations”.[[21]](#footnote-21)
3. *Katz*,[[22]](#footnote-22) rendered by the Supreme Court in 2013, is a leading case to determine a regulation’s validity. Abella J., on behalf of the Court, explained that regulations benefit from a presumption of validity. The burden is therefore on challengers to demonstrate their invalidity. To do so, it must be shown that the regulation is “inconsistent with the objective of the enabling statute or the scope of the statutory mandate”.[[23]](#footnote-23) Moreover, a purposive approach is favoured so that, where possible, the regulation is construed in a manner which renders it *intra vires*. Abella J. stated:

[25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation*(2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires*.

[26] Both the challenged regulation and the enabling statute should be interpreted using a “broad and purposive approach . . . consistent with this Court’s approach to statutory interpretation generally”.

[27] This inquiry does not involve assessing the policy merits of the regulations to determine whether they are “necessary, wise, or effective in practice” (*Jafari v. Canada (Minister of Employment and Immigration)*, 1995 CanLII 3592 (FCA), [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* ...:

. . . the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

[28] It is not an inquiry into the underlying “political, economic, social or partisan considerations” (*Thorne’s Hardware Ltd. v. The Queen*, 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court’s view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, 1978 CanLII 40 (SCC), [1979] 1 S.C.R. 2, at p. 12; see also*Jafari*,at p. 602; Keyes, at p. 266).  They must be “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, 1981 CanLII 175 (SCC), [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health*(1976), 1976 CanLII 739 (ON SC), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261).  In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, “it would take an egregious case to warrant such action”.[[24]](#footnote-24)

[Emphasis added; references omitted]

1. The test that emerges from *Katz* is therefore stringent because the regulation is presumed valid. Moreover, it must be irrelevant, extraneous or even completely unrelated to the statutory purpose to be found to be *ultra vires*.
2. With respect to the reasonableness standard, in *Vavilov*, the Supreme Court stated that the reasonableness of the regulatory act must nonetheless be measured in light of the *Katz* principles:

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long‑Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48.[[25]](#footnote-25)

1. In this case, I agree with the AGQ that the words of the *ECA* must be read as a whole to decide whether the government could enact section 3 of the *RCR*. Moreover, the “modern principle” of statutory interpretation, as stated by Elmer Driedger, recognizes the important role of context, which allows for an interpretation that is harmonious with the scheme of the Act, its object, and the intention of the legislature.[[26]](#footnote-26) Words must not be added when interpreting a law, but this does not mean the implicit meaning of a text cannot be ascertained by necessary inference. Professors Côté and Devinat clearly explain the caution required when applying the presumption against adding or removing words:

[translation]

Despite the many times this presumption has been applied in the case law, it must be applied with caution because legal communication, like any other communication, is comprised of two elements, the express (the wording) and the implicit (the overall context of the statement). The presumption studied focuses solely on the express element of the communication. It assumes that judges who add or remove words from the legislative text are usurping the legislature’s role. However, the interpreter is only revealing the legislature’s intention insofar as they are making explicit that which is implicit in the text. The question therefore is not so much whether the judge may add words, but whether the words added have an effect other than to explain the implicit element of the legal communication.[[27]](#footnote-27)

[References omitted]

1. The interpretation of an enabling provision is subject to the same principles. The legislative context as a whole must be considered, and the challenged regulation and its enabling statute should be interpreted using a broad and purposive approach consistent with the Supreme Court’s general approach to statutory interpretation.[[28]](#footnote-28)
2. The *ECA*’s object is stated in section 1:

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| --- | --- |
| **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. | 1. La présente loi a pour objet de promouvoir la qualité des services de garde éducatifs destinés aux enfants avant leur admission à l’école en vue d’assurer la santé, la sécurité, le développement, la réussite éducative, le bien-être et l’égalité des chances des enfants qui reçoivent ces services, notamment ceux qui présentent des besoins particuliers ou qui vivent dans des contextes de précarité socio-économique.  Elle a également pour objet de favoriser le développement harmonieux d’une offre de services de garde éducatifs à l’enfance qui soit pérenne et qui tienne compte des besoins des parents, afin de faciliter la conciliation de leurs responsabilités parentales avec leurs responsabilités professionnelles ou étudiantes, ainsi que de leur droit de choisir le prestataire de services de garde éducatifs. |

1. The *ECA* set up a network of subsidized childcare providers in Quebec. Parents who have a space for their child in the network pay the contribution set by regulation. Section 42(4) states that the coordinating office has the function of determining a parent’s eligibility for the reduced contribution. This provision reads:

|  |  |
| --- | --- |
| **42.** A home educational childcare coordinating office has the following functions in the territory assigned to it, in compliance with the instructions given by the Minister under the second paragraph of section 40.0.1:  …  **(4)**to determine, according to the cases and conditions determined by regulation, a parent’s eligibility for payment of the contribution set by the Government under section 82; | **42.** Le bureau coordonnateur a pour fonctions, dans le territoire qui lui est attribué et dans le respect des instructions données en vertu du deuxième alinéa de l’article 40.0.1 :  […]  **4°**de déterminer, selon les cas et conditions déterminées par règlement, l’admissibilité d’un parent à la contribution fixée par le gouvernement en vertu de l’article 82; |

1. The AGQ argues that the legislature’s intention is to entrust to a regulatory authority not only the determination of the parents’ contribution, but the eligibility conditions as well. The AGQ in fact contends that it is an indirect authorization, described as follows by authors Issalys and Lemieux:

[translation]

Indirect authorization refers to the existence of regulations and therefore assumes a power to establish the regulations, even though that Act does not otherwise specifically assign this power. It leaves room for doubt on the existence and exact scope of the regulatory power.[[29]](#footnote-29)

1. I share the AGQ’s position that it is an indirect authorization.
2. This is clear from section 42(4), but also from section 87 of the *ECA*, which states that a parent may contest the decision of a permit holder or coordinating office regarding the parent’s eligibility or exemption:

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| --- | --- |
| **87.** A parent who believes he or she has been wronged by the decision of a permit holder or home educational childcare coordinating office regarding the parent’s eligibility for payment of the contribution set by regulation or for an exemption may apply to the Minister for a review of the decision.  The application must be made in writing within 90 days after the day on which the parent is notified of the decision, and must contain a brief summary of the grounds for the review.  The Minister may grant an extension if the parent can show that he or she was unable, for serious and valid reasons, to act sooner. | **87.** Le parent qui se croit lésé par la décision d’un titulaire de permis ou d’un bureau coordonnateur de la garde éducative en milieu familial à propos de son admissibilité à la contribution fixée par règlement ou à son exemption peut demander au ministre de réviser cette décision.  La demande est faite par écrit et elle expose sommairement les motifs invoqués. Elle est présentée dans les 90 jours suivant la date à laquelle le parent est avisé de la décision.  Le ministre peut prolonger ce délai si le parent démontre qu’il n’a pu pour des motifs sérieux et légitimes agir plus tôt. |

1. Section 106 *ECA* lists numerous regulatory powers vested in the government of Quebec, that is, 52 in total. These authorizations cover all regulatory powers with a major financial or social impact on the childcare services network governed by the *ECA*. Section 106(26) states:

|  |  |
| --- | --- |
| **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; | **106.** Le gouvernement peut, par règlement, pour l’ensemble ou une partie du territoire du Québec :  […]  **26°** déterminer les conditions et modalités suivant lesquelles le parent verse la contribution fixée par le gouvernement et les cas où le parent en est exempté, totalement ou partiellement, pour tout ou partie des services déterminés;  [Emphasis added] |

1. Moreover, the vast majority of regulatory powers in the *ECA* is granted to the government. Only one is granted to the Minister of Family. It is set out in section 107 of the *ECA* and concerns accreditation.
2. By considering both the object of the *ECA* and that Act as a whole and its purpose, I am of the view that the government could determine the eligibility conditions prescribed in section 3 of the *RCR*. The *ECA* must be considered “in [the] entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]”.[[30]](#footnote-30) By interpreting the *ECA* according to these teachings, the *terms and conditions* referred to in section 106(26) “for payment of the basic parental contribution set by the Government” include, in my opinion, the eligibility conditions that must be met to benefit from the reduced contribution and to which the legislature refers in sections 42(2) and 87 of the *ECA*. This is logical and consistent. Indeed, as the AGQ argues, it is difficult to claim that the government can, in a regulation, establish situations where a parent may be exempted from paying a reduced contribution but cannot determine the eligibility conditions. I therefore conclude that the trial judge made a reviewable error in determining that the government could not establish the eligibility conditions for the reduced contribution in section 3 of the *RCR*. In my view, the government was authorized to enact this regulatory provision.

## Interpretation of the regulation

1. In its incidental appeal, the CDPDJ argues that the judge erred in determining that the *RCR* is clear, and that the effect of subparagraph (5) of section 3 is to exclude refugee claimants because those whose refugee status has been recognized are eligible. The fact that recognized refugees are eligible for the reduced contribution under this provision does not exclude the possibility that refugee claimants are eligible under another provision. Moreover, the CDPDJ contests the judge’s statement that subparagraph (3) of section 3 of the *RCR* applies only to seasonal workers who come here during the summer to help in our fields because it is not supported by any evidence.
2. According to the CDPDJ, both the purposive, historical, systemic and logical approaches to interpretation support the conclusion that refugee claimants are also eligible for the reduced contribution under section 3 of the *RCR*.
3. At the hearing before the Court, the CDPDJ added that this provision, moreover, grants discretion to the Ministère to include or exclude eligible persons, as it did between 2015 and 2018, by considering refugee claimants eligible for the reduced contribution.
4. The judge ruled on this issue in paragraphs 21 to 27 of his judgment. He wrote:

[translation]

**SECOND ISSUE:** Does section 3 of the *Reduced Contribution Regulation* exclude refugee claimants from the reduced contribution?

[21] Section 3 of the *Reduced Contribution Regulation* states the following:

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.

O.C. 583-2006, s. 3; S.Q. 2015, c. 8, s. 178; S.Q. 2020, c. 5, s. 13

[22] It is probably worth reproducing section 4 of the applicable law, the *Educational Childcare Act*, to place section 3 of the *RCR* in context:

4. Every child has a right to quality personalized educational childcare services until the end of elementary school.

Such right must be exercised taking into account the organization and resources of childcare providers and of accredited home childcare coordinating offices and their right to agree or refuse to provide childcare to a child, the rules relating to subsidies and the priority given to children from birth until their admission to preschool education.

[23] Section 3 of the *RCR* is therefore the provision that identifies the persons eligible for subsidized spaces at the reduced contribution originally set at five dollars ($5) but apparently now eight dollars and seventy cents ($8.70).

[24] The plaintiff and the Commission contest more particularly the shift in orientation by the Ministère’s public servants who, after a few years of application, decided to interpret the beginning of subparagraph (3) “the parent is staying in Québec primarily for work purposes” as excluding refugee claimants. The Commission also rightly contests the public servants’ addition of conditions to the regulatory provisions.

[25] However, the Court tends to believe that the words “primarily for work purposes” in subparagraph (3) of section 3 of the *RCR* refers to seasonal workers from Mexico or other Central or South American countries who come to help in the fields during the summer. Counsel for the plaintiff in fact stated that she represents several of them when the Court brought this up at the hearing, thereby in a way suggesting that she agrees.

[26] Counsel for the Commission relied on principles of interpretation drawn from a well-known treatise to argue that it should be viewed otherwise.

[27] However, in the Court’s view, it is primarily subparagraph (5) that excludes *a contrario* refugee claimants, because it refers to recognized refugees (as being among eligible persons); refugee claimants are precisely persons who have applied to be recognized as refugees.[[31]](#footnote-31)

[References omitted]

1. The judge’s analysis is succinct, and I do not believe that subparagraph (3) of section 3 of the *RCR* refers solely to seasonal workers who come during the summer to work in the fields, as he said. However, I agree that section 3 of the *RCR* does not apply to refugee claimants. Therefore, they are not eligible for the reduced contribution.
2. The proper approach to interpret section 3 of the *RCR* is again that of Driedger: the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature.[[32]](#footnote-32)
3. Subparagraph (3) of section 3 of the *RCR* applies to persons staying in Quebec primarily for work purposes. As the AGQ argues, three conditions must be met for that provision to apply: (1) the person must be staying in Quebec; (2) primarily for work purposes; and (3) hold a work permit issued under the *Immigration and Refugee Protection Act* or be exempted from holding such a permit under that *Act*.
4. In this case, Ms. Kanyinda held a work permit but was not staying in Quebec primarily for work purposes. Instead, she hoped to be accepted as a refugee with her children and live here. The Quebec legislature gives the terms “stay” and “settle” different meanings. This distinction appears in the *Québec Immigration Act*,[[33]](#footnote-33) where both terms are used to distinguish temporary immigration status from permanent status:

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| --- | --- |
| **1.** The purposes of this Act are the selection of foreign nationals wishing to stay temporarily or settle permanently in Québec, …  …  **6.** The classes of foreign nationals wishing to stay temporarily in Québec are  (1) the temporary foreign worker class;  (2) the international student class; and  (3) the person on a temporary stay for medical treatment class.  …  **10.** To stay or settle in Québec, foreign nationals belonging to one of the classes listed in sections 6 and 7 must file an application with the Minister under an immigration program, unless they are covered by an exemption provided for by government regulation. … | **1.** La présente loi a pour objets la sélection de ressortissants étrangers souhaitant séjourner au Québec à titre temporaire ou s’y établir à titre permanent […]  […]  **6.** Les catégories de ressortissants étrangers qui souhaitent séjourner à titre temporaire au Québec sont les suivantes:  1°  la catégorie des travailleurs étrangers temporaires;  2°  la catégorie des étudiants étrangers;  3°  la catégorie des personnes en séjour temporaire pour traitement médical.  […]  **10.** Un ressortissant étranger appartenant à l’une des catégories prévues aux articles 6 et 7 doit, pour séjourner ou s’établir au Québec, présenter une demande au ministre dans le cadre d’un programme d’immigration, à moins qu’il ne soit visé par une exemption établie par règlement du gouvernement. […] |

1. It is clear from subparagraph (3) of section 3 of the *RCR* that the persons covered are those who enter the country for the purpose of staying here temporarily to work. That provision does not apply to persons waiting for a decision on their refugee status, even though they hold a work permit, as was the case for Ms. Kanyinda.
2. This interpretation of subparagraph (3) of section 3 of the *RCR* is also consistent with the wording of subparagraph (5) of section 3 of the *RCR*, which applies to refugees. For refugee claimants to be eligible for the reduced contribution, it would have to have been expressly stated. Subparagraph (5) of section 3 of the *RCR* as worded cannot include this category of persons.
3. Nor do I accept the CDPDJ’s argument that the *RCR* calls for the application of discretion. Subparagraph (3) of section 3 of the *RCR* must be interpreted and does not grant a discretionary power. The Ministère did consider refugee claimants as eligible for the reduced contribution from 2015 to 2018 but excluded them starting in 2018 without amending the text. It was an interpretation of section 3 of the *RCR* that has varied over time.
4. In short, the government established eligibility requirements for the reduced contribution. As stated above, to be eligible, a person must be covered by one of the subparagraphs in section 3 of the *RCR*. The terms used in subparagraph (3) of section 3 of the *RCR*, however, do not grant discretion to recognize refugee claimants whose refugee status has not been officially recognized under the *IRPA* as eligible for the reduced contribution. These requirements are established by regulation and must be complied with by those responsible for its application.

## Discrimination in the administrative law sense

1. I must now determine whether the distinctions relating to immigration status introduced by section 3 of the *RCR* are rationally justified in light of the enabling provision and legislative objective. In other words, is section 3 of the *RCR* discriminatory in the administrative law sense?
2. The judge did not rule on this issue raised by Ms. Kanyinda at trial.
3. The AGQ argues that the very purpose of the power delegated by the legislature allows distinctions to be made between parents who are eligible and those who are not. In fact, the enabling statute grants the government considerable discretion to make distinctions based on legitimate policy choices between different categories of persons. Consequently, the distinctions based on immigration status in section 3 of the *RCR* are reasonable, justified, and consistent with the discretion granted by the legislature.
4. Ms. Kanyinda argues that the authority to make regulations does not authorize the enactment of discriminatory provisions, except where “the discrimination is a necessary incident to exercising the power delegated by the province”.[[34]](#footnote-34) No statutory authorization, however, allows the government to determine by regulation the eligibility conditions for the reduced contribution. The *ECA* does not authorize or necessarily involve the establishment of distinctions between different categories of persons in this matter. Section 3 of the *RCR* is therefore discriminatory in the administrative law sense and is illegal.
5. In regulatory matters, the notion of administrative discrimination presupposes a distinction between categories of persons or circumstances that is not rationally justifiable with respect to the terms and public interest purpose of the enabling statute.[[35]](#footnote-35) It differs, however, from discrimination in relation to fundamental rights insofar as it is not necessarily based on immutable or constructively immutable personal characteristics.[[36]](#footnote-36)
6. In *Arcade Amusements*,[[37]](#footnote-37) the Supreme Court explained that discriminatory regulations may be rendered invalid even if they are rational or reasonable. Since then, the courts have applied the rule prohibiting administrative discrimination many times.[[38]](#footnote-38) It is not, however, absolute. Distinctions may be expressly or implicitly authorized by the enabling statute.[[39]](#footnote-39) Moreover, in certain matters, the purpose of the [translation] “regulation inevitably includes a certain form of discrimination which is then admissible”.[[40]](#footnote-40)
7. The case law and the scholarly commentary reveal that the issue of administrative discrimination is related to the existence of a statutory authorization to establish regulatory distinctions.[[41]](#footnote-41) Authors Jacques Lagacé and Richard Tremblay explain [translation] “that the approach verifying, using a narrow interpretation of the enabling statute provisions, whether the legislature authorized the regulatory body to discriminate, is largely dissatisfactory”.[[42]](#footnote-42) The power to discriminate is inherent in the power to regulate. The regulatory body has implicit power to discriminate.[[43]](#footnote-43) The distinctions between circumstances, however, must be reasonable and consistent with the object of the Act. The regulatory power holder cannot discriminate arbitrarily, and the discrimination cannot infringe the dignity of the person or be based on grounds prohibited by the *Charters*.[[44]](#footnote-44)
8. In this case, the legislature states that there are eligibility requirements for the reduced contribution. Since I have concluded that the government was empowered to determine these eligibility conditions by regulation, it thus had the discretion to make distinctions between certain categories of persons to determine which ones were eligible. This is consistent with the object of the *ECA* and does not make section 3 of the *RCR* discriminatory in the administrative law sense. I must nonetheless determine whether the distinction that excludes refugee claimants is consistent with the *Charters*, which I will do in the next section.

#### Does section 3 of the *RCR* infringe the right to equality protected by section 15 of the *Canadian Charter*?

1. Ms. Kanyinda raises three grounds of discrimination, that is sex by adverse effects, citizenship and immigration status, as an analogous ground.

## Discrimination based on sex

1. Ms. Kanyinda argues that section 3 of the *RCR* does not directly target women but that it affects them disproportionately. The result is that there is adverse effects discrimination since women bear a disproportionate share, alone or in a couple, of the responsibility for the care and custody of children. Section 3 of the *RCR* therefore constitutes a barrier to entry into the labour market, to francization, and more broadly, to integration into Quebec society. It disproportionately impacts women refugee claimants.
2. For the AGQ, the distinction created by this provision is not based on sex but rather on immigration status, which is not an analogous ground within the meaning of section 15 of the *Canadian Charter*. In the alternative, should the Court conclude that section 3 of the *RCR* infringes a right protected by section 15, this infringement is justified in a free and democratic society. Indeed, according to the AGQ, reserving eligibility for the reduced contribution to persons with recognized refugee status is justified.
3. The trial judge briefly examined the three grounds of discrimination raised by Ms. Kanyinda. With respect to the ground based on sex, he wrote:

[translation]

[38] The ground of sex is based essentially on the Supreme Court of Canada judgment in *Fraser v. Canada (Attorney General)*, a case involving adverse effects discrimination.

[39] In that case, the employees, Royal Canadian Mounted Police constables, complained that they could not accumulate full-time service for the purposes of the pension plan when they reduced their working hours under a job-sharing agreement that allowed two full-time employees to combine their working hours into one full-time position.

[40] The Supreme Court determined that the scheme disproportionately affected women because they were mostly, if not exclusively, the ones who took advantage of the program primarily to look after children. There was therefore discrimination based on sex, even though men could avail themselves of the job-sharing program, due to the adverse effects of a seemingly neutral condition of employment.

[41] The Attorney General relies on *Symes v. Canada*, which deals with the discriminatory impact of a provision of the *Income Tax Act* that prevented businesswomen from deducting childcare expenses from their income.

[42] The Supreme Court decided that even though it was agreed that women pay far more of the social costs caused by having children than men, it would have required evidence that women pay childcare expenses disproportionately—which was not presented.

[43] Moreover, the Attorney General distinguished it from *Fraser*, where there was evidence on the percentage of women who used the job-sharing agreement, for example, 100% during the period from 2010 to 2014, whereas the figures of the plaintiff’s expert were not conclusive.

[44] The Court finds that it must agree with the Attorney General that, in this case, there is also nothing to determine in what proportion men and women refugee claimants will pay the additional childcare expenses for their children. The case of the plaintiff, who arrived alone with her children, cannot be considered statistical evidence.[[45]](#footnote-45)

[References omitted]

1. I am of the view that the judge erred in concluding that section 3 of the *RCR* does not adversely discriminate against women refugee claimants based on sex.
2. The right to equality is set out in section 15(1) of the *Canadian Charter*:

|  |  |
| --- | --- |
| **15 (1)** 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. | **15 (1)** La loi ne fait acception de personne et s’applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l’origine nationale ou ethnique, la couleur, la religion, le sexe, l’âge ou les déficiences mentales ou physiques. |

1. Over the years, the Supreme Court has ruled many times on the test applicable to a section 15 analysis.[[46]](#footnote-46) Indeed, the Supreme Court has characterized section 15(1) as “the *Charter*’s most conceptually difficult provision”.[[47]](#footnote-47) Its analytical framework was clarified over the years and reconsidered by the Supreme Court in 2022 in *Sharma*.[[48]](#footnote-48) The Supreme Court revisited the analysis to provide guidance on the application,[[49]](#footnote-49) but stated that the two-step test is not at issue. The Court stated:

[28] The two‑step test for assessing a s. 15(1) claim is not at issue in this case. It requires the claimant to demonstrate that the impugned law or state action:

(a)   creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and;

(b)   imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R. v. C.P.*, 2021 SCC 19, at paras. 56 and 141; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19‑20).[[50]](#footnote-50)

1. In that case, the Supreme Court explained that the way the two-step test must be applied and the burden at each step are not clear, more particularly in cases of adverse effects discrimination which “occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground”.[[51]](#footnote-51) The law indirectly targets members of the protected group.
2. The first step is therefore to demonstrate that the law creates, on its face or in its impact, a distinction based on a protected ground. There must be a disproportionate impact on a protected group, as compared to non-group members.[[52]](#footnote-52) For example, this form of distinction means that a law may create “built-in headwinds” for members of protected groups.[[53]](#footnote-53) It may also be manifested by “the absence of accommodation for members of protected groups”.[[54]](#footnote-54) In *Sharma*, however, the Supreme Court recalled that “s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation”.[[55]](#footnote-55)
3. Moreover, in that same judgment, the Court stated the following on the comparative exercise at that step:

[41] The disproportionate impact requirement necessarily introduces comparison into the first step. As McIntyre J. explained in *Andrews*: “[Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises” (p. 164; see also *Fraser*, at para. 55). This Court no longer requires a “mirror comparator group” (*Withler*, at paras. 55‑64; *Fraser*, at para. 94). However, *Withler* confirms that comparison plays a role at both steps of the s. 15(1) analysis. At the first step, the word “distinction” itself implies that the claimant is treated differently than others, whether directly or indirectly (*Withler*, at para. 62, cited in *Fraser*, at para. 48).[[56]](#footnote-56)

1. A few remarks first about the judge’s interpretation of *Symes*[[57]](#footnote-57) of the Supreme Court. He appears to rely primarily on *Symes* to conclude that there is no discrimination, stating that [translation] “there is nothing to determine in what proportion men and women refugee claimants will pay the additional childcare expenses for their children. The case of the plaintiff, who arrived alone with her children, cannot be considered statistical evidence”.[[58]](#footnote-58) In that judgment, however, the situation was very different because of the type of claim. Ms. Symes alleged that a provision of the *Income Tax Act* refusing to allow her to deduct her babysitter’s salary as a business expense infringed section 15 of the *Canadian Charter*. The arguments concerned only the alleged prejudice for the specific subgroup of married businesswomen who were denied this tax deduction. Iacobucci J., on behalf of the majority, explained why it was necessary, in this case, to demonstrate that women disproportionately pay the childcare expenses:

Only if women disproportionately pay such expenses can s. 63 have any effect at all, since s. 63's only effect is to limit the tax deduction with respect to such expenses.[[59]](#footnote-59)

1. In this case, the issue to decide is of a very different nature. Ineligibility for the subsidized daycare program arising from the application of section 3 of the *RCR* is an additional barrier to entering the labour market which disproportionately impacts women who want to work. The judge could not reduce his analysis to the respective share of childcare expenses paid by men and women.
2. I return now to the examination of section 3 of the *RCR*. As Ms. Kanyinda acknowledged, it does not directly concern women. It is neutral on its face since parents are either men or women. However, by excluding refugee claimants, it has a disproportionately negative impact on women refugee claimants and is therefore adverse effect discrimination.
3. In my view, it appears from the evidence that Ms. Kanyinda has met her burden at the first step of demonstrating the adverse impact relating to the ground of sex. She has demonstrated that the exclusion under section 3 of the *RCR* creates or contributes to creating a disproportionate impact on the group of women refugee claimants. Ms. Kanyinda has filed convincing scientific evidence in support of her arguments, more particularly Jill Hanley’s expert report.
4. Dr. Hanley, a professor at the McGill School of Social Work since 2006, filed a report titled “The labour implications of the exclusion of refugee claimants from Quebec’s subsidized childcare program”. She states that affordable childcare increases women’s access to the labour market:

22. For decades there have been calls in Canada for a national affordable childcare program. Arguments in support of public provision or subsidy often assert that the provision of affordable childcare increases women’s access to the workforce, has positive outcomes for child development and has broader socioeconomic benefits. The introduction of Quebec’s universal subsidized childcare program in 1997 has been the envy of many outside of the province and is widely considered a success according to the above objectives.[[60]](#footnote-60)

[References omitted]

1. In support of these assertions, Dr. Hanley referred to two reports, among others, by Cleveland and Krashinsky (1998) and by Lefebvre and Merrigan (2008):

This report details an assessment of the economic impact of a major investment of public money in good quality child care for Canadian children 2 to 5 years of age… Chapter 3 presents and analyzes evidence concerning the economic impacts of child care on mothers’ participation in the labor force in particular, and on family life in general…[[61]](#footnote-61)

(Cleveland & Krashinsky)

In 1997, the provincial government of Québec, the second most populous province in Canada, initiated a new child-care policy. Licensed child-care service providers began offering day-care spaces at the reduced fee of $5.00 per day per child for children aged 4. By 2000, the policy applied to all children not in kindergarten. Using annual data (1993-2002) drawn from Statistics Canada’s Survey of Labour and Income Dynamics, the results show that the policy had a large and statistically significant impact on the labor supply of mothers with preschool children.[[62]](#footnote-62)

(Lefebvre & Merrigan)

1. Moreover, as Dr. Hanley explained, there is a high degree of consensus in the Canadian and international literature that access to affordable childcare increases women’s participation in the labour market. She states the following:

There is a high degree of consensus in the Canadian and international literature (Quebec, North America, Europe, Latin America) and over several decades, that access to affordable childcare increases women’s (i.e. mothers’) participation in the labour force and, conversely, that high costs of childcare discourage women’s employment.

Women continue to have disproportionate responsibility for children within two-parent heterosexual families and such couples are much more likely to decide that the female parent will say home to care for children if the cost or availability of childcare is prohibitive to seeking employment.[[63]](#footnote-63)

[References omitted]

1. Dr. Hanley added that the majority of single-parent families are headed by women, which means that when the cost of childcare is too high compared to the salary earned, mothers face significant barriers to accessing the labour market.[[64]](#footnote-64)
2. With respect to the empirical studies on refugee claimants, Dr. Hanley stated the following:

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 6say that they are not working because childcare is too expensive. Of these, 100% are women, and 61% are single parents.[[65]](#footnote-65)

[References omitted, emphasis omitted]

1. She concluded that many studies have established a link between the lack of access to affordable childcare and women’s access to the labour market, more particularly women refugee claimants.

58. I have reviewed the Canadian and international literature on the topic of the effects of affordable childcare and offered some preliminary quantitative and qualitative data from Quebec-specific research. We can be very confident that the exclusion of refugee claimants – a highly racialized population – from Quebec’s subsidized childcare program results in the following effects:

A. Many parents – particularly mothers, and even more so single mothers – of young children are unable to access the labour market in the absence of affordable childcare.

B. Parents denied access to the labour market find themselves dependent on Last Resort Financial Assistance, at high cost both for the state and in terms of parents’ financial and social wellbeing.

C. Other parents enter the workforce while either paying an unreasonably high proportion of their income on childcare (introducing other budgetary problems) or relying on informal, unregulated childcare (introducing instability into their job tenure).

D. Refugee claimants who are unable to work while their children are preschool age (the claims process takes years to complete) face lifelong employment effects related to deskilling, earning potential and career trajectories that will follow many of them into their lives as Permanent Residents and, eventually, Canadian citizens.

E. Denial of subsidized childcare to refugee claimants creates social exclusion. Refugee claimants may feel unable to contribute socially while experiencing reinforced dependence on social assistance and many parents feel acutely that their children are being denied opportunities for development and social connection.[[66]](#footnote-66)

1. The AGQ did not contradict these findings, by an expert or otherwise.
2. In *Sharma*, the Supreme Court set out the factors courts should consider to confirm the causation burden at step one of the analysis of a section 15(1) claim:

[49] … Ideally, claims of adverse impact discrimination should be supported by *both* (para. 60). To give proper effect to the promise of s. 15(1), however, a claimant’s evidentiary burden cannot be unduly difficult to meet. In that regard, courts should bear in mind the following considerations:

(a)   No specific form of evidence is required.

(b)   The claimant need not show the impugned law or state action was the *only*or the*dominant* cause of the disproportionate impact ⸺ they need only demonstrate that the law was *a* cause (that is, the law created*or contributed to*the disproportionate impact on a protected group).

(c)   The causal connection may be satisfied by a reasonable inference. Depending on the impugned law or state action at issue, causation may be obvious and require no evidence. Where evidence is required, courts should remain mindful that statistics may not be available. Expert testimony, case studies, or other qualitative evidence may be sufficient. In all circumstances, courts should examine evidence that purports to demonstrate a causal connection to ensure that it conforms with standards associated to its discipline.

(d)   Courts should carefully scrutinize scientific evidence (see National Judicial Institute, *Science Manual for Canadian Judges* (2018); see also National Research Council and Federal Judicial Center, *Reference Manual on Scientific Evidence* (3rd ed. 2011)).

(e)   If the scientific evidence is novel, courts should admit it only if it has a “reliable foundation” (*R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 33; see also *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 36).[[67]](#footnote-67)

1. In this case, Dr. Hanley’s studies are recent. They have a reliable basis, however, since the disadvantages suffered by women who want to access the labour market have been recognized by the jurisprudence of the Supreme Court on this issue.
2. It has long been recognized that women are disadvantaged in the labour market due to their family responsibilities. In *Fraser*, Abella J. stated that the Court has recognized these disadvantages:

[103]  Judgments of this Court have also recognized that women face disadvantages in the workplace because of their largely singular responsibility for domestic work. The Court has acknowledged the sacrifices women make at work “for the sake of domestic considerations” (*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, perL’Heureux‑Dubé J., concurring); and that “women bear a disproportionate share of the child care burden in Canada” (*Symes v. Canada*,[1993] 4 S.C.R. 695,at pp. 762‑63; see also *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 49‑50, per L’Heureux‑Dubé J., dissenting).

[104]  Recognizing the reality of gender divisions in domestic labour and their impact on women’s working lives is neither new nor disputable (see *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20, October 17, 1995, at paras. 155‑56 and 158).[[68]](#footnote-68)

1. In light of these Supreme Court teachings, the evidence adduced by Ms. Kanyinda, which is uncontradicted, supports the conclusion that section 3 of the *RCR* creates a distinction based on sex by excluding refugee claimants with work permits from the subsidized childcare program. I find that Ms. Kanyinda has fulfilled the relevant evidentiary burden at step one of the analysis.[[69]](#footnote-69)
2. Step two of the analysis requires a demonstration that section 3 of the *RCR* imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. I conclude that this is the case here.
3. Although women refugee claimants are not specifically excluded by section 3 of the *RCR*, this provision reinforces, perpetuates, and exacerbates the disadvantage they suffer, as women, in the labour market, which is demonstrated by the evidence adduced by Ms. Kanyinda. Women suffer a historical disadvantage in the workforce due to the fact that they bear a disproportionate share of the responsibility for the care and custody of children. Indeed, the Supreme Court has acknowledged this fact many times,[[70]](#footnote-70) as I stated. As a result, women participate less than men in the labour market. The fact that refugee claimants are, by this very fact, ineligible for the reduced contribution for subsidized childcare spaces clearly has a disproportionate impact on women in this group.
4. I conclude that section 3 of the *RCR* reinforces and perpetuates the historical disadvantage suffered by women who want to participate in the labour market. The distinction it creates by excluding refugee claimants therefore constitutes adverse effect discrimination based on sex within the meaning of section 15 of the *Canadian Charter*.

## Is the discrimination justified under section 1 of the Canadian Charter?

1. When a right protected by the *Canadian Charter* is infringed, the state must establish that this infringement is justified in a free and democratic society. In this case, the AGQ had the burden of proving that the infringement: (1) is based on a pressing and substantial objective; (2) is rationally connected to the objective; (3) is minimal; and (4) that there is proportionality between its effects and the objective.[[71]](#footnote-71)
2. The AGQ argues that the pressing and substantial objective of excluding refugee claimants from the reduced contribution for childcare spaces is that the legislature wants to provide financial assistance to persons with a sufficient connection to Quebec. The AGQ added that there is a rational connection because refugee claimants are waiting to be granted refugee status. It follows that as long as no decision has been made on this status, the state cannot assume that the claim is justified. The AGQ further argues that the impairment is minimal and proportionate. Ineligibility is not permanent but solely during the period prior to the decision by federal authorities on granting refugee status.
3. Courts typically show deference when reviewing a pressing and substantial objective.[[72]](#footnote-72) As authors Brun, Tremblay, and Brouillet recall, the courts will review objectives in only [translation] “the most patently extravagant” cases.[[73]](#footnote-73) Here, although the objective of [translation] “sufficient connection to Quebec” is based on very general considerations,[[74]](#footnote-74) I find that it meets the first requirement of the section 1 test due to the flexibility that must prevail at this stage.
4. With respect to the rational connection between the impairment and the objective, the AGQ argues that the Supreme Court stated that “[t]he government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so”.[[75]](#footnote-75) Moreover, the connection may be made out on the basis of reason or logic, as opposed to proof.[[76]](#footnote-76)
5. In *Frank v. Canada (Attorney General)*, the Supreme Court recalled the question to ask to determine whether there is a rational connection. It stated the following:

[59] The question at the first step of the proportionality inquiry is whether the measure that has been adopted is rationally connected to the objective it was designed to achieve. 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).[[77]](#footnote-77)

1. The AGQ submits that the state cannot assume that the refugee claim is well founded and that the refugee claimant will remain in the country. This demonstrates that the exclusion of persons whose status is not recognized is rationally connected to this objective.
2. In my view, the AGQ has not demonstrated that the measure is rationally connected to the pressing and substantial objective.
3. A reading of section 3 of the *RCR* reveals that several categories of persons eligible for the reduced contribution are staying in Quebec only temporarily. This is the case, for example, of workers with a work permit for a specific period (subparagraph (3)), foreign students holding a certificate of acceptance issued by the Quebec government (subparagraph (4)), and holders of temporary resident permits issued under section 24 of the *IRPA* (subparagraph (7)). As Ms. Kanyinda argues, this last case is particularly striking since this type of permit is granted in exceptional circumstances to allow a person to remain in Canada despite inadmissibility or failure to comply with the *IRPA*. This status is temporary and may be revoked at any time.
4. These persons are therefore staying in Quebec for only a limited time. For persons covered under subparagraph (7) of section 3 of the *RCR*, the resident permit may be revoked at any time. The common point between all the categories of persons covered by section 3 of the *RCR* is that they must all hold a work permit, not that they may remain in Quebec.
5. The AGQ had to demonstrate the following concerning the minimal impairment:

[66] The second component of the proportionality test requires the government to show that the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective (*RJR-MacDonald*, at para. 160; *Oakes*, at p. 139). In other words, the measure must be “carefully tailored” to ensure that rights are impaired no more than is reasonably necessary (*RJR-MacDonald*, at para. 160; *Mounted Police Association*, at para. 149). However, some deference must be accorded to the legislature by giving it a certain latitude: “If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement” (*RJR-MacDonald*, at para. 160).[[78]](#footnote-78)

1. In my view, the AGQ has not demonstrated that the impairment is minimal. Even were it to be accepted that refugee claimants do not have a sufficient connection to Quebec, they could be considered eligible for the reduced contribution while respecting the objective of favouring persons with such a connection according to the criteria determined by the government.
2. Proportionality between the effects and the objective has not been demonstrated. The AGQ raises no benefit arising from this exclusion under section 3 of the *RCR* from the perspective of legislative policy or society as a whole. On the contrary, Ms. Kanyinda has clearly demonstrated the adverse effects suffered by refugee claimants, supported by scientific evidence.
3. For all these reasons, I find that the violation of section 15 of the *Canadian Charter* is not justified under section 1.

## Appropriate remedy

1. As a remedy, Ms. Kanyinda asks for a reading in. She contends that the three conditions established by the case law for this remedy are met: (1) reading in would further the government objective of providing affordable quality educational childcare services and would constitute a lesser interference with that objective than would striking down section 3 of the *RCR*; (2) the choice of means used by the legislature to further that objective is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and (3) reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the subsidized childcare scheme.[[79]](#footnote-79)
2. The AGQ argues that the appropriate remedy is usually section 52(1) of the *Constitution Act, 1982*,[[80]](#footnote-80) and that the courts must proceed with restraint and caution before granting a remedy other than a declaration of inoperability because they risk intruding on the legislature’s role.[[81]](#footnote-81)
3. In my view, reading in is the best way to remedy the underinclusiveness of section 3 of the *RCR.* It balances the elimination of discriminatory practices and the need to protect the rights of the other categories of persons protected by the *ECA*. As noted by author Vinay Shandal, this interpretative approach is a logical solution when a statute grants benefits to some groups but excludes other groups, as in this case:

A third section 52 remedy is reading in. Where a statute that grants benefits to some groups violates the Charter because it excludes other groups, a court can read in the excluded group as a way of extending the statutory benefit to the excluded group. As stated in *Schachter*, "where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme”.[[82]](#footnote-82)

1. Moreover, the inclusion of refugee claimants under section 3 of the *RCR* will not have significant financial repercussions because they will not be automatically eligible for the reduced contribution, but rather the possibility of eligibility. I therefore propose that section 3(3) of the *RCR* should be read as making parents who reside in Quebec for the purpose of a refugee claim while holding a work permit eligible for the reduced contribution.

## Discrimination based on citizenship and immigration status

1. Given my conclusion that there is adverse effect discrimination based on sex, there is no need to rule on the two other grounds of discrimination raised under the *Canadian Charter*.

## Discrimination under sections 10 and 12 of the Quebec Charter

1. In its incidental appeal, the CDPDJ argues that the judge erred in law by deciding that the exclusion of refugee claimants from eligibility for the reduced contribution for subsidized childcare does not violate sections 10 and 12 of the *Quebec Charter*. The CDPDJ submits that, contrary to what the judge states, section 12 applies because this case does not concern a regulation, but the Ministère’s decision to no longer grant the reduced contribution to refugee claimants. According to the CDPDJ, the ineligibility of refugee claimants violates section 10 of the *Quebec Charter* because it establishes a distinction based on sex, social condition, and ethnic origin, which jeopardizes the full and equal exercise of their right to a service ordinarily offered to the public.
2. According to the AGQ, section 3 of the *RCR* does not create a distinction based on the grounds of discrimination cited by the CDPDJ. Even if it did, the AGQ considers that the trial judge was right to conclude that section 12 of the *Quebec Charter*, which protects against discrimination when making a juridical act, does not apply here.
3. Given my conclusion on the violation of section 15 of the *Canadian Charter*, I will not rule on whether section 10 of the *Quebec Charter* applies in this case. I will merely state that I cannot accept the CDPDJ’s argument that it was the Ministère’s decision to deny refugee claimants the reduced contribution that is problematic here. This was not a discretionary decision by the Ministère, but a decision taken due to the wording of section 3 of the *RCR*, and it is this provision which is at issue.
4. For these reasons, I would allow the AGQ’s principal appeal in part, for the sole purpose of setting aside paragraph 82 of the trial judgment, allow Ms. Kanyinda’s incidental appeal in part, declare that section 3 of the *RCR* constitutes discrimination based on sex that infringes a right protected by section 15 of the *Canadian Charter*, declare that section 3(3) of the *RCR* should henceforth be read as making parents who reside in Quebec for the purpose of a refugee claim and hold a work permit eligible for the reduced contribution, and dismiss the CDPDJ’s incidental appeal, the whole without legal costs on appeal given the mixed outcome of the appeals.

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| JULIE DUTIL J.A. |

1. *Reduced Contribution Regulation*, CQLR, c. S-4.1.1, r. 1. [↑](#footnote-ref-1)
2. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. [↑](#footnote-ref-2)
3. *Immigration and Refugee Protection Regulations,* SOR/2000-227, s. 159.9. The hearing before the Refugee Protection Division must normally be held not later than 30, 45 or 60 days after the day on which the claim is referred, depending on the claimant’s situation. [↑](#footnote-ref-3)
4. *Kanyinda c. Procureur général du Québec*, 2022 QCCS 1887 [Judgment under appeal]. [↑](#footnote-ref-4)
5. Judgment under appeal at paras. 13–20. [↑](#footnote-ref-5)
6. *Ibid*. at paras. 21–27. [↑](#footnote-ref-6)
7. *Ibid*. at paras. 28–35. [↑](#footnote-ref-7)
8. *Ibid*. at paras. 36–44. [↑](#footnote-ref-8)
9. *Ibid*. at paras. 45–47. [↑](#footnote-ref-9)
10. *Ibid*. at paras. 48–52. [↑](#footnote-ref-10)
11. *Ibid*. at paras. 53–62. [↑](#footnote-ref-11)
12. *Ibid*. at paras. 63–71. [↑](#footnote-ref-12)
13. *Ibid*. at paras. 72–80. [↑](#footnote-ref-13)
14. *Ibid*. at paras. 29–35. [↑](#footnote-ref-14)
15. *Innovative Medicines Canada v. Canada (Attorney General),* 2022 FCA 210; *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs*), 2022 ABCA 381, leave to appeal to SCC granted, 40570 (26 October 2023); *Auer v. Auer*, 2022 ABCA 375, leave to appeal to SCC granted, 40582 (26 October 2023); *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211 at paras. 185–193, leave to appeal to SCC granted, 40614 (17 August 2023) [*International Air Transport Association*]. [↑](#footnote-ref-15)
16. *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. [↑](#footnote-ref-16)
17. *Canada (Minister* *of Citizenship and* *Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. [↑](#footnote-ref-17)
18. *International Air Transport Association, supra* note 15 at paras. 186–190. [↑](#footnote-ref-18)
19. *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*]. [↑](#footnote-ref-19)
20. Patrice Garant, *Droit administratif*, 7th ed. (Montreal: Yvon Blais, 2017) at 270, No. 4.1.1. Cited by the Court of Appeal in *Janssen inc. c. Ministre de la Santé et des Services sociaux*, 2019 QCCA 39 at para. 39; *Ruel c. Québec (Éducation)*, [2001] R.J.Q. 2590 at para. 49 (CA). [↑](#footnote-ref-20)
21. Pierre Issalys & Denis Lemieux, *L'action gouvernementale : précis de droit des institutions administratives*, 4th ed. (Montreal: Yvon Blais, 2020) at 613, No. 7.9. See also: John Mark Keyes, *Executive legislation*, 3rd ed. (Toronto: LexisNexis Canada, 2021) at 383. [↑](#footnote-ref-21)
22. *Katz,* *supra* note 19. [↑](#footnote-ref-22)
23. *Ibid*. at para. 24. [↑](#footnote-ref-23)
24. *Ibid.* at paras. 25–28. [↑](#footnote-ref-24)
25. *Vavilov*, *supra* note 17 at para. 111. [↑](#footnote-ref-25)
26. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 26–27 [*Bell ExpressVu*], citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, reproduced in Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: Lexis Nexis Canada, 2022) at 7, No.2.01. [↑](#footnote-ref-26)
27. Pierre-André Côté & Mathieu Devinat, *Interprétation des lois*, 5th ed. (Montreal, Thémis, 2021) at 318, No.1014. [↑](#footnote-ref-27)
28. *Katz*, *supra* note 19 at para. 26. [↑](#footnote-ref-28)
29. P. Issalys & D. Lemieux, *supra* note 21 at 622–624; See also: J. M. Keyes, *supra* note 21 at 358–359. [↑](#footnote-ref-29)
30. *Bell ExpressVu*, *supra* note 26 at paras. 26–27. [↑](#footnote-ref-30)
31. Judgment under appeal at paras. 21–27. [↑](#footnote-ref-31)
32. *Bell ExpressVu*, *supra* note 26 at para. 26. [↑](#footnote-ref-32)
33. *Québec Immigration Act*, CQLR, c. I-0.2.1. [↑](#footnote-ref-33)
34. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para. 28 [*Spraytech*]. [↑](#footnote-ref-34)
35. P. Issalys & D. Lemieux, *supra* note 21 at 694–695, No. 7.30. [↑](#footnote-ref-35)
36. J. M. Keyes, *supra* note 21 at 371. [↑](#footnote-ref-36)
37. *Montréal v. Arcade Amusements Inc.,* [1985] 1 SCR 368 at 406. [↑](#footnote-ref-37)
38. *Spraytech*, *supra* note 34 at para. 28; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 SCR 371 at 413; *R. v. Greenbaum*, [1993] 1 SCR 674 at 694; *R. v. Sharma*, [1993] 1 SCR 650 at 667–668; *Restaurants Canada c. Ville de Montréal*, 2021 QCCA 1639 at para. 41 [*Restaurants Canada*]; *Repentigny (Ville) c. Jotanau Inc.*, J.E. 2001-96 at para. 28 (CA). [↑](#footnote-ref-38)
39. P. Garant, *supra* note 20 at 320, No. 4.2. [↑](#footnote-ref-39)
40. P. Issalys & D. Lemieux, *supra* note 21 at 694–695. [↑](#footnote-ref-40)
41. *Restaurants Canada*, *supra* note 38atpara. 42. [↑](#footnote-ref-41)
42. Jacques Carl Morin & Richard Tremblay, “Les critères de la légalité des règlements”, in Richard Tremblay, ed., *Éléments de légistique - Comment rédiger les lois et les règlements*, (Cowansville, Qc.: Yvon Blais, 2010) 151 at 179. [↑](#footnote-ref-42)
43. Jacques Lagacé & Richard Tremblay, “Les habilitations réglementaires”, in Richard Tremblay, ed., *Éléments de légistique - Comment rédiger les lois et les règlements*, (Cowansville, Qc.: Yvon Blais, 2010) 617 at 626. [↑](#footnote-ref-43)
44. J. C. Morin & R. Tremblay, *supra* note 42 at 180. [↑](#footnote-ref-44)
45. Judgment under appeal at paras. 38–44. [↑](#footnote-ref-45)
46. See in particular: *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 30 [*Withler*]; *R. v. Kapp*, 2008 SCC 41 at para. 17; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 23 [*Law*]; *Andrews v. Law Society of British Columbia*, [1989] 1SCR 143 at 174–175 [*Andrews*]. [↑](#footnote-ref-46)
47. *Law,* *supra* note 46 at para. 2, repeated in *R. v. Sharma*, 2022 SCC 39 at para. 34 [*Sharma*]. [↑](#footnote-ref-47)
48. *Sharma*, *supra* note 47. [↑](#footnote-ref-48)
49. *Ibid.* at para. 35. [↑](#footnote-ref-49)
50. *Ibid*. at para. 28. [↑](#footnote-ref-50)
51. *Ibid*. at para. 29, citing *Fraser v. Canada* (*Attorney General*), 2020 SCC 28 at para. 30 [*Fraser*]; *Withler,* *supra* note 46 at para. 64. [↑](#footnote-ref-51)
52. *Sharma,* *supra* note 47 at para. 40. [↑](#footnote-ref-52)
53. *Fraser,* *supra* note 51 at para. 53, citing *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras. 60–62 [*Eldridge*]; *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 82; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3; *Ont. Human Rights Comm v. Simpsons‑Sears*, [1985] 2 SCR 536. [↑](#footnote-ref-53)
54. *Fraser, supra* note 51 at para. 54, citing *Eldridge,* *supra* note 53 at paras. 69, 71 and 83. [↑](#footnote-ref-54)
55. *Sharma,* *supra* note 47 at para. 63, citing *Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at paras. 33, 39 and 42; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para. 41; *Eldridge,* *supra* note 53 at para. 73; *Thibaudeau v. Canada*, [1995] 2 SCR 627 at para. 37. [↑](#footnote-ref-55)
56. *Sharma,* *supra* note 47 at para. 41, citing *Fraser supra* note 51; *Andrews,* *supra* note 46 at 164. [↑](#footnote-ref-56)
57. *Symes v. Canada*, [1993] 4 SCR 695 [*Symes*]. [↑](#footnote-ref-57)
58. Judgment under appeal at para. 44 [Reproduced verbatim]. [↑](#footnote-ref-58)
59. *Symes,* *supra* note 57 at 763. [↑](#footnote-ref-59)
60. Expert report of Dr. Jill Hanley, 4 November 2020, at 8, at para. 22. [↑](#footnote-ref-60)
61. *Ibid.* at note 4. [↑](#footnote-ref-61)
62. *Ibid.* at note 5. [↑](#footnote-ref-62)
63. *Ibid.* at 9–11, at paras. 24–25. [↑](#footnote-ref-63)
64. *Ibid.* at 11, at para. 26. [↑](#footnote-ref-64)
65. *Ibid*. at 16, at paras. 43–44. [↑](#footnote-ref-65)
66. *Ibid*. at 20, at para. 58. [↑](#footnote-ref-66)
67. *Sharma,* *supra* note 47 at para. 49. [↑](#footnote-ref-67)
68. *Fraser,* *supra* note 51 at paras. 103–104. [↑](#footnote-ref-68)
69. *Sharma,* *supra* note 47 at para. 50. [↑](#footnote-ref-69)
70. *Fraser,* *supra* note 51 at paras. 103–104; *Young v. Young*, [1993] 4 SCR 3 at 49–50; *Symes,* *supra* note 57 at 762–763. [↑](#footnote-ref-70)
71. *R. v. Oakes*, [1986] 1 SCR 103 at paras. 69–70. [↑](#footnote-ref-71)
72. Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed. (Cowansville, Qc.: Yvon Blais, 2014) at 1020, No. XII-3.78. [↑](#footnote-ref-72)
73. *Ibid.* [↑](#footnote-ref-73)
74. On the importance of articulating the measure’s purpose at an appropriate level of generality, see: *Frank v. Canada (Attorney General)*, 2019 SCC 1 at para. 46. [↑](#footnote-ref-74)
75. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 48. [↑](#footnote-ref-75)
76. *Frank v. Canada (Attorney General*), *supra* note 74 at para. 59. [↑](#footnote-ref-76)
77. *Ibid.* [↑](#footnote-ref-77)
78. *Ibid.* at para. 66. [↑](#footnote-ref-78)
79. *Schachter v. Canada*, [1992] 2 SCR 679; *Vriend v. Alberta*, *supra* note 53. [↑](#footnote-ref-79)
80. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [↑](#footnote-ref-80)
81. *R. v. Ferguson*, [2008] 1 SCR 96 at para. 50; *Ontario (Attorney General) v. G*, 2020 SCC 38 at paras. 165–166. [↑](#footnote-ref-81)
82. Vinay Shandal, “Combining Remedies Under Section 24 of the Charter and Section 52 of the Constitution Act, 1982: A Discretionary Approach” (2003) 61 UT Fac L Rev 175 at 4. [↑](#footnote-ref-82)