**English translation of the judgment of the Court**

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| A.P. c. Procureur général du Québec | | | | | 2025 QCCA 24 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| MONTREAL | | SEAT | | | |
| No.: | 500-09-030178-222 | | | | |
| (500-17-113736-204) | | | | | |
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| DATE: | January 15, 2025 | | | | |
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| CORAM: | | | THE HONOURABLE | MARIE-FRANCE BICH, J.A.  PATRICK HEALY, J.A.  BENOÎT MOORE, J.A. | |
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| A. P. | | | | | |
| APPELLANT – Plaintiff | | | | | |
| v. | | | | | |
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| ATTORNEY GENERAL OF QUEBEC | | | | | |
| RESPONDENT – Defendant | | | | | |
| and | | | | | |
| TRIBUNAL ADMINISTRATIF DU QUÉBEC | | | | | |
| RÉGIE DE L’ASSURANCE MALADIE DU QUÉBEC | | | | | |
| IMPLEADED PARTIES – Impleaded Parties | | | | | |
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| JUDGMENT | | | | | |
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1. The appellant is appealing a judgment of the Superior Court, District of Montreal (the Honourable Marc St-Pierre), which, on July 21, 2022, dismissed an action against the respondent and the impleaded parties in order to declare null and inoperable s. 10, para. 4 of the *Health Insurance Act* on the basis that it is discriminatory and contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*.
2. For the reasons of Bich, J.A., with which Healy and Moore, JJ.A. concur, **THE COURT:**
3. **DISMISSES** the appeal, with legal costs.

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|  | | MARIE-FRANCE BICH, J.A. |
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|  | | PATRICK HEALY, J.A. |
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|  | | BENOÎT MOORE, J.A. |
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| Mtre Olga Redko | | |
| Mtre Étienne Morin-Lévesque | | |
| IMK | | |
| For the Appellant | | |
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| Mtre Luc-Vincent Gendron-Bouchard | | |
| Mtre Andréa Boivin-Claveau | | |
| BERNARD, ROY (JUSTICE-QUÉBEC) | | |
| For the Respondent | | |
|  | | |
| Mtre Philippe Gilliard | | |
| ROUSSEAU LANDRY | | |
| For the Impleaded Party Régie de l’assurance maladie du Québec | | |
|  | | |
| Date of hearing: | February 7, 2024 | |

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| REASONS OF BICH, J.A. |
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1. Does s. 10, para. 4 of the *Health Insurance Act*,[[1]](#footnote-1) which sets a cap on the reimbursement of medical services received outside Quebec, discriminate against Quebec women that require reproductive health care (contraception, pregnancy, voluntary termination of pregnancy (“VTP”), delivery, etc.)?[[2]](#footnote-2) The appellant claims that it does, at least as regards pregnancy-related care, and argues that the impugned statutory provision interferes with access to such care, even though it is essential to women’s autonomy and their ability to fully participate in society. The appellant further argues that the burden resulting from s. 10, para. 4 *HIA* is also in line with an entrenched sexist reality, where society still lays largely upon women full responsibility or, at least, primary responsibility, for reproductive health, including in financial terms.

# I. Background

1. Let us briefly recall the facts.
2. From January to June 2016, the appellant, normally domiciled in Quebec, lived in British Columbia, with her partner, for professional reasons. Pregnant, she consulted to monitor her pregnancy. Various examinations revealed that the foetus had abnormalities that would affect its development and its very survival. The appellant resigned herself to terminate her pregnancy. During the procedure, an intra-uterine device was also inserted to avoid another immediate pregnancy.
3. The appellant paid out of pocket the costs related to the pregnancy monitoring and care given to her (including the VTP), which amounted to $1,715.08, and, upon her return to Quebec, she applied to the Régie de l’assurance maladie (“Board”) for the reimbursement of expenses thus incurred (some of which through providers in the uninsured private sector.) Relying on s. 10, para. 4 *HIA*, the Board allowed the claim in part only, agreeing to reimburse her $385.50, i.e., the amount that would have been paid to health professionals for equivalent care provided in Quebec.[[3]](#footnote-3)
4. Dissatisfied, the appellant asked the Board to review this first decision, with limited success: the amount of the reimbursement was increased an additional $219.95, for a new total of $605.45. The appellant thereupon brought her challenge to the Tribunal administratif du Québec (“TAQ”), arguing that s. 10, para. 4 of the *HIA* is contrary to ss. 7 (security of the person) and 15 (equality) of the *Canadian Charter of Rights and Freedoms*[[4]](#footnote-4) and that it also violates s. 1 (personal security, inviolability and freedom) as well as ss. 10 and 4 (equal exercise of the right to dignity) of the Quebec *Charter of Human Rights and Freedoms*,[[5]](#footnote-5) and is not saved by s. 1 of the former or by s. 9.1 of the latter.
5. On March 4, 2020, the TAQ dismissed the appellant’s application.[[6]](#footnote-6) In its view, the latter had not established that s.10, para. 4 *HIA* created any distinction capable of infringing, on the basis of sex (the only ground alleged), s. 15 of the *Canadian Charter of Rights and Freedoms* or s. 10 of the *Quebec Charter*. Moreover, neither s. 7 of the *Canadian Charter* nor s.1 of the *Quebec Charter* impose any positive obligation on the state, in this case, to fully reimburse reproductive health care (including VTP) obtained outside Quebec.
6. The appellant applied for judicial review of that decision to the Superior Court, essentially restating the grounds submitted to the TAQ (i.e., the discriminatory nature of s. 10, para. 4 *HIA*, a provision that also infringes upon women’s security by interfering with their access to pregnancy-related health care). In its judgment dated July 21, 2022, the Superior Court, per Marc St-Pierre, J.S.C., dismissed the application.[[7]](#footnote-7) Firstly, as did the TAQ, the court held that the appellant had not established that s. 10, para 4 *HIA*, inasmuch that it set a cap on the reimbursement of the cost of health services obtained outside Quebec, created a distinction based on sex:

[14] For the Court, as mentioned at the hearing, there is a major distinction between those cases and this one; firstly, the provisions under attack in *Brooks* and *Alliance* directly infringed on women and, second, in *Fraser*, there was evidence that women were disproportionately affected by the job-sharing agreement that penalized pension plan beneficiaries.

[15] Counsel for the Plaintiff insisted on the [TRANSLATION] “reproductive burden” discussed by her expert witness that should serve as evidence of the disproportionate impact on women of the cost of reproductive care.

[16] With respect, the Court does not believe this is the issue; the question is instead whether, in general, the Quebec limitation on reimbursing the cost of services obtained outside the province has a disproportionate impact on women as compared to men; no evidence was adduced in this regard.

[17] In the circumstances, the Court cannot find that women are indirectly discriminated against under section 15 of the Canadian charter by a provision that limits the reimbursement of services covered by the RAMQ obtained outside the province.[[8]](#footnote-8)

1. Secondly, relying mainly on the Federal Court’s decision in *Canadian Doctors for Refugee Care v. Attorney General of Canada*[[9]](#footnote-9)(which involved a challenge to a reduction of the medical coverage offered to refugee claimants), the Superior Court concluded that s. 10 para. 4 *HIA* does not violate s. 7 of the *Canadian Charter* or s. 1 of the *Quebec Charter* and that it does not infringe the right to life, security and liberty that these provisions protect.

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1. On November 3, 2022, the appellant was granted leave to appeal that judgment.[[10]](#footnote-10)
2. It should be mentioned that on the very same day of the appeal hearing, on February 7, 2024, the Court rendered its decision in *Procureur général du Québec c. Kanyinda*,[[11]](#footnote-11) which also deals with discrimination on the basis of sex. The Court invited the parties to submit, if they deemed it useful to do so, comments on the potential impact of that judgment on this case. On the following February 16, the appellant and the respondent both did so by filing additional submissions; the impleaded party Board informed the Court that it would not be submitting any.

# II. Grounds of appeal

1. Before the Court, the appellant is no longer challenging the validity of s. 10, para. 4 *HIA* under s. 7 of the *Canadian Charter* and under ss. 1 and 10 of the *Quebec Charter*.[[12]](#footnote-12) The only issue in the appeal, therefore, is whether s. 10, para. 4 *HIA* infringes s. 15 of the *Canadian Charter*.

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1. To ensure that the arguments advanced by the parties are fully understood, I will begin by reproducing s.10 *HIA*:

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| **10.** An insured person is entitled to exact from the Board the reimbursement of the cost of the insured services furnished to him outside Québec by a professional in the field of health, except the pharmaceutical services and medications referred to in the third and fourth paragraphs of section 3, provided that he delivers to the Board, on request, the receipts for the fees paid by him, and furnishes it with the information the Board needs to justify the payment claimed. | **10.** Une personne assurée a droit d’exiger de la Régie le remboursement du coût des services assurés qui lui ont été fournis en dehors du Québec par un professionnel de la santé, à l’exception des services pharmaceutiques et des médicaments visés aux troisième et quatrième alinéas de l’article 3, pourvu qu’elle remette à la Régie sur demande les reçus d’honoraires qu’elle a payés et qu’elle lui fournisse les renseignements dont la Régie a besoin pour justifier le paiement réclamé. |
| Notwithstanding the first paragraph, the cost of filling or renewing a prescription and the cost of the medications provided to an eligible person, within the meaning of the Act respecting prescription drug insurance (chapter A-29.01), as well as the cost of services and medications determined by regulation and provided to an insured person outside Québec by a person legally authorized to practise as a pharmacist in the place concerned and with whom the Board has entered into an individual agreement for that purpose, may be reimbursed if the services and medications are furnished in a pharmacy situated in a region bordering on Québec and if no pharmacy situated, in Québec, within a radius of 32 kilometres of that pharmacy provides services to the public. | Malgré le premier alinéa, le coût de l’exécution d’une ordonnance ou de son renouvellement et de médicaments fournis à une personne admissible au sens de la Loi sur l’assurance médicaments (chapitre A‐29.01) ainsi que le coût de services et de médicaments prévus par règlement fournis à une personne assurée, à l’extérieur du Québec, par une personne légalement autorisée à y exercer la profession de pharmacien et avec qui la Régie a conclu une entente particulière à cette fin, peut faire l’objet d’un remboursement, s’ils sont fournis dans une pharmacie située dans une région limitrophe au Québec lorsque, dans un rayon de 32 km de cette pharmacie, aucune pharmacie au Québec ne dessert la population. |
| ***Not in force***  The same applies to the cost of medications provided, outside Québec, to an eligible person within the meaning of the Act respecting prescription drug insurance, as part of the services provided by an institution in accordance with the third paragraph of section 8 of that Act. | ***Non en vigueur***  Il en est de même du coût de médicaments fournis à une personne admissible au sens de la Loi sur l’assurance médicaments, à l’extérieur du Québec, dans le cadre des activités d’un établissement suivant le troisième alinéa de l’article 8 de cette loi. |
| However, the person shall only be entitled to claim the lesser of the amount actually paid for the services and the amount established by the Board for such services paid in Québec. | Toutefois, elle n’a droit d’exiger que le moindre du montant qu’elle a effectivement payé pour ces services ou de celui établi par la Régie pour de tels services payés au Québec. |
| Notwithstanding the fourth paragraph, an insured person may exact the amount actually paid for medical services in the cases and on the conditions fixed by regulation. | Malgré le quatrième alinéa, une personne assurée peut exiger le montant effectivement payé pour des services médicaux dans les cas et conditions déterminés par règlement. |
|  | (Underlining added) |

1. Here, the appellant is only challenging the fourth paragraph of that section and the limit that it imposes on the reimbursement provided in the first, a limit that is alleged to be discriminatory in the case of pregnancy-related healthcare.[[13]](#footnote-13) As the appellant wrote in her brief, in setting out the basis of that challenge:

4. Under the *HIA*, through the public insurance plan operated by the Régie de l’assurance maladie du Québec (the “**RAMQ**”), insured Quebec residents access a wide range of medical services within the province without paying for them directly.

5. However, under s. 10 *HIA*, an insured resident who receives medical treatment outside Quebec, even in another Canadian province, must pay out of pocket for that treatment and apply to the RAMQ for reimbursement of their expenses after the fact. Para. 4 of s. 10 *HIA* provides that an insured person may *only* be reimbursed for up to the amount paid for a given service in Quebec – regardless of the nature of the care sought.

6. The Appellant, an insured Quebec resident, was impacted by this statutory limitation when she had to seek pregnancy-related healthcare, including an abortion, while temporarily residing in Vancouver. She paid for her care out of pocket. When she sought reimbursement, the RAMQ applied para. 4 of s. 10 *HIA* to deny most of her claim.

7. The application of para. 4 of s. 10 *HIA* to the pregnancy-related care the Appellant required violated her right to equality guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* (“***Charter***”).

[…]

31. The principal issue in this appeal is whether para. 4 of s. 10 *HIA* violates the Appellant’s right to equality under s. 15(1) of the Charter by limiting the amount of reimbursement available for pregnancy-related healthcare received outside the province.

32. This appeal also raises an important question about the applicable analytical framework under s. 15(1): When faced with a law of general application, how may a claimant prove its disproportionate impact? Can she show that a law has a disproportionate impact on a protected group when applied in a *particular context*? Or *must* she prove the disproportionate impact of the *global effects* of the law?

33. The Appellant submits that:

* It is appropriate to ask **whether the application of the *HIA* to pregnancy‑related healthcare** has a disproportionate impact on women. It is unnecessary to insist on proof of disproportionate impact from a global application of s. 10 to *all* possible forms of healthcare, as the Judge did in this case.
* Section 10 is neutral on its face, in that the limit on reimbursement applies to all types of medical services, irrespective of the sex of the patient. Yet women will disproportionately (in fact, exclusively) rely on s. 10 in the context of pregnancy-related care; men will *never* require such care or be charged for it. For the same reason, the limit on reimbursement for pregnancy-related healthcare imposes a greater financial burden on women than on men. That is, **because of the inherent association between pregnancy and sex, the application of s. 10 to pregnancy‑related care has a disproportionate impact on women**.
* The financial burden imposed by the limit on reimbursement perpetuates women’s historical disadvantage in accessing pregnancy-related healthcare, which is distinct from most if not all other forms of sex-specific care due to its inherent link with women’s autonomy, dignity, and capacity to make fundamental life choices. A limitation on access to such care thus has a significant detrimental impact on women’s ability to participate fully in society – a consequence that will not necessarily result from limitations on access to *other* sex-specific care. **As a result, when applied to pregnancy-related care, s. 10 HIA is discriminatory**.
* The Attorney General has failed to demonstrate that such discrimination is justified in a free and democratic society.

1. In her additional submissions, the appellant indicated, *inter alia*, that:

2. As a preliminary point, this Court stressed in *Kanyinda* that “*l’absence de mesures d’adaptation pour les membres des groupes protégés*” can be the source of discrimination. The present case is another illustration of this principle. Section 10, para. 4 of the *Health Insurance Act*, CQLR c. A-29 (“***HIA***”) fails to account for the unique nature of pregnancy-related care, instead treating it like any other health service. The *absence* of accommodation is the source of the violation of the Appellant’s right to equality.

[…]

6. **Second**, in *Kanyinda*, the claimant demonstrated that excluding asylum seekers from subsidized childcare services had a disproportionate impact on women based on an expert report finding that limits on affordable childcare predominantly limited *women’s* access to the labour market. This uncontradicted expert evidence, in addition to Supreme Court *dicta* about the reality of gender divisions in domestic labour and their impact on women’s working lives, led this Court to conclude that the impugned law created a distinction based on sex through its effects.

7. Likewise, in the present case, when the limit on reimbursement is applied to pregnancy-related care, para. 4 of s. 10 *HIA* has a disproportionate effect on women. As in *Kanyinda*, this conclusion is supported both by uncontradicted expert evidence (to the effect that women are predominantly responsible for the financial costs of accessing pregnancy-related health care) and by Supreme Court *dicta* regarding the “strong association” between pregnancy and gender.

8. In fact, a finding of disproportionate impact is even clearer in this case than in *Kanyinda*: there, women were *disproportionately* (through not *exclusively*) affected by the law. Here, since only women can become pregnant, only women will require pregnancy-related healthcare. The financial burden of pregnancy‑related care imposed by para. 4 of s. 10 *HIA* will thus be borne disproportionately, if not *exclusively*, by women (in this vein, the TAQ judge made a finding of fact that it was “*incontestable*” that women predominantly bear the “*fardeau supplémentaire lié à la reproduction*”).

9. **Third**, both *Kanyinda* and the present case are illustrations of the Supreme Court’s statement in *Fraser* that “disproportionate impact can be established if members of protected groups are denied benefits or forced to take on burdens more frequently than others.” In *Kanyinda*, women were disproportionately *denied* *a benefit* (access to subsidized childcare services); here, the effect of para. 4 of s. 10 *HIA* when applied to pregnancy-related care is to disproportionately oblige women to *assume a burden* (the financial burden resulting from the obligation to pay for pregnancy-related care).

[…]

10. At the second step of the s. 15(1) analysis, in *Kanyinda*, this Court concluded based on uncontradicted expert evidence that exclusion of asylum seekers from subsidized childcare services reinforced, perpetuated, and exacerbated women’s historical disadvantage, since women are disproportionately responsible for childcare.

11. The same type of analysis applies in here. The Lévesque report demonstrates that women bear the primary responsibility – including financial responsibility – for seeking out and obtaining pregnancy-related healthcare, which in turn is perpetuated by legislative action that obliges women to bear such financial responsibility. The perpetuation of this economic disadvantage is conjunctive with the perpetuation of *barriers to access* to pregnancy-related care that result from the financial costs of such care (including failures to reimburse such costs) and their attendant deleterious consequences. Indeed, Dr. Lévesque explained that “*les études démontrent que si [une femme] a pas l’argent pour [interrompre sa grossesse] et que les soins requis pour le faire sont excessifs sur le plan financier, bien ça va moduler sa décision et elle va devenir mère alors que ce n’est pas ce qu’elle souhaite faire*”. As in *Kanyinda*, this evidence is uncontradicted.

(References omitted)

1. The respondent, for its part, submits that the *HIA* set up an [translation] “insurance policy” by which the state, through the Board, bears, upon certain conditions, the cost of health services rendered in Quebec to insured persons[[14]](#footnote-14) or reimburses the costs thereof when they are rendered outside Quebec to those same persons. Taking into account that legislative framework, i.e., the scheme’s purpose, the allocation of the state’s resources and the public policy goal that is pursued, it cannot be argued that s. 10, para. 4 *HIA* infringes s. 15 of the *Canadian Charter* by indirectly creating, by its impact, a distinction based on sex: this provision, which applies indifferently to any insured service, imposes, rather, the same reimbursement scheme on all insured persons, irrespective of their race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, to use the words of s. 15, or any analogous category. It does not, therefore, establish any distinction contrary to that provision.
2. More specifically, according to the respondent, the appellant has failed to show that the provision distinguishes between insured persons on the basis of their sex, affecting women disproportionately. On that matter, the responded claims that the appellant conflates the two steps of the test articulated in the caselaw to determine whether there is discrimination, and uses women’s historical disadvantage, notably in matters of reproductive health, to establish the existence of a distinction, an approach that has been clearly rejected by the Supreme Court in *Sharma*.[[15]](#footnote-15)
3. In any event, the respondent submits that the appellant has not discharged her burden of showing, at the second step, that s. 10, para. 4 *HIA* reinforces, perpetuates or exacerbates the disadvantage that women face in matters of reproductive health care, with the impacts that follow on their ability to fully integrate into social life and the workforce. Rather, the appellant seeks here [translation] “a benefit that is not provided in the legislation,”[[16]](#footnote-16) i.e., reimbursement of the entire cost of the care received outside Quebec, a benefit that the legislator is not bound to provide.
4. In its additional submissions, the respondent thus argued that:

[translation]

Firstly, the Court of Appeal’s reasons in *Kanyinda* make it clear that that case involved access to a benefit provided by a regulation, more specifically access to payment of the reduced contribution (see, *inter alia*, paras. 12, 60 *in fine*, 64, 65 and 87 of the judgment) provided in s. 3 of the *Reduced Contribution Regulation* (CQLR c. S-4.1.1, r.1). In short, the incidental appellant in *Kanyinda* was claiming what had been denied her but granted to others: the reduced contribution.

The situation is altogether different in *A. P. c. PGQ*. Indeed, in this case, the appellant is eligible for the benefit provided for in the legislation, i.e., the reimbursement for care received outside Quebec, up to the lesser of the amount actually paid and the amount established by the Board for such services in Quebec. As the facts on the record indicate, the appellant received that benefit in accordance with the terms set forth in s. 10 of the Quebec *Health Insurance Act* (CQLR, c. A-29) (“*HIA*”), like any other insured person receiving care normally available in Quebec in another province (respondent’s argument, paras. 16 to 30).

It follows that the appellant is seeking a benefit that is not provided for in the *HIA* (respondent’s argument, paras. 35 to 38), in other words, she wishes to obtain a full reimbursement for care normally available in Quebec that she received outside Quebec. However, pursuant to the *HIA*, no insured person is eligible for such a benefit.

[…]

In *Kanyinda*, the Court emphasized that a comparative exercise was necessary in the demonstration of any adverse effect under an analysis on the right to equality (paras. 84 and 85 of the judgment). The Court was of the view that the evidence before it allowed it to compare men and women. In *A. P. c. PGQ*, the very nature of the theory advanced by the appellant, which consists in examining the legislation’s impact on women only, regardless of its impact on men, precludes any comparison.

In addition, there is nothing on the record to show that the care reimbursement terms set forth in s. 10 *HIA* have a disproportionate financial impact on women as compared to men. Rather, the available evidence illustrates that all insured persons receive the same benefit provided for in the legislation and, incidentally, that the legislation had the same impact for any insured person.

1. Criticizing *Kanyinda*, moreover, the respondent adds that [translation] “women’s lack of entry into the labour market can be a historical disadvantage, and their entry a *goal* pursued by the legislator, but the latter is not a *benefit* that it has the power to confer”[[17]](#footnote-17) and that [translation] “[t]he benefits conferred by the legislation are necessarily more modest and can merely constitute means to further such goals.”[[18]](#footnote-18)

# III. Analysis

1. I begin with a few words on the applicable standard of review in this case. This is an appeal of a judgment of the Superior Court on the application for judicial review of a TAQ decision rendered pursuant to s. 18.4 *HIA.* Given that the question of law raised in those proceedings went to the very validity of s. 10, para. 4 *HIA* under s. 15(1) of the *Canadian Charter*, the Superior Court was bound to apply the correctness standard, which must also guide the review that will now be undertaken. The same holds true for the questions of mixed fact and law and, as the Supreme Court noted recently, “no deference is owed in respect of questions of mixed fact and law that arise in connection with a constitutional question because it is important that constitutional questions be answered correctly.”[[19]](#footnote-19) As for the TAQ’s purely factual findings, they are reviewable on the reasonableness standard, to the extent that they can be “be isolated from the constitutional analysis.”[[20]](#footnote-20)

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1. Is s. 10, para. 4 *HIA* discriminatory against women and contrary to s. 15(1) of the *Canadian Charter*, as the appellant submits? To answer this question, we must rely on the analytical framework articulated by the Supreme Court concerning the interpretation and application of that provision.
2. Section 15(1) of the *Canadian Charter* provides that:

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| **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. Reinforcing that proposition regarding discrimination between women and men, s. 28 of the *Canadian Charter* states that:

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| **28**  Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. | **28**  Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes. |

1. As our Court recently noted, this latter provision “requires those interpreting the *Canadian Charter* to take (substantive) sexual equality into account when determining the meaning and scope of ss. 2 to 23 and applying them to a given situation.”[[21]](#footnote-21) This guideline is indeed imperative and has “primacy over the other interpretative rules that are set out in the *Charter* and that cannot, themselves, legitimize the introduction in the rights and freedoms guaranteed by ss. 2 to 23 of distinctions between women and men,”[[22]](#footnote-22) rights and freedoms that include, of course, the right to equality recognized, in various forms, by s. 15(1) of that same charter. In that regard, s. 28 certainly reinforces the notion of a liberal and generous interpretation of s. 15(1).
2. Reviewing the Supreme Court’s significant body of jurisprudence on the matter of discrimination, Brown and Rowe, JJ., in *Sharma*,[[23]](#footnote-23) explained in the following terms the approach in determining the existence or non-existence of a situation contrary to s. 15(1) of the *Canadian Charter*:

[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;

(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).[[24]](#footnote-24)

1. As McLachlin, J. (as she then was) wrote 25 years ago in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*,[[25]](#footnote-25) s. 15(1) of the *Canadian Charter* prohibits discrimination, whether “overt or covert”,[[26]](#footnote-26) i.e., direct – which can be observed on its face – or indirect – which results from the standard’s adverse effect –, but the demonstration that must be made thereof is not exactly the same in nature. Where the issue involves, as in this case (and as I will explain below), indirect discrimination (that which creates a distinction by the imposition “of obligations, penalties or restrictive conditions that result from a policy or practice which is on its face neutral but which has a disproportionately negative effect on an individual or group because of a special characteristic of that individual or group,”[[27]](#footnote-27) Brown and Rowe, JJ., in *Sharma*, add the following on how to proceed to the two-step analysis:

[31] The first step examines whether the impugned law created or contributed to a disproportionate impact on the claimant group based on a protected ground. This necessarily entails drawing a comparison between the claimant group and other groups or the general population (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164). The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that *has the effect of reinforcing, perpetuating, or exacerbating a disadvantage*. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).

(Underlining added)

1. The idea that *distinction* is a comparative notion is well established in the caselaw. As is mentioned in the passage above, the Supreme Court, in *Andrews v. Law Society of British Columbia*, per McIntyre, J. for the majority, had already observed that equality itself 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.”[[28]](#footnote-28) In *Hodge v. Canada (Minister of Human Resources Development)*, Binnie, J., relying on *Andrews*, noted for his part that “[a] person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison.”[[29]](#footnote-29)
2. The comparative nature of the exercise is not displaced in cases where indirect discrimination is alleged: the treatment imposed on all without any apparent distinction may in fact create, *by its effect*, a distinction between individuals based on their personal characteristics (indeed, this is what the appellant submits here). In other words, there is a distinction where the effects of the law on some are not those that it has on others. As McIntyre, J. wrote in this regard in *Andrews*, “a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another”[[30]](#footnote-30) (underlining added), which implies a comparison. In *Eldridge v. British Columbia (Attorney General)*, a decision involving a case of indirect discrimination, La Forest, J., on behalf of the Supreme Court, also recognized that “[a] person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied “equal protection” or “equal benefit” of the law.”[[31]](#footnote-31) The comparison requirement, which is analysed at length, is also recognized in *Withler*[[32]](#footnote-32) whether the distinction is express or whether it results from an adverse effect:

[62] The role of comparison at the first step is to establish a “distinction”. Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

[…]

[64] In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in *Law*, *Lovelace* and *Hodge*. In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. Thus in *Granovsky*, the Court noted that “[t]he CPP contribution requirements, which on their face applied the same set of rules to all contributors, operated unequally in their effect on persons who want to work but whose disabilities prevent them from working” (para. 43). In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.

[65] The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances.At this step, comparison maybolster the contextual understanding of a claimant’s place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping.  The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances. (See Andrea Wright, “Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate”, in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real:* *Securing Substantive Equality under the Charter*(2006), 409, at p. 432; Sophia Reibetanz Moreau, “Equality Rights and the Relevance of Comparator Groups” (2006), 5 *J.L. & Equality* 81; Pothier.)

(Underlining added)

1. That said, and returning to *Sharma,*[[33]](#footnote-33)Brown and Rowe, JJ. articulated a number of clarifications on each step of the test, particularly as regards to indirect discrimination, i.e., by adverse impact. In that regard, they noted the following as to the first step of the test:

[39] Two questions arise. First, what is the*standard* by which courts should measure impact? And secondly, how may claimants *prove* impact?

[40] We start with the difference between impact and disproportionate impact. All laws are expected to impact individuals; merely showing that a law impacts a protected group is therefore insufficient. At step one of the s. 15(1) test, claimants must demonstrate a *disproportionate* impact on a protected group, as compared to non‑group members. Said differently, leaving a gap between a protected group and non‑group members unaffected does not infringe s. 15(1).

[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 (*Withle*r, at para. 62, cited in *Fraser*, at para. 48).

[42] As we have explained, in adverse impact cases, the law appears facially neutral. At step one, the claimant must present sufficient evidence to prove the impugned law, in its impact, creates or contributes to a disproportionate impact on the basis of a protected ground (*Fraser*, at para. 60, citing *Taypotat*, at para. 34; *Alliance*, at para. 26; *Symes v. Canada*, [1993] 4 S.C.R. 695, at pp. 764-65). Causation is thus a central issue. […]

[…]

[50] In summary, the first step asks whether the impugned provisions create or contribute to a disproportionate impact on the claimant group based on a protected ground as compared to other groups. If a claimant establishes that the law or state action creates or contributes to a disproportionate impact, the court should proceed to the second step. But to be clear, while the evidentiary burden at the first step should not be undue, it must be fulfilled. The particular evidentiary burden on claimants will depend on the claim. What remains consistent is that there is a burden on claimants at step one.[[34]](#footnote-34)

(Underlining added)

1. As for the second step of the test, Brown and Rowe, JJ. summarized it as follows:

(i) Evidentiary burden

[51] It has never been the view of this Court that every distinction is discriminatory (*Andrews*, at p. 182). Hence the importance of the second step of the s. 15(1) test, requiring the claimant to establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group’s disadvantage. The question becomes, what does it mean to reinforce, perpetuate, or exacerbate disadvantage?

[52] Courts must examine the historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the step two requirements. Two decisions of this Court demonstrate this point. In *Fraser*, Abella J. observed: “The goal is to examine the impact of the harm caused to the affected group”, which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion (para. 76 (emphasis added), citing C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at pp. 62‑63). In *Withler*, this Court explained that a negative impact or worsened situation was required: […]

(Underlining added, unless otherwise indicated)

1. A law that reinforces or furthers stereotyping or prejudice, or that appears to be arbitrary will, of course, be suspect in that context.[[35]](#footnote-35)
2. Finally, relying on Wagner, C.J.’s consideration of the issue in *R. v. C.P.*,[[36]](#footnote-36) Brown and Rowe, JJ. recalled that “[t]o determine whether a distinction is discriminatory under the second step, courts should also consider the broader legislative context.”[[37]](#footnote-37) Citing *Withler*,[[38]](#footnote-38) they wrote: “Where the impugned provision is part of a larger legislative scheme (as is often so), the Court explained, that broader scheme must be accounted for (para. 3), and the “ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis” (para. 38 (emphasis added)).”[[39]](#footnote-39) To this end, “the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors”[[40]](#footnote-40) will all be factors to consider.
3. Finally, Brown and Rowe, JJ. indicated that:

[63] First, s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation (*Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at para. 37; *Eldridge*, at para. 73; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41; *Alliance*, at para. 42). Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers. In *Alliance*, this Court struck down amendments to Quebec’s pay equity legislation that “interfere[d] with access to anti‑discrimination law” by undermining existing legislative pay equity protections (para. 39). But in so doing, Abella J. expressly declined to impose a “freestanding positive obligation on the state to enact benefit schemes to redress social inequalities” (para. 42). The Court further affirmed that s. 15(1) does not bind the legislature to its current policies: […][[41]](#footnote-41)

1. Similarly, and still at the second step of their analysis, courts must be respectful of the lawmaking dynamic: “when the state does legislate to address inequality, it can do so *incrementally*”[[42]](#footnote-42), the courts owing a degree of deference to the legislator who must indeed be given “reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety […].”[[43]](#footnote-43)
2. Finally, two observations.
3. First, it must be emphasized that the two steps of the test articulated by the Supreme Court are not watertight, and that there exist overlaps between them, particularly in the case of indirect discrimination, as observed in the following passage of *Sharma*:

[30] Uncertainty in the evidentiary burden in adverse impact cases has arisen when courts collapse the two steps of analysis into one, as the majority at the Court of Appeal did here (see para. 83). The two steps are not watertight compartments or “impermeable silos” (*Fraser*, at para. 82), since each step considers the impact of the impugned law on the protected group. While there may be overlap in the evidence that is relevant at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct from the other.

1. In the case of indirect discrimination, the first step of the test consists in ascertaining whether there exists a disproportionate adverse impact on the members of a protected group (disproportion to be assessed on a comparative basis). When such is the case, that adverse impact almost inevitably intersects, at the second step, with the issue of whether it creates, reinforces or exacerbates an economic, social, political or other historical or systemic disadvantage – and therefore a prejudice. That same impact must therefore be addressed under two headings: that of determining indirect discrimination against a protected group or members of such a group, and that of its relation in its causal connection, so to speak (creating, reinforcing or exacerbating), with the disadvantage (marginalization, exclusion, oppression) that the protected group or members of that group are subjected to.
2. Second, from a methodological perspective, it should be mentioned that “[j]udicial notice can play a role at step two”[[44]](#footnote-44) of the s. 15 test, as is the case at step one, according to the usual criteria.[[45]](#footnote-45)
3. I will now apply this teaching to the case at bar.

\* \*

1. Before going any further, however, it is necessary to clarify the scope of the matter before the Court and that of the review that will have to be made thereof – in short, to identify what is truly at issue here.
2. We begin our inquiry by reviewing the exact nature of the appellant’s claim. In her application for review, she claimed that the Board had failed to reimburse the entire cost of the services received relating to her pregnancy and its termination, including the costs of medical services *per se*, medication and services not insured in Quebec. Indeed, she claimed that “[t]he RAMQ’s refusal to reimburse certain of [her] expenses in whole or in part has a disproportionate and adverse effect on [her] because of her pregnancy, and therefore constitutes discrimination on the basis of sex, contrary to sections 15 and 10 of the *Canadian Charter* and *Quebec Charter*, respectively”[[46]](#footnote-46) (at the time, she also alleged that that Board’s decision infringed s. 7 of the *Canadian Charter* and s. 1 of the *Quebec Charter*, a submission that she abandoned on appeal). However, as the remainder of the application at issue shows, the debate, in both respects, focusses first and foremost on s. 10, para. 4 *HIA.* Likewise, the appellant’s claim before the TAQ and her application for judicial review before the Superior Court essentially raised the issue of the validity of that specific provision of the *HIA.* As discussed above, that is also what is claimed in her appeal proceedings and brief, as well as in the explanations that her counsel provided at the hearing before our Court.
3. However, although the conclusions of the amended originating application addressed to the Superior Court, the notice of appeal, the application for leave to appeal, as well as the appellant’s brief, all call for s. 10 *HIA* to be declared invalid, apparently in its entirety, the discussion before the TAQ, the Superior Court and our Court focussed solely on the limit imposed by the fourth paragraph of that provision on the reimbursement or payment of insured services rendered outside Quebec. If applicable, only that portion of s. 10 HIA should be declared invalid, which is not without impact on the analysis that will have to be made of the appellant’s position.
4. For the sake of convenience, I repeat here the wording of s. 10 *HIA*:

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| **10.** An insured person is entitled to exact from the Board the reimbursement of the cost of the insured services furnished to him outside Québec by a professional in the field of health, except the pharmaceutical services and medications referred to in the third and fourth paragraphs of section 3, provided that he delivers to the Board, on request, the receipts for the fees paid by him, and furnishes it with the information the Board needs to justify the payment claimed. | **10.** Une personne assurée a droit d’exiger de la Régie le remboursement du coût des services assurés qui lui ont été fournis en dehors du Québec par un professionnel de la santé, à l’exception des services pharmaceutiques et des médicaments visés aux troisième et quatrième alinéas de l’article 3, pourvu qu’elle remette à la Régie sur demande les reçus d’honoraires qu’elle a payés et qu’elle lui fournisse les renseignements dont la Régie a besoin pour justifier le paiement réclamé. |
| Notwithstanding the first paragraph, the cost of filling or renewing a prescription and the cost of the medications provided to an eligible person, within the meaning of the Act respecting prescription drug insurance (chapter A-29.01), as well as the cost of services and medications determined by regulation and provided to an insured person outside Québec by a person legally authorized to practise as a pharmacist in the place concerned and with whom the Board has entered into an individual agreement for that purpose, may be reimbursed if the services and medications are furnished in a pharmacy situated in a region bordering on Québec and if no pharmacy situated, in Québec, within a radius of 32 kilometres of that pharmacy provides services to the public. | Malgré le premier alinéa, le coût de l’exécution d’une ordonnance ou de son renouvellement et de médicaments fournis à une personne admissible au sens de la Loi sur l’assurance médicaments (chapitre A‐29.01) ainsi que le coût de services et de médicaments prévus par règlement fournis à une personne assurée, à l’extérieur du Québec, par une personne légalement autorisée à y exercer la profession de pharmacien et avec qui la Régie a conclu une entente particulière à cette fin, peut faire l’objet d’un remboursement, s’ils sont fournis dans une pharmacie située dans une région limitrophe au Québec lorsque, dans un rayon de 32 km de cette pharmacie, aucune pharmacie au Québec ne dessert la population. |
| ***Not in force***  The same applies to the cost of medications provided, outside Québec, to an eligible person within the meaning of the Act respecting prescription drug insurance, as part of the services provided by an institution, in accordance with the third paragraph of section 8 of that Act. | ***Non en vigueur***  Il en est de même du coût de médicaments fournis à une personne admissible au sens de la Loi sur l’assurance médicaments, à l’extérieur du Québec, dans le cadre des activités d’un établissement suivant le troisième alinéa de l’article 8 de cette loi. |
| However, the person shall only be entitled to claim the lesser of the amount actually paid for the services and the amount established by the Board for such services paid in Québec. | Toutefois, elle n’a droit d’exiger que le moindre du montant qu’elle a effectivement payé pour ces services ou de celui établi par la Régie pour de tels services payés au Québec. |
| Notwithstanding the fourth paragraph, an insured person may exact the amount actually paid for medical services in the cases and on the conditions fixed by regulation. | Malgré le quatrième alinéa, une personne assurée peut exiger le montant effectivement payé pour des services médicaux dans les cas et conditions déterminés par règlement. |

1. Although the appellant is challenging only the fourth paragraph of that provision, as we have just seen, the first and fifth paragraphs provide useful context: the first paragraph sets out the principle applicable to insured services received outside Quebec, a principle delimited by the fourth paragraph, whereas the fifth provides an exception to that limit, by way of regulation (an exception that does not apply to the appellant’s situation.)[[47]](#footnote-47) We further note that under s. 11 *HIA*, the Board may also, rather than proceeding by way of reimbursement, where circumstances warrant, assume up front the costs incurred outside Quebec (and directly pay the health professionals that rendered the care), but, again, up to the limit provided by the fourth paragraph of s. 10, subject to a single exception:

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| **11.** The Board itself may also assume, on behalf of any insured person, payment of the cost of the services contemplated in section 10 upon presentation of a statement of fees and after having obtained the information it needs to justify the payment claimed. | **11.** La Régie peut aussi assumer elle-même, pour le compte d’une personne assurée, le paiement du coût des services visés dans l’article 10, sur présentation d’un relevé d’honoraires et après avoir obtenu les renseignements dont elle a besoin pour justifier le paiement réclamé. |
| Nevertheless, it shall not so pay an amount higher than that which it would have paid upon presentation of a receipt for fees under section 10. | Elle ne peut toutefois payer ainsi un montant supérieur à celui qu’elle aurait payé sur présentation d’un reçu d’honoraires en vertu de l’article 10. |
| Notwithstanding the second paragraph, it may assume payment of the amount claimed for medical services in the cases and on the conditions fixed by regulation. | Malgré le deuxième alinéa, elle peut assumer le coût effectivement réclamé pour des services médicaux dans les cas et conditions déterminés par règlement. |

1. Our inquiry must then turn to explaining the ambit of ss. 10 and 11 *HIA*, which also determines the scope of the challenge.
2. These provisions cover the reimbursement or payment of the cost of “insured services furnished […] outside Québec  / *services assurés […] fournis en dehors du Québec*” (s. 10 *HIA*), insured services being defined as follows by s. 1, para. 1*(a)* *HIA*:

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| --- | --- |
| **1.** In this Act, unless the context indicates a different meaning, the following expressions and words mean or designate: | **1.** Dans la présente loi, à moins que le contexte n’indique un sens différent, les expressions et mots suivants signifient ou désignent : |
| *(a)*“insured services” : the services, medications, devices or other equipment that compensate for a physical deficiency, visual or hearing aids and communication devices contemplated in section 3; | a)  « services assurés » : les services, médicaments, appareils ou autres équipements suppléant à une déficience physique, aides visuelles, aides auditives et aides à la communication visés dans l’article 3; |

1. Section 3 *HIA* provides the list of the services in question, which include “all services rendered by physicians that are medically required / *tous les services que rendent les médecins et qui sont requis au point de vue medical*” (s. 3, para. 1*(a)*), “family planning services determined by regulation and furnished by a physician */* *les services de planification familiale déterminés par règlement et qui sont rendus par un médecin*” (s. 3, para. 1*(d)*), as well as “assisted procreation services determined by regulation and rendered by a physician / *les services de procréation assistée déterminés par règlement et qui sont rendus par un médecin*” (s. 3, para. 1*(e)*). The medical services contemplated here are therefore *services rendered by a physician*. The services of dentists and optometrists are also contemplated, upon certain conditions (s. 3, paras. 1*(b)* and *(c)* *HIA*, which are not in issue here). For their part, the third and fourth paragraphs of s. 3 refer to pharmaceutical services and medications. Section 3 also deals with devices or other equipment that compensate for a physical deficiency, visual or hearing aids and communication devices, which are not the subject of this appeal.
2. Sections 10 and 11 *HIA* provide for the reimbursement or payment of the insured services with the meaning of s. 3 (a provision that the appellant has not challenged),[[48]](#footnote-48) including *medical* services defined above, but *excluding* pharmaceutical services and medications provided outside Quebec, as stated in the first paragraph of s. 10, subject, however, to the exceptions provided in its second and third paragraphs (which are not applicable here, the third paragraph not being in force in any event). Indeed, the rules relating to pharmaceutical services and medication are provided in a separate statute, the *Act respecting prescription drug insurance*[[49]](#footnote-49) (enacted in 1996), which established a basic prescription drug insurance plan available to persons in Quebec and whose purpose is described in s. 2 thereof:

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| --- | --- |
| **2.** The purpose of the basic plan is to ensure that all persons in Québec have reasonable and fair access to the medication required by their state of health. | **2.** Le régime général a pour objet d’assurer à l’ensemble de la population du Québec un accès raisonnable et équitable aux médicaments requis par l’état de santé des personnes. |
| To that end, the plan provides for a minimum level of coverage for the cost of pharmaceutical services and medications, and requires a financial participation on the part of persons or families covered by the plan depending, in particular, on their economic situation. | À cette fin, il prévoit une protection de base à l’égard du coût de services pharmaceutiques et de médicaments et exige des personnes ou des familles qui en bénéficient une participation financière tenant compte notamment de leur situation économique. |

1. The coverage provided by that statute is reserved to persons resident of Quebec registered with the Board who are not entitled to coverage under a group insurance or employee benefit plan that include such protection. It is limited to pharmaceutical services and medications “provided in Québec / *fournis au Québec*” (ss. 7 and 8 of the *Act respecting prescription drug insurance*), save for the exceptions provided by the second and third paragraphs of s. 8, exceptions which have no application here.[[50]](#footnote-50) The principle and the exceptions provided in that regard by the first three paragraphs of s. 10 *HIA* are consistent with the requirements of ss. 7 and 8 of the *Act respecting prescription drug insurance*, under which they arise and of which they are inseparable.
2. The appellant has not challenged the relevant provisions of the *Act respecting prescription drug insurance*, and she obviously cannot do so indirectly by way of a challenge focussing on s. 10, para. 4 *HIA.* Furthermore, the appellant has not formally challenged in this respect the first three paragraphs of s. 10 *HIA*, although she is claiming the reimbursement, in bulk, of all the costs that the Board refused to reimburse her for, without however advancing any argument based on the precise content of her claim or on the *Act respecting prescription drug insurance*.
3. Lastly, it should also be noted that ss. 10 and 11 *HIA* do not cover the cost of hospital services (which are governed by the *Hospital Insurance Act,)*[[51]](#footnote-51) Quebec having entered reciprocal billing agreements with all Canadian provinces and territories on that matter, including British Columbia,[[52]](#footnote-52) agreements pursuant to which such services are not paid by insured persons where the latter obtain them outside Quebec, but are billed directly to the organization having jurisdiction in their province of origin (given that the wording of the agreements is not in evidence, it is impossible to know whether they include restrictions that may have been authorized by the enabling statutes). It will be noted that the parties, in this appeal, have not drawn such distinctions between insured services under s. 3 *HIA* and hospital services. The latter cannot be in issue here since there are not contemplated by s. 10 (or 11) *HIA.*
4. Finally (and I will have occasion to return to the subject), the appellant is not challenging the compliance of s. 10, para. 4 *HIA* with subss. 11(1)(b)(i) and (ii) of the *Canada Health Act*,[[53]](#footnote-53) nor is she challenging the validity of the latter provisions.
5. To conclude, the appeal therefore only concerns – and can only concern – s. 10, para. 4 *HIA*, and it relates solely to the reimbursement or payment of the medical services defined at s. 3 *HIA* (and specifically those at sub-paras. *(a)*, *(d)* and *(e)* of the first paragraph thereof, which contemplate services provided by *physicians*). Not at issue are pharmaceutical services, medications, and hospital services (in the latter case, excluding services rendered by physicians) referred to in ss. 3 and 10, paras. 1, 2 and 3 *HIA*, but that are governed first and foremost by other statutes and rules that the appellant has not challenged.[[54]](#footnote-54) The analysis will focus therefore on the medical services contemplated in s. 10, para. 4 *HIA*.

\* \*

1. The first step of the analysis is to determine whether s. 10, para. 4 *HIA* creates, directly or in its impact, a distinction on the basis, in this case, of sex, a ground covered by s. 15(1) of the *Canadian Charter*.
2. **Direct distinction.** First, we may note that s. 10, para. 4 contains no direct, i.e., explicit, distinction: its wording is neutral and does not differentiate among insured persons, whether on the basis of their sex, or that of any of the other characteristics enumerated at s. 15(1) of the *Canadian Charter* (race, national or ethnic origin, colour, religion, age or mental[[55]](#footnote-55) or physical disability), or any analogous characteristics recognized by the courts (e.g.: sexual orientation,[[56]](#footnote-56) civil or matrimonial status,[[57]](#footnote-57) citizenship,[[58]](#footnote-58) “aboriginality-residence”[[59]](#footnote-59) and “non-resident status in a self-governing Indigenous community”[[60]](#footnote-60)) or indeed on any other characteristic (e.g., income). In fact, on the wording of the provision, when obtaining medical services (whatever they may be) outside Quebec, all persons covered by the *HIA* are entitled to the reimbursement provided under s. 10, para. 1 *HIA*, subject to the limit provided under s. 10, para. 4 *HIA*. None will obtain more, and none will obtain less. The same benefit and the same constraint are imposed on all insured persons, including for pregnancy-related care or, more generally, reproductive health.
3. From this perspective, the situation in the case at bar is nothing like that in *Brooks v. Canada Safeway Ltd.*[[61]](#footnote-61) or *Benner v. Canada (Secretary of State),*[[62]](#footnote-62) which provide an example of direct discrimination on the basis of sex, nor with *M. v. H.**,*[[63]](#footnote-63) a case involving direct discrimination on the basis of sexual orientation.
4. Thus, in *Brooks,*[[64]](#footnote-64) a disability insurance program expressly excluded pregnant women from coverage otherwise provided to other company members, for the entire period extending from the tenth week preceding the anticipated date of birth to the end of the sixth week following childbirth, whether the disability was because of pregnancy or of another cause. Pregnant women were therefore explicitly denied a benefit granted to their colleagues, which obviously constituted a clear distinction (clearly on the basis of sex, moreover, as the Supreme Court acknowledged).
5. Likewise, in *Benner*, the *Citizenship Act*[[65]](#footnote-65) treated children born abroad of a Canadian father differently from those born abroad of a Canadian mother. The latter could not acquire Canadian citizenship without going through an onerous process from which the first were exempted. An additional obligation was therefore imposed on children of a Canadian mother, while denying them access to the benefits and advantages available to children of a Canadian father. There again, the distinction, based on the parent’s sex in that case, appeared textually in the statute, a distinction pursuant to which certain persons were denied “equal protection” and “equal benefit” of the law within the meaning of s. 15(1) of the *Canadian Charter*.
6. Lastly, in *M. v. H.*, the Ontario statute in issue excluded, by omission, same-sex partners, reserving its benefits to opposite-sex partners. As the Supreme Court noted, the distinction, based on sexual orientation, was apparent on the face of the legislation: “Thus it is apparent that the legislation has drawn a formal distinction between the claimant and others, based on personal characteristics”,[[66]](#footnote-66) in that case, sexual orientation.
7. By contrast, to repeat, s. 10, para. 4 *HIA* makes no such distinction (indeed, s. 10 in its entirety makes no such distinction itself, no more than does s. 11).
8. **Indirect distinction.** But although s. 10, para. 4 *HIA* does not create a direct distinction and does not impose any differential treatment, on its face, between women and men, or between women and any other group in terms of reimbursement or payment of the cost of medical services obtained outside Quebec, does it however create such a distinction indirectly, i.e., by the disproportionate adverse impact that it would have on pregnant women – and thus on women, as the appellant submits? In other words, does the neutrality of the legislation conceal an adverse impact on them?
9. Those questions must be answered in the negative, given that the comparative approach to be applied at this step of the analytical process does not establish that, to the extent that insured persons within the meaning of the *HIA* are involved (which is the case of the appellant), s. 10, para. 4 *HIA* creates or contributes to a disproportionate adverse impact on women, resulting in differential treatment between them and others, in this case, men.
10. Rather, the impact of s. 10, para. 4 *HIA* is the exact reflection of its wording, and the evidence does not show that its implementation creates any differential treatment whatsoever between women and any other person: no insured person can obtain, for medical services provided outside Quebec, an amount exceeding that which would have been paid to health professionals if the service had been rendered in Quebec, regardless of its nature (provided that it was insured within the meaning of s. 3 and covered under s. 10, para. 1 *HIA*), and regardless of the insured individual’s personal characteristics. The law does not affect women more than men (the first comparator group, where discrimination on the basis of sex is claimed, as in this case) or any other group, whether or not protected under s. 15(1) of the *Canadian Charter*: women are not denied, in matters of reproductive health care, a benefit available to others; nor are they subject to restrictions that are not imposed on others.
11. In other words, at least *a priori*, the weight of the law and of the limit that it imposes on the reimbursement provided by s. 10, para. 1 *HIA* (or on the payment provided by s. 11 *HIA*) falls equally on the shoulders of all persons covered by the Quebec health insurance plan, including pregnant women and women generally, and it does not affect the latter disproportionally. Not being fully reimbursed is certainly disadvantageous compared to a full reimbursement (which is obvious), but all insured persons under the *HIA* suffer that same disadvantage. Specifically, all insured persons are liable to suffer that disadvantage to the extent that the cost of medical services that they incur outside Quebec exceeds the cost of the same services in Quebec.
12. The situation of women with respect to s. 10, para. 4 *HIA* is therefore not comparable to that which was at issue, for instance, in *BCGSEU*[[67]](#footnote-67) or *Fraser v. Canada (Attorney General)*[[68]](#footnote-68), the archetypical cases on the matter, or in *Kanyinda*.[[69]](#footnote-69)
13. In *BCGSEU*, the provincial government imposed, among other minimum physical requirements, a certain aerobic standard as a hiring condition of any person wishing to work as a forest firefighter. Ostensibly neutral (and moreover enacted in good faith), that standard, as the evidence showed, was largely based on male physiology, which had the practical effect of excluding most women from that job, the latter having a lower aerobic capacity than that of men, regardless of their physical condition. The Supreme Court, per McLachlin, J. (as she then was), noted the adverse nature of the impugned standard, which indirectly established, by its impact, a distinction on the basis of sex and significantly restricted women’s access to a type of job, being a disproportionate restriction compared to men. The Supreme Court then considered the issue of whether, despite this, the standard was nevertheless valid as a *bona fide* occupational requirement (she concluded that it was not), a matter that is not relevant here.
14. *Fraser* involved a job-sharing program introduced by the RCMP, a program primarily used by women with children, and who thus find themselves working part-time as a result. Under the statute and regulations applicable to the RCMP members’ retirement plan, periods of leave (leave without pay, for example) could generally be “bought back” in order to increase pension benefits that would otherwise have been reduced, an advantage that was only available however to members who worked full‑time, and that was thus unavailable to members who took part in the job-sharing program. Essentially, that had a disproportionate impact on women by denying those who chose work-sharing of a benefit enjoyed by other members of the RCMP. Abella, J. for the majority, found that there existed a distinction based on sex, women being less well treated than men in terms of retirement:

[97] In my respectful view, the use of an RCMP member’s temporary reduction in working hours as a basis to impose less favourable pension consequences plainly has a disproportionate impact on women. The relevant evidence — the results of the system — showed that:

* + RCMP members who worked reduced hours in the job‑sharing program were predominantly women with young children.
* From 2010‑2014, 100 percent of members working reduced hours through job‑sharing were women, and most of them cited childcare as their reason for doing so.

[98] These statistics were bolstered by compelling evidence about the disadvantages women face as a group in balancing professional and domestic work. Evidence submitted by Ms. Fraser indicated that women have historically borne the overwhelming share of childcare responsibilities, that part‑time workers in Canada are disproportionately women, and that they are far more likely than men to work part‑time due to child care responsibilities. As a result, they experience less stable employment and periods of “scaling back at work”, including within police services.

[…]

[106] All of these sources — and more — show the clear association between gender and fewer or less stable working hours. They provide powerful support for Ms. Fraser’s core argument: that the RCMP’s use of a temporary reduction in working hours as a basis for imposing less favourable pension consequences has an adverse impact on women. The first part of the s. 15(1) test has therefore been met.

1. Lastly, in *Kanyinda*, the Court of Appeal considered the validity of a regulatory provision applied in such a way that refugee claimant parents awaiting acknowledgment of their refugee status could not access subsidised childcare centres in Quebec (nor even their waiting lists) even if they held a work permit. In the Court’s opinion, the regulation was [translation] “facially neutral, because parents are either men or women.”[[70]](#footnote-70) However, its impact was not and, as the Court noted, [translation], “by excluding refugee claimants, there is a disproportionate adverse impact on female refugee claimants, and is thus discriminatory as a result of its adverse impact.”[[71]](#footnote-71) Indeed, the exclusion of refugee claimants affected mainly women, who, according to the evidence, still assume for the most part the care and responsibility of children, and thus disadvantaged them socio-economically, in a way that male refugee claimants (or individuals who are not refugee claimants) were not. A distinction on the basis of sex could therefore be inferred (a distinction that the Court, at the second step, would find discriminatory, because it reinforced a historical and systemic disadvantage suffered by women by reason of their family responsibilities).
2. As can be seen, in each one of these examples, the distinction had the effect of disproportionately disadvantaging women by actively depriving them of a benefit, an access or a right granted to men (whether it be denying them a job, the opportunity to improve their retirement plan or access to subsidized childcare) or by imposing on them a burden, a restriction or an inconvenience that men do not have to bear or suffer. Moreover, in the case of *Fraser* and *Kanyinda*, it so happens that that harm confirmed, reinforced and perpetuated the general disadvantage women face in the workplace, which, at the second step of the applicable test, pointed to the discriminatory character of the distinction (i.e., the differential treatment) inflicted upon them.
3. However, it is clear in this case, at the first step of the applicable test, that s. 10, para. 4 *HIA* does not have the effect of denying women, whether with respect to pregnancy-related care or other healthcare, a legally recognized benefit, i.e., a limited reimbursement of the cost of medical services outside Quebec. Indeed, and restating what I wrote earlier,[[72]](#footnote-72) whether they be a woman or a man, regardless of their personal characteristics and regardless of the nature of the medical service in issue, including where it relates to gender-specific care, all insured persons within the meaning of the *HIA* are entitled, in exactly the same measure, to the limited reimbursement or payment of the cost of medical services provided to them outside Quebec, that is to say: where the cost exceeds that of equivalent services provided in Quebec, the Board reimburses or pays only the amount equal to the cost in Quebec. In such a case, no insured person will obtain more (unless they satisfy the requirements of s. 10, para. 5 *HIA*, which is not in issue here), none will obtain less, and each is subject to the same limit. In other words, all insured persons, regardless of their sex (or other characteristic) have access to the same benefit (that of a reimbursement) and are subject to the same restriction (that of a capping of said reimbursement).
4. In short, whether directly or in its impact, s. 10, para. 4 *HIA* creates no distinction between insured persons: no one (notably men) is conferred an advantage that women, or certain women, are denied, excluded from or deprived of. Correlatively, the same disadvantage and the same risk of disadvantage are imposed on all insured persons.
5. But the appellant submits that this does not end the matter, because treating pregnant women *like everyone else* effectively creates a distinction related to the general and preexisting disadvantage of women in society. As explained earlier, women bear, particularly in financial terms, most of the responsibility and cost of reproductive health care, and certainly those of pregnancy, including VTP which, again, can be detrimental to their integration into the labour market. Failure to fully reimburse the care in question would increase that adverse impact. In the appellant’s view, *Kanyinda* supports that argument, based on the Court’s finding that not having access to subsidized childcare has a deleterious impact on female refugee claimants’ access to the labour market. Likewise, not having access to the unlimited reimbursement of the cost of pregnancy-related care received outside Quebec has that same deleterious impact on women’s access to the job market and on their socioeconomic status or well-being.
6. How should this be resolved?
7. In my view, we can begin by dismissing the comparison with *Kanyinda*, which is *not* an example of a situation where all persons are treated the same way, which indirectly gives rise to a distinction. In that case, as described above, the state extended a practical benefit to Quebec parents, i.e., the payment of a reduced contribution for access to subsidized childcare governed by the *Educational Childcare Act*,[[73]](#footnote-73) a benefit from which refugee claimants were excluded. However, the evidence showed that that exclusion predominantly affected women, on whom rests the primary responsibility for children, much more than men, thus establishing a differential treatment on the basis of sex (which was held to be discriminatory, at the second step, since it reinforced women’s historic and systemic disadvantage in the workplace, a disadvantage resulting form their family responsibilities.) This is not the situation here, where the same limited benefit is extended to all insured persons under the *HIA*: there is no exclusion, whether direct or indirect.
8. It is *Eldridge*[[74]](#footnote-74)*,* rather, that illustrates here the notion that apparently equal treatment can lead to discriminatory distinctions and require that the state, in certain circumstances, proactively extend to some what it does not make available to others, i.e., “accommodation for members of protected groups.”[[75]](#footnote-75) However, that duty arises, as was the case in *Eldridg*e*,* when measures must be taken to ensure that members of a protected group *truly* have access to the same advantages or services *made available* to all. In that case, the fact that the state did not offer interpretation services (in sign language, to be precise) effectively denied persons with a hearing loss healthcare of equivalent quality to that enjoyed by persons that did not have that difficulty. The distinction lay in that adverse impact of government rules which, by not providing interpreters to anyone (and thus apparently treating everyone the same way), adversely affected those with hearing impairments by interfering with their access to quality health care. Such persons were thus prevented from enjoying the equal protection and the equal benefit as that of hearing persons, within the meaning of s. 15(1) of the *Canadian Charter,* the absence of interpreter leading them to receive health services of lesser quality than that provided to hearing persons. In other words, and to borrow the language used in *Law*[[76]](#footnote-76), the state, in failing to take into account hearing impaired persons’ already disadvantaged position within Canadian society, resulted in substantively differential treatment between them and others on the basis of a personal characteristic, in that case, their hearing impairment.
9. The situation evoked by the appellant is not of the same nature, however, and, even if one cannot deny the systemic socioeconomic disadvantage that women face, notably for reasons related to pregnancy, reproductive health and family responsibilities, the fact remains that the evidence does not show how s. 10, para. 4 *HIA* would have a more pronounced adverse impact on women, as compared to men or members of other groups (whether protected or not within the meaning of s. 15 of the *Canadian Charter*), thus creating a distinction, that is to say differential treatment in relation to the same benefit, i.e, in the case at bar, access to health care and services.
10. In support of her position, the appellant filed the report and testimony of an expert witness, sexologist Sylvie Lévesque, holder of a PhD in public health and professor at UQAM’s (University of Quebec at Montreal) Sexology Department. The report, entitled “L’accès à l’avortement : quels enjeux pour le bien-être des femmes?” (Access to Abortion: What’s at Stake for Women’s Wellbeing”), deals exclusively, as its title indicates, with access to VTP – and not with reproductive health generally, which the appellant invokes here  – and it is based on a literature review on the subject, which literature comprises rather few studies from Quebec or Canada, as the expert pointed out in her testimony, which she explained by the fact that abortion is generally accessible in Canada (in contrast, for example, to the United States.)[[77]](#footnote-77) In that regard, the report begins by noting the following:

[translation] In Canada, abortion is considered to be a medical procedure, which must be performed by a physician and offered free of charge to Canadian citizens under the *Canada Health Act* (Palley, 2006). This intervention has been classified as a medically necessary service by all physicians and surgeons’ associations of the various Canadian provinces. Compared to pregnancy-related health services, abortion is a simple, quick and relatively inexpensive procedure in Canada (Kaposy, 2010).

As health is a matter of provincial jurisdiction, responsibility for the provision of health services lies with the government of each province. In Quebec, two types of abortion are available: surgical abortion and, since 2018, medical abortion using the combined regimen of mifepristone and misoprotol (Mifegymiso), commonly known as the ‘abortion pill’. A woman who learns that she is pregnant and who no longer wishes to continue her pregnancy can make an appointment with a doctor trained and qualified to perform abortions; that person may work at different locations, e.g., within the public healthcare network, a community clinic or a private office (Collège des médecins du Québec, 2017). If the woman holds a valid health insurance card, the procedure will be covered by the RAMQ. Medical abortion has recently become available through family physicians or specialists trained in pregnancy termination.

Overall, in Quebec, the time required to access abortion services is short, i.e., one or two weeks on average (Lévesque and Gonin, 2018). In Canada, the vast majority of abortions (90%) occur within the first 12 weeks of gestation, and more than 99.3% are completed within the first 20 weeks (Abortion Rights Coalition of Canada, 2018). […][[78]](#footnote-78)

(Transcript)

1. In sum, as noted by the expert witness, women insured under the *HIA* have, in Quebec, generally quick and free access[[79]](#footnote-79) to VTP, the latter being an equally accessible and relatively inexpensive procedure across Canada,[[80]](#footnote-80) in contrast to other countries.
2. Next, the expert witness examined the reasons that can explain unplanned pregnancies and the willingness to resort to VTP (difficult access to contraception, limited knowledge in matters of fertility and contraception, no partner or an unreliable partner, domestic violence, young age, financial difficulties that preclude having a child). Finally, the expert witness canvassed the obstacles to abortion, including cost, which can sometimes delay the intervention or render it impossible:

[translation] The cost of the procedure or associated fees also seems to be a factor that can explain late access to abortion. The Canadian study by Sethna and Doull (2013) reports that 22% of the women surveyed had to pay for an abortion. Of these, 19% said that they had paid for the abortion procedure and travel to the clinic. The average out-of-pocket costs seem to indicate that women did not pay for the procedure *per se* but were instead billed for ancillary costs such as administrative fees or medication. However, a quarter of the women who had to pay out-of-pocket expenses reported that this exceeded $300, which could correspond to the procedure itself.

Another factor that can condition access to abortion is reciprocal billing between provinces. For many years, abortion was among the services excluded from reciprocal billing agreements. This exclusion caused a great deal of harm to many women, considering territorial mobility and trans-provincial migration, particularly among young women for study purposes and First Nations women living in northern territories or far from urban centres (Sethna and Doull, 2013). That situation changed on June 18, 2015 in all Canadian provinces and territories except Quebec. Quebec, for its part, removed abortion from its excluded services in March 2016. In practice, however, this situation appears to be more difficult. Quebec women who need to obtain an abortion in another province may encounter administrative and financial difficulties in accessing abortion. Obstacles are created by the steps that must be taken to obtain reimbursement and the additional costs that may be charged, despite the prohibition set out in the Canada Health Act: “provincial extra billing and user charges for medically necessary health services are not permitted” (Palley, 2006, p. 556). Unfortunately, as Waddington et al. point out, “we are not aware of any studies examining whether or not challenges of reciprocal billing between provinces have impeded Canadian women's ability to access abortion care in a timely fashion” (2015, p.41). However, these authors point out that in the United States, studies have highlighted the delays in access to abortion that can be caused by legal or administrative hurdles (Bitler and Zavodny, 2001).[[81]](#footnote-81)

(Transcript)

1. The administrative hurdles referred to in the above passage were not identified, however, and the appellant’s testimony does not indicate that she faced such difficulties: she accessed VTP less than five days after being informed of the foetus’s abnormalities and deciding to terminate her pregnancy. It is true that she had contacted the Board as soon as she began monitoring her pregnancy to determine what health insurance coverage she was entitled to. Because no one was able to inform her or help her, in what was apparently a great deal of confusion, she wound up paying out of pocket all the costs that she was charged for the care received (which was not easy, since that unexpected expense of more than $1,700 exceeded her very tight budget at the time). Upon her return to Quebec, she applied for a reimbursement of that expenditure. The steps that she had to take both before and after her return caused considerable stress,[[82]](#footnote-82) and were certainly an inconvenience, but it is difficult to characterize this as a harm specifically related to the VTP, pregnancy or sex. Indeed, this is what the TAQ rightly found.[[83]](#footnote-83) It was, rather, the lack of means and the red tape associated with the reimbursement process, combined here with administrative muddling, that caused the stress that the appellant experienced. That said, any person of little means that must pay for unexpected, but necessary, medical expenses will experience the same type of stress, considering that bureaucratic incompetence and gridlock are not exclusive to reimbursement applications relating to pregnancy-related care or VTP.
2. Moreover, expert-witness Lévesque further explained that [translation] “[t]he costs involved in obtaining an abortion can lead some women to decide against terminating their pregnancy”[[84]](#footnote-84) and, as an example of this, she points to access to abortion in the United States, referring to various American studies. She also referred to an Australian study in the same vein. Lastly, the expert addressed the physical and psychological consequences of the inability to access VTP, as well as the medium- and long-term repercussions of a [translation] “refusal to obtain an abortion”[[85]](#footnote-85) on the socio-professional path of women, i.e, those who generally bear responsibility for reproductive health, financially and otherwise.
3. Expert-witness Lévesque’s findings are, undoubtedly, correct, but they remain very generic.[[86]](#footnote-86) They are not sufficient to establish that s. 10, para. 4 *HIA*, by the limit that it imposes on the reimbursement or payment of medical services received outside Quebec, affects women disproportionately (which is the appellant’s position), that is to say 1° that by that provision’s effect, women, compared to other insured persons (most notably men, the ground of discrimination invoked here being sex), suffer consequences that others do not, or that they suffer more of these, and 2° that they are thereby subject to differential treatment which results in, to paraphrase McLachlin, C.J. in *Auton*, their failing to receive, or receiving to the same degree, a benefit provided by law, or their being saddled with a burden the law does not impose on someone else.[[87]](#footnote-87)
4. It must certainly be recognized that persons belonging to groups protected under s. 15(1) of the *Canadian Charter* are often at a disadvantage as far as income or resources are concerned. This is the case for women and, on that point, one simply has to turn to the findings of the Supreme Court in *Fraser*[[88]](#footnote-88) or in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*[[89]](#footnote-89) and *Centrale des syndicats du Québec v. Quebec (Attorney General)*[[90]](#footnote-90). These cases recall the economic and social devaluation of women’s work, hence the pay inequity which endures, as well as, more generally, the systemic disadvantage which is theirs in the labour market and which results in part, as noted in *Kanyinda*, from the reproductive and parental responsibilities that they are overwhelmingly saddled with. Would this not mean – and that is actually what the appellant is saying – that they are consequently, and necessarily, “over-disadvantaged” compared to men as to the application of the limit provided in s. 10, para. 4 *HIA*, particularly as regards to reproductive health care, including VTP? To restate what was articulated in *Law*,[[91]](#footnote-91) by failing to take into account women’s continuing disadvantaged position within Canadian society, would s. 10, para. 4 *HIA* not result in substantively differential treatment between them “and others” (in this case, men) on the basis of one or several personal characteristics, in this case, their sex (an over‑disadvantage that could even be greater still when women also belong to other groups protected by s. 15 of the *Canadian Charter*, through an intersecting effect)?
5. This is what the appellant asserts but fails to demonstrate. Indeed, nothing in the evidence allows us to concretely compare “the actual impact of the impugned law”[[92]](#footnote-92) on women and on men (the only ground of discrimination invoked being sex) and the manner in which either are affected by that provision. Certainly, s. 10, para. 4 *HIA* may have a different impact on insured persons, but nothing in the evidence establishes that this impact would be in any way related to or vary according to sex.
6. It must be recalled here that, from the beginning, the purpose and objective of the implementation of the Canadian and Quebec public health system and the organization of the health system were and still are to provide the population with as wide and continuing access to quality care as possible, without financial or other barriers and *without difference* based on individuals’ socioeconomic categories or personal characteristics, which is essential to the welfare of every person and to the optimal development of society itself.[[93]](#footnote-93) In this context, it could therefore be considered that the limit imposed by s. 10, para. 4 *HIA* is intrinsically disadvantageous[[94]](#footnote-94) and that it runs counter to the principle of equal and universal access by imposing a potential financial burden on all insured persons who will receive medical services outside Quebec. Persons of little means will be particularly affected (as they were before the public health care plan was put in place), which can indeed interfere with their access to health care and, ultimately, their integration into society or the workplace, regardless of the group, whether protected or not, to which they belong. These are the persons that s. 4, para. 10 *HIA* likely affects disproportionately, weakness or insufficiency of financial means being a sort of transversal characteristic, which unites many individuals across all the groups.
7. Indeed, that limit is disadvantageous for all insured persons receiving medical services outside Quebec and it is no less disadvantageous when it is aimed at groups other than women (for pregnancy-related care), including protected groups. Consider, for instance, persons with disabilities (whether physical or mental). Section 10, para. 4 *HIA* equally affects access to the care specific to their condition that would be provided to them outside Quebec and, potentially, with the same impacts exactly. One can also think of certain ethnic groups, who are often at a disadvantage, including in terms of access to health care, which is nevertheless essential to their socioeconomic integration, itself plagued, already, by other difficulties. Another example would be the situation of the elderly, or, conversely, of children. In all these cases, problems of access to certain medical services, costs being the first, can have the same type of repercussions, increase a person’s incapacity or generate such an incapacity, generally undermine their socioeconomic path or integration or reduce their chances of development.
8. In fact, even persons that do not belong to a protected group are disadvantaged by the limit set by s. 10, para. 4 *HIA*, especially in the case of the less well-off. One need only take the example of a person that suffers a stroke or is involved in a serious accident in a country (the United States immediately come to mind) with which Quebec does not have a reciprocity agreement for medical and hospital services, and where the costs of those services are very high: pursuant to s. 10, para. 4 *HIA*, the reimbursement (or payment) of the cost of the services received in that country would only be very partial, with all the consequences that one may easily imagine. One could of course be tempted to retort that persons who travel outside Quebec need only obtain private insurance, but this is not affordable for everyone (the appellant, for example).[[95]](#footnote-95) From that standpoint, again, s. 10, para. 4 *HIA*, by limiting the reimbursement or payment of health costs, can have the same adverse impact on the less well-off. That limit can even be ruinous in certain cases[[96]](#footnote-96) and, to the extent that it would prevent medical service from being obtained, could jeopardize the life, autonomy and very future of the persons involved (including women, it goes without saying.)[[97]](#footnote-97)
9. It should moreover be noted that in her amended application for judicial review, the appellant indeed alleged that the restriction provided in s. 10, para. 4 *HIA* “may force affected persons to decide between paying for necessary medical treatment that might be financially ruinous, or not paying and not receiving that treatment and suffering the health consequences that result.”[[98]](#footnote-98) The amended notice that she addressed to the Attorney General of Quebec under art. 76 *C.C.P.* also contained the following:

4. Second, an application of s. 10 of the *Act* can actually have the effect of impeding individuals from accessing crucial health services. Some Quebec residents who find themselves having to seek health care in a different province might not be able to afford paying for health services out of pocket, particularly if they are not guaranteed a full reimbursement of the fees they incur. As a result of s. 10, these individuals might be forced to forego necessary treatment and suffering the health consequences of doing so. […][[99]](#footnote-99)

1. It is true that those statements, which are difficult to dispute, were made in support of the ground under s. 7 of the *Canadian Charter*, which the appellant was still advancing in first instance, but that she abandoned in this appeal. Still, the impact that she describes is indeed that which s. 10, para. 4 *HIA* is liable to have on any insured person (within the meaning of the *HIA*) who does not have the capacity (or who has less capacity) to pay the cost of medical services that they require while temporarily residing outside Quebec. By so doing, the appellant points to the main problem raised by s. 10, para. 4 *HIA*, a problem that however affects *all* insured persons in need of health care outside Quebec, and not only women for their pregnancy-related care.
2. The dispute between the parties did not however turn on the issue of whether s. 10, para. 4 *HIA* can create a potentially discriminatory distinction on the basis of social condition, status or class[[100]](#footnote-100) or of financial means. I will not, therefore, consider that issue. Apart from this, and as mentioned previously, the evidence does not show that women, in the case of pregnancy care (including VTP), are more disadvantaged than any other person under s. 10, para. 4 *HIA.*
3. In fact, invoking the general discrimination that women are still subject to in our society, the appellant, here, seeks a benefit – that of the full and unlimited reimbursement or payment of the cost of medical services received outside Quebec – that the law extends to no one. However, as was clearly pointed out in *Auton* (whose teaching is adopted in *Sharma*), the question of whether the benefit sought is provided by the law is an essential element of the analysis required under s. 15(1) of the *Canadian Charter*:

28 The specific role of s. 15(1) in achieving this objective is to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis. This confines s. 15(1) claims to benefits and burdens imposed by law. […]

[…]

29 Most s. 15(1) claims relate to a clear statutory benefit or burden. Consequently, the need for the benefit claimed or burden imposed to emanate from law has not been much discussed. Nevertheless, the language of s. 15(1) as well as the jurisprudence demand that it be met before a s. 15(1) claim can succeed.

[…]

38 The petitioners rely on *Eldridge* in arguing for equal provision of medical benefits. In Eldridge, this Court held that the Province was obliged to provide translators to the deaf so that they could have equal access to core benefits accorded to everyone under the British Columbia medicare scheme. The decision proceeded on the basis that the law provided the benefits at issue — physician-delivered consultation and maternity care. However, by failing to provide translation services for the deaf, the Province effectively denied to one group of disabled people the benefit it had granted by law. *Eldridge* was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred. For this reason, *Eldridge* does not assist the petitioners.[[101]](#footnote-101)

(Underlining added, except for the word “applying” in para. 38 above, which is underlined in the original)

1. *Auton* dealt with a claim on behalf of autistic children for the recognition of a certain therapy, not yet provided in the public health network and whose cost, to avoid any discrimination, would be entirely borne by the state under the health insurance plan. However, as the Supreme Court noted, “the benefit claimed, no matter how it is viewed, is not a benefit provided by law”[[102]](#footnote-102) and the enquiry could therefore end there. Moreover, that benefit was provided to no other person belonging to the comparator group.[[103]](#footnote-103) The situation here is similar: the benefit claimed by the appellant is not a benefit provided by law. Indeed, the unlimited reimbursement (or payment) of the cost of medical services received outside Quebec is not a benefit available to anyone else under Quebec’s health insurance plan, which subjects any reimbursement or payment to a limit in all cases.
2. On another note, it must be emphasized that it has not been proven here that women receiving pregnancy-related medical services outside Quebec obtain, under ss. 10 or 11 *HIA*, a reimbursement or a payment of a lesser amount than that received by men or any insured persons who received any other type of care. One could have questioned the existence of a distinction if, for example, it had been established that pregnant women, and here, I give a random number, never recover more than 50% of the costs that they claim, whereas men (for gender-specific or any other medical services), persons belonging to another protected group or insured persons generally recover, for their part, and still hypothetically, amounts which, while respecting the cap provided in s. 10, para. 4 *HIA*, represent 75% of the costs that they assumed outside Quebec. The problem would perhaps have been related not only to s. 10, para. 4 *HIA*, but also to the inadequacy or parsimony of the scale established by the Board for reproductive health services received in Quebec. The evidence, however, contains nothing of the sort: it does not address that scenario (which was not, moreover, evoked by the parties) and we are totally unaware of the scales used by the Board, which were not themselves challenged.
3. In sum, ss. 10 and 11 *HIA* confer to insured persons under that law both the same benefit and the same disadvantage: any person receiving outside Quebec insured medical services within the meaning of the *HIA* is entitled to the reimbursement or the payment of the expenses they assumed, but up to the limit set by s. 10, para. 4 *HIA*, a limit that applies in all cases, whether the service is specific to sex, gender or any other characteristic. Within the meaning of s. 15 of *Canadian Charter*, and quoting *Sharma*, s. 10, para. 4 *HIA* does not thus create, “on its face or in its impact”[[104]](#footnote-104), a distinction on the basis of sex, the only ground invoked by the appellant, or any enumerated ground or recognized analogous ground. To the contrary, no matter how restrictive the law may be, and quoting this time s. 15(1) itself, “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law”, such protection and benefit being intrinsically restricted in this case.
4. In light of all of this, the appellant’s proposition is not persuasive, given that it has not been shown that women are victims, on the basis of their sex, of a distinction by being deprived of a benefit extended to others (most notably men) or by having to bear a heavier burden.
5. Finally, the appellant’s argument that the mere fact that the cost of pregnancy-related medical services is subject to a cap on reimbursement or payment, when such services are received outside Quebec, necessarily establishes a disadvantageous distinction on the basis of sex, and one that is necessarily disproportionate given that only women are liable to receive such services, cannot succeed.[[105]](#footnote-105) Indeed, it should be noted that some types of care specifically concern men (vasectomy, prostate or testicular cancer treatment, for example) and that they are associated with medical services that only men receive: are we therefore to conclude on this basis that the limit imposed by s. 10, para. 4 *HIA* creates, as to those services, a distinction, likewise on the basis of sex, having a disadvantageous and disproportionate impact, but in this case on men? To ask the question, and I say this respectfully, is to answer it.
6. Similarly, why single-out pregnancy-related services? Certain ailments (breast cancer or osteoporosis, to name a few) affect women much more frequently. Also, what to make of medical conditions to which certain ethnic minorities are especially prone to? How should persons living with a physical or mental disability be treated?
7. In fact, were we to accept the appellant’s argument on that point, we would have to conclude that all groups protected by s. 15 of the *Canadian Charter*, and that are protected precisely because they are traditionally disadvantaged or marginalized and subject to discrimination, suffer a disadvantage by virtue of s. 10, para. 4 *HIA*, which, by imposing a cap on the reimbursement or payment of the costs incurred outside Quebec, exacerbates their precariousness, and affects their socioeconomic integration by impeding their access to healthcare. Ultimately, only men not belonging to any protected group would be subject to the limit set by s. 10, para. 4 *HIA.*
8. The argument cannot be sustained and does not support a finding that there exists a distinction based on a prohibited ground, in this case, sex. That argument, which infers the disadvantage of the prohibited ground of distinction, would, rather, provide to any person belonging to a protected group under s. 15 a benefit (that of a full reimbursement of the cost of medical services outside Quebec) which would not be available to other insured persons under the *HIA*. I cannot accept such reasoning, at least in the case at bar.
9. One may perhaps wish that the reimbursement or payment scheme provided in ss. 10 and 11 *HIA* was more generous (particularly when the services are received elsewhere in Canada.)[[106]](#footnote-106) That, however, does not change the fact that the impugned statutory provision creates no distinction, whether directly or by adverse impact, between members of a protected group, in this case women, for the purposes of care related to their reproductive health (including VTP), and members of any other comparator group, howsoever composed (men, members of another protected group, the general population).
10. Obviously, things would be quite different if pregnancy-related care generally and VTP specifically were excluded from the insured services under the *HIA* or if they were completely or partially excluded from the reimbursement or payment scheme provided in ss. 10 and 11 *HIA*, or again if it were provided, for that type of services, that reimbursement or payment would be at a level lower than that to which other insured persons were entitled, most notably men (since what is alleged here is discrimination on the basis of sex), or, in the case of VTP, that the reimbursement or payment was conditional on the procedure being provided in a public hospital only or prior to a certain date or subject to the Board’s prior approval or any other condition not imposed upon other insured persons. But such is not the case.
11. Consequently, and as the TAQ had correctly found in its March 4, 2020 decision, the appellant’s demonstration does not satisfy stage one of the two-step test governing the application of s. 15 of the *Canadian Charter*: having disregarded the required comparative exercise, she failed to establish the existence of a *differential* treatment *associated with sex*. Section 10, para. 4 *HIA* does not articulate such a distinction, which cannot be inferred or result in an adverse impact either. As the TAQ wrote, [translation] “[t]he right to equality does not protect against a measure that affects one group, when it affects all groups generally”[[107]](#footnote-107) and, I might add, when it affects all groups in the same way. The appeal must therefore be dismissed without the need of proceeding to the second step.

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1. I will allow myself, however, some additional observations.
2. As we know – for this is a notorious fact – maintaining the public health care system is one of the main missions of the Quebec government,[[108]](#footnote-108) a system established under the *HIA*, the *Act respecting health services and social services*, the *Hospital Insurance Act* and, more recently, *An Act to make the health and social services system more effective*,[[109]](#footnote-109) all of this within the parameters established under the *Canada Health Act*. Needless to say, this is, in all respects, an especially complex and very finely tuned system. Issues surrounding the determination of insured services, access to those services, and their funding are inextricably bound to the very structure of the system, which counts on a variety of institutional, collective, and individual actors and stakeholders, as well as to the capacities and resources of the Quebec government (alongside the federal contribution under the *Canada Health Act*). It is with caution therefore that courts will tread around matters relating to the management or economic direction of the system, lest they usurp the legislature’s role and that of the executive (we shall recall here the warning of Karakatsanis, J. in *Ontario v. Criminal Lawyers' Association of Ontario*[[110]](#footnote-110)), subvert the scheme or undermine its integrity.
3. That caution, of course, does not mean that the courts can never intervene in such matter, and, as McLachlin, C.J. and Major, J. wrote in *Chaoulli*:

104 The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. […][[111]](#footnote-111)

1. But this, which is irrefutable, does not mean that courts are well equipped to resolve the difficulties of the health system and, aside from exceptions of which *Chaoulli* and *Eldridge*[[112]](#footnote-112) are examples, it is not ordinarily within their attributes to remodel it. This was expressed in the Supreme Court’s decision in *Auton*[[113]](#footnote-113), a case that bears a similarity to the case at bar, since the issue there, as here, involved a benefit that was not extended to a protected group in a matter of health care (i.e., a treatment that could be provided to autistic children that was not covered by the province’s public health plan). The Supreme Court did not consider this to be a violation of s. 15 of the *Canadian Charter* and it did not intervene.[[114]](#footnote-114)
2. Finally, and Wagner, C.J. explicitly recalled this in *R. v. C.P.*, the analysis to be undertaken under s. 15 of the *Canadian Charter* focusses on “the actual impact of the provision in its full context”[[115]](#footnote-115) (underlining added). The Chief Justice also reminds us of the danger of “artificially cherry-picking individual features from a multifaceted legislative scheme”[[116]](#footnote-116) in making a finding of discrimination: the scheme must be considered as a whole. Applying these teachings, s. 10, para. 4 *HIA* cannot be considered alone and in isolation, as the appellant would have it; rather, it must be considered in its general legislative context, in light of the features of the entire scheme. Indeed, “the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.”[[117]](#footnote-117)
3. As indicated earlier, the purpose of the scheme set up by the Quebec legislature is to guarantee to all persons residing or staying in the province and who are registered with the Board free and universal access to health care, regardless of individuals’ characteristics, including their ability to pay: the aim is to ensure equal access, by eliminating [translation] “financial barriers to access to those services”,[[118]](#footnote-118) including, of course, medical services. The services thereby available to insured persons (i.e., the services provided under the law and regulations) are in principle rendered in Quebec,[[119]](#footnote-119) which is natural, given that, to state the obvious, the Quebec government does not control what occurs outside its borders.
4. This last point is not insignificant. If the cap provided under s. 10, para. 4 *HIA* did not exist, any person insured under the *HIA* and receiving care outside Quebec would be entitled, under s. 10, paragr. 1, to be fully reimbursed or paid the cost of medical services thus received, whether they were foreseen or unforeseen (thereby incidentally neutralizing s. 10, para. 5 *HIA*, which would become useless). This could even encourage insured persons to obtain care outside Quebec, whether elsewhere in Canada or in another country. This is likely why, from the outset, the legislator, while extending the territorial coverage of health insurance (as was already contemplated in 4(1)(d) of the federal *Medical Care Act*[[120]](#footnote-120)), chose to impose a limit on the reimbursement of medical expenses incurred outside Quebec. Indeed, the principle enshrined in ss. 10 and 11 *HIA* exists since the original enactment, in 1970, of the public health system. At the time, this was set forth in ss. 9 and 10 of the Act as it then was[[121]](#footnote-121) and already included the limitation enshrined in the current *HIA*:

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| **9.** A resident of the province of Québec shall be entitled to exact from the Board the reimbursement of the cost of the insured services furnished to him outside the province of Québec by a professional provided that such resident delivers to the Board the receipts for the fees paid by him, and furnished it with the information the Board needs to justify the payment claimed. | **9.** Une personne qui réside au Québec a droit d'exiger de la Régie le remboursement du coût des services assurés qui lui ont été fournis en dehors du Québec par un professionnel de la santé pourvu qu'elle remette à la Régie les reçus d'honoraires qu'elle a payés et qu'elle lui fournisse les renseignements dont la Régie a besoin pour justifier le paiement réclamé. |
| However, he shall only be entitled to exact the lesser of the amount he actually paid for such services or that which would have been paid by the Board for such services to a professional of the province of Québec under an agreement. | Elle n'a toutefois droit d'exiger que le moindre du montant qu'elle a effectivement payé pour ces services ou de celui qui aurait été payé par le Régie pour de tels services à un professionnel de la santé du Québec en vertu d'une entente. |
| **10.** The Board itself may also assume, on behalf of any resident of the province of Québec, payment of the cost of the services contemplated in section 9 upon presentation of a statement of fees and after having obtained the information it needs to justify the payment claimed. | **10.** La Régie peut aussi assumer elle-même, pour le compte d'une personne qui réside au Québec, le paiement du coût des services visés à l'article 9, sur présentation d'un relevé d'honoraires et après avoir obtenu les renseignements dont elle a besoin pour justifier le paiement réclamé. |
| Nevertheless, it shall not so pay an amount higher than that which it would have paid upon presentation of a receipt for fees under section 9. | Elle ne peut toutefois payer ainsi un montant supérieur à celui qu'elle aurait payé sur présentation d'un reçu d'honoraires en vertu de l'article 9. |

1. In any event, it is difficult to envision any reimbursement or payment without a cap, given that the resources of the Quebec government (and that of taxpayers) are not infinite and that the control of costs – all costs – is, it goes without saying, essential to the preservation of the integrity of the health insurance system and the maintenance of its objectives. The fourth paragraph of s. 10 *HIA*, just as the first, is attuned to these objectives and is informed by a rational allocation of resources in the context of a public policy crafted for the benefit of the greatest number and whose perennity must be ensured.
2. It should be noted, moreover, that the other provinces and territories also impose a cap on the reimbursement or payment of the cost of medical services provided outside their boundaries, a cap that varies depending on whether the services are provided in Canada or abroad,[[122]](#footnote-122) but which forms an integral part of all provincial and territorial plans, although it is not the same everywhere. Although not determinative, the comparison is nevertheless useful and illustrative.
3. Thus, subject to any interjurisdictional arrangements, in Alberta,[[123]](#footnote-123) Manitoba,[[124]](#footnote-124) New Brunswick,[[125]](#footnote-125) Nunavut,[[126]](#footnote-126) Newfoundland and Labrador,[[127]](#footnote-127) and the Northwest Territories,[[128]](#footnote-128) the reimbursement of the cost of medical services received in Canada cannot in principle exceed an amount calculated on the basis of the rates provided by the public plan of the province or territory in which were they were provided (which appears to correspond to s. 11(1)(b)(i) of the *Canada Health Act*).
4. By contrast, and subject to interjurisdictional agreements negotiated by their governments, Prince Edward Island,[[129]](#footnote-129) Ontario,[[130]](#footnote-130) Saskatchewan,[[131]](#footnote-131) and Yukon[[132]](#footnote-132) reimburse or pay medical services obtained outside those jurisdictions according to their own scales (as does Quebec).
5. For its part, unless an interprovincial or other agreement is reached, Nova Scotia reimburses or pays the cost of medical services received outside the province up to a reasonable amount determined by the Minister, who can set a maximum.[[133]](#footnote-133) The same appears to be the case in British Columbia where, absent any reciprocity agreement, the competent authority determines the amount to be reimbursed.[[134]](#footnote-134)
6. Finally, some provinces limit reimbursement to cases of emergency or unexpected circumstances.[[135]](#footnote-135)
7. For services outside Canada, almost all provinces and territories impose a cap similar to that of s. 10 al., para. 4 *HIA,*[[136]](#footnote-136) with a few exceptions or adjustments here and there. Thus, British Columbia reimburses a reasonable amount (with the above reservation).[[137]](#footnote-137) Nova Scotia does not reimburse the cost of medical services received outside Canada, except when they have been preapproved (under very specific circumstances and conditions provided in the statute.)[[138]](#footnote-138)
8. This context shows that the cap imposed by the Quebec legislature on the reimbursement/payment of the cost of health services rendered outside Quebec to a person insured in Quebec is not arbitrary; moreover, it is not based on a stereotype or a prejudice. It is a limit that goes to the very nature of the health care plan set up by the province and by which the various needs, interests, requirements and constraints (including financial) unique to a public health system can be reconciled, for the benefit of as many people as possible[[139]](#footnote-139). It creates no more distinction (in this case based on sex) than if the legislature had instead decided not to reimburse out-of-province medical expenses.
9. One may regret that Quebec has not, in the matter of medical services, entered into reciprocity agreements with the provinces and territories of Canada, as it has done with respect to hospital care. That, however, is a matter of policy which does not render s. 10, para. 4 *HIA* discriminatory, as it does not create a distinction contrary to s. 15 of the *Canadian Charter* (a distinction that, in the present case, would be based on sex).[[140]](#footnote-140)

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1. For all these reasons, I would dismiss the appeal, with legal costs.

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| MARIE-FRANCE BICH, J.A. |

1. CQLR, c. A-29 [“*HIA*”]. [↑](#footnote-ref-1)
2. Reproductive health care can also include, *inter alia*, post-partum care and the prevention and treatment of illnesses or abnormalities of the reproductive system. [↑](#footnote-ref-2)
3. According to the Board's first decision, some of the appellant's claims were not covered by the *HIA*. See Exhibit P-4, *Statement of payments and Reimbursement* (February 10, 2017). [↑](#footnote-ref-3)
4. Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK)*,* [“*Canadian Charter*”]. [↑](#footnote-ref-4)
5. CQLR, c. C-12 [“Quebec Charter”]. [↑](#footnote-ref-5)
6. *A.P. c. Régie de l’assurance maladie du Québec*, 2020 QCTAQ 02730. [↑](#footnote-ref-6)
7. *A.P. c. Attorney General of Quebec*, 2022 QCCS 2875. [↑](#footnote-ref-7)
8. Although the trial judge did not refer to s. 10 of the *Quebec Charter*, his reasoning applied thereto by implication. [↑](#footnote-ref-8)
9. 2014 FC 651. [↑](#footnote-ref-9)
10. *A.P. c. Attorney General of Quebec*, 2022 QCCA 1502. [↑](#footnote-ref-10)
11. 2024 QCCA 144 (application for leave to appeal to the Supreme Court granted, October 3, 2024, no. 41210) [“*Kanyinda*”]. [↑](#footnote-ref-11)
12. Notice of appeal, para. 16, and application for leave to appeal, para. 18: “*The Judge rejected arguments based on s. 7 of the Canadian Charter and ss. 1 and 10 of the Quebec Charter, which are not the subject of the present appeal*” (underlining added). [↑](#footnote-ref-12)
13. During the hearing, one of the appellant’s counsel made clear that the declaration of invalidity sought was directed solely to pregnancy-related care, including VTP. [↑](#footnote-ref-13)
14. S. 1, para. *g*.1) *HIA* defines an “insured person” as “*a resident or temporary resident of Québec who is duly registered with the Board* / une personne qui réside ou qui séjourne au Québec et qui est dûment inscrite à la Régie”. That definition is elaborated upon by ss. 5-8 *HIA.* None of those provisions are challenged in this appeal, nor were they even referred to. [↑](#footnote-ref-14)
15. *R. v. Sharma*, 2022 SCC 39 [“*Sharma*”]. [↑](#footnote-ref-15)
16. Respondent’s brief, submissions, para. 13. See also, para. 36. [↑](#footnote-ref-16)
17. Respondent’s additional submissions, p. 3. [↑](#footnote-ref-17)
18. *Ibid.* [↑](#footnote-ref-18)
19. *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, at para. 95 (concurring reasons of Côté, J., a passage with which Jamal, J. concurred at para. 45 of his majority reasons). [↑](#footnote-ref-19)
20. *Id.*, at para. 97 (concurring reasons of Côté, J., a passage with which Jamal, J. concurred at para. 45 of his majority reasons). Generally, see paras. 92-97 of that decision.

    On those standards and their respective scope, see also: *York Region District School Board v. Elementary Teachers’ Federation of Ontario*, 2024 CSC 22, at paras. 63-71 (majority reasons of Rowe, J.); *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 17 and 55-57 (majority reasons of Wagner, C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin, JJ.). [↑](#footnote-ref-20)
21. *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254, at para. 456 (application for leave to appeal to the Supreme Court, no. 41231). [↑](#footnote-ref-21)
22. *Ibid.* [↑](#footnote-ref-22)
23. *Supra*, note 15. [↑](#footnote-ref-23)
24. Karakatsanis, J., in her dissent, applied the same two-step test: *Sharma*, *supra*, note 15, at para. 188. That was also the test applied by Kasirer and Jamal, JJ. for the majority, in *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at para. 188, as well as by Martin and O’Bonsawin, JJ. dissenting, but not on that point (*id.*, para. 347). Our Court applied that test in *Kanyinda*, *supra*, note 11, at para. 82. [↑](#footnote-ref-24)
25. [1999] 3 S.C.R. 3 [“*BCGSEU*”]. [↑](#footnote-ref-25)
26. *Id.*, at para. 48. [↑](#footnote-ref-26)
27. *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1137 (per Dickson, C.J., for a unanimous Court). Although that case involved the *Canadian Human Rights Act* (then S.C. 1976-77, c. 33), the definition of indirect discrimination was no different from that applicable for the purposes of the *Canadian Charter*. [↑](#footnote-ref-27)
28. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164 [“*Andrews*”]. [↑](#footnote-ref-28)
29. *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, at para. 1. See also para. 17 of that decision. [↑](#footnote-ref-29)
30. *Andrews*, *supra*, note 28, at p. 165. [↑](#footnote-ref-30)
31. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 58 [“*Eldridge*”]. [↑](#footnote-ref-31)
32. *Withler v. Canada (Attorney General)*, 2011 SCC 12 [“*Withler*”]. That decision also explains the risks associated with the comparative exercise (the goal being the furtherance of substantive equality rather than formal equality), notably in the choice of the comparator group. [↑](#footnote-ref-32)
33. *Supra*, note 15. [↑](#footnote-ref-33)
34. *Kanyinda*, *supra*, note 11, also adopted that teaching, quoting para. 41 of *Sharma* in its entirety. [↑](#footnote-ref-34)
35. *Sharma*, *supra*, note 15, at para. 53. [↑](#footnote-ref-35)
36. 2021 SCC 19. [↑](#footnote-ref-36)
37. *Sharma*, *supra*, note 15, at para. 56. [↑](#footnote-ref-37)
38. *Supra*, note 32. [↑](#footnote-ref-38)
39. *Sharma*, *supra*, note 15, at para. 57 (underlining added). [↑](#footnote-ref-39)
40. *Sharma*, *supra*, note 15, at para. 59. [↑](#footnote-ref-40)
41. In her dissent, Karakatsanis, J. appears to indicate that such a positive obligation of the state cannot be excluded from the outset (*Sharma*, *supra*, note 15, at para. 205). [↑](#footnote-ref-41)
42. *Sharma*, *supra*, note 15, at para. 64 (italics in the original). [↑](#footnote-ref-42)
43. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 317, passage quoted in *Sharma*, *supra*, note 15, at para. 65 (per Brown and Rowe, JJ. for the majority). [↑](#footnote-ref-43)
44. *Sharma*, *supra*, note 15, at para. 55, point b) (per Brown and Rowe, JJ. for the majority). [↑](#footnote-ref-44)
45. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paras. 78-79 [“*Law*”]. See also: Julien Fournier, “Tracer la frontière entre la preuve du contexte législatif et social et la plaidoirie : proposition d’un cadre d’analyse pour l’application de la prohibition de l’expertise sur le droit dans le contentieux constitutionnel”, (2021) 51 *R.G.D.* 279–315. [↑](#footnote-ref-45)
46. *Applicant’s First Application for Review, dated July 19, 2017*, Exhibit P-5, p. 3/8. [↑](#footnote-ref-46)
47. Sections 23.1 and 23.2 of the *Regulation respecting the application of the Health Insurance Act*, CQLR, c. A-29, r. 5, thus provide that, subject to certain formalities, the costs of an insured service required, but not available in Quebec, may by fully assumed or reimbursed by the Board. [↑](#footnote-ref-47)
48. I point this out because the *HIA* does not cover certain types of health care provided by health professionals other than physicians. [↑](#footnote-ref-48)
49. CQLR, c. A-29.01. [↑](#footnote-ref-49)
50. Sections 7 and 8 of the *Act respecting prescription drug insurance* state that:

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    | **7.**  The basic plan provides coverage to every eligible person for the cost of pharmaceutical services and medications provided in Québec, to the extent provided for in this Act, regardless of the risk associated with that person’s state of health. | **7.**  Le régime général garantit à toute personne admissible, dans la mesure prévue par la présente loi, le paiement du coût de services pharmaceutiques et de médicaments qui lui sont fournis au Québec, sans égard au risque relié à son état de santé. |
    | **8.**  Coverage under the basic plan includes, to the extent provided for by this Act, the pharmaceutical services determined by government regulation under subparagraph 1.2 of the first paragraph of section 78 and the medications entered on the list of medications drawn up by the Minister in a regulation made under section 60, when provided in Québec by a pharmacist on the prescription of a physician, a medical resident, a dentist, a midwife or another professional authorized by law or a regulation under subparagraph b of the first paragraph of section 19 of the Medical Act (chapter M-9). […] | Les garanties du régime général couvrent, dans la mesure prévue par la présente loi, les services pharmaceutiques déterminés par règlement du gouvernement en vertu du paragraphe 1.2° du premier alinéa de l’article 78, ainsi que les médicaments inscrits à la liste des médicaments dressée par règlement du ministre en vertu de l’article 60, fournis au Québec par un pharmacien sur ordonnance d’un médecin, d’un résident en médecine, d’un dentiste, d’une sage-femme ou d’un autre professionnel habilité par la loi ou par un règlement pris en application du paragraphe b du premier alinéa de l’article 19 de la Loi médicale (chapitre M-9). […] |
    | The same coverage applies when a person obtains medications in a pharmacy outside Québec from a person legally authorized to practise as a pharmacist in the place concerned and with whom the Board has entered into an individual agreement for that purpose, if the pharmacy is situated in a region bordering on Québec and if no pharmacy situated in Québec within a radius of 32 kilometres of that pharmacy provides services to the public. | La même couverture s’applique dans le cas où une personne obtient des médicaments dans une pharmacie à l’extérieur du Québec d’une personne légalement autorisée à y exercer la profession de pharmacien et avec qui la Régie a conclu une entente particulière à cette fin, lorsque la pharmacie est située dans une région limitrophe au Québec et que, dans un rayon de 32 kilomètres de cette pharmacie, aucune pharmacie au Québec ne dessert la population. |
    | In addition, coverage includes, in the cases and on the conditions and for the classes of persons determined by government regulation, the medications specified in the regulation that are provided as part of the services provided by an institution within the meaning of the Act respecting health services and social services (chapter S-4.2) or the Act respecting health services and social services for Cree Native persons (chapter S-5) or any other institution recognized for that purpose by the Minister that is situated outside Québec in a region bordering on Québec. | Les garanties couvrent également, dans les cas, aux conditions et pour les catégories de personnes déterminés par règlement du gouvernement, les médicaments indiqués par ce règlement qui sont fournis dans le cadre des activités d’un établissement au sens de la Loi sur les services de santé et les services sociaux (chapitre S-4.2) ou de la Loi sur les services de santé et les services sociaux pour les autochtones cris (chapitre S-5) ou, le cas échéant, d’un établissement reconnu à cette fin par le ministre et situé à l’extérieur du Québec dans une région limitrophe. |
    | […] | […] |

    (Shaded passage not in force, underlining added)

    As can be seen, the portion of the third paragraph of s. 8 above which is not in force mirrors the third paragraph of s. 10 *HIA*, which itself is not in force. [↑](#footnote-ref-50)
51. CQLR, c. A-28. [↑](#footnote-ref-51)
52. For interprovincial agreements relating to hospital services, agreements to which Quebec is a party (services that include VTP since March 2016 and that included it at the date on which the appellant obtained that care), see: *Regulation respecting the application of the Hospital Insurance Act*, CQLR, c. A‑28, r. 1, ss. 14 to 19 (provisions enacted in 1981 or, in the case of s. 15.1, in 1982, as amended from time to time, but in all cases well before 2016, the material time here). See also:

    https://g26.pub.msss.rtss.qc.ca/Formulaires/Circulaire/ConsCirculaire.aspx?enc=fiC/nTJX+J0= and its appendix 2014-015 Message (2016-05-09).pdf (regarding the withdrawal, in March 2016, of the exclusion of [translation] “therapeutic abortion and voluntary termination of pregnancy”);

    https://www.ramq.gouv.qc.ca/SiteCollectionDocuments/professionnels/manuels/425-services-hospitaliers-internes-externes/ententes-interprovinciales.pdf;

    Health Canada, *Canada Health Act – Annual Report 2022-2023*, Ottawa, Health Canada, February 2024, p. 39, https://www.canada.ca/content/dam/hc-sc/documents/services/publications/health-system-services/canada-health-act-annual-report-2022-2023/canada-health-act-annual-report-2022-2023.pdf. [↑](#footnote-ref-52)
53. R.S.C. (1985), c. C-6. [↑](#footnote-ref-53)
54. One should note here that the TAQ’s decision (*supra*, note 6) indicated that [translation] “[t]he parties admitted, during the hearing, that the amounts reimbursed by the Board represented the totality of the amounts that could be reimbursed under the *Health Insurance Act* and regulations (at para. 55). One might nevertheless ask whether the appellant could have obtained a full reimbursement of the $500 billed by the BC Women’s Hospital (a public facility, invoice 0340, May 16, 2016, Exhibit P-2) for what appears to be hospital costs, which were at the time covered by the existing interprovincial agreement. Indeed, one might even ask whether the hospital facility in question should have billed her such an amount (if it is indeed an amount related to hospital services), in view of that agreement. In the absence of the requisite evidence, the Court is unable to answer that question, which, incidentally, was not addressed, nor even raised by the parties. [↑](#footnote-ref-54)
55. Which includes intellectual, cognitive, and sensory disabilities, as well as mental illnesses and disorders. [↑](#footnote-ref-55)
56. *Egan v. Canada*, [1995] 2 S.C.R. 513 (followed, *inter alia*, in: *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Withler*, *supra*, note 32). [↑](#footnote-ref-56)
57. *Quebec (Attorney General) v. A*, 2013 CSC 5, [2013] 1 S.C.R. 61. [↑](#footnote-ref-57)
58. *Andrews*, *supra*, note 28. [↑](#footnote-ref-58)
59. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. [↑](#footnote-ref-59)
60. *Dickson v. Vuntut Gwitchin First Nation*, *supra*, note 24, at para. 198 (per Kasirer and Jamal, JJ. for the majority). [↑](#footnote-ref-60)
61. [1989] 1 S.C.R. 1219 [“*Brooks*”]. [↑](#footnote-ref-61)
62. [1997] 1 S.C.R. 358 [“*Benner*”]. [↑](#footnote-ref-62)
63. *Supra*, note 56. [↑](#footnote-ref-63)
64. Although that case dealt with the application of a provincial human rights statute, its teaching is grounded in principles also recognized in s. 15 of the *Canadian Charter*. [↑](#footnote-ref-64)
65. S.C. 1974-75-76, c. 108, proclaimed in force February 15, 1977 by SI/77‑43 (R.S.C.,1985, c. C‑29). [↑](#footnote-ref-65)
66. *M. v. H.*, *supra*, note 56, at para. 62 (per Cory and Iacobucci, JJ. for the majority, reasons of Cory, J.). [↑](#footnote-ref-66)
67. *Supra*, note 25, at paras. 11-12 and 69. [↑](#footnote-ref-67)
68. 2020 SCC 28 [“*Fraser*”]. [↑](#footnote-ref-68)
69. *Supra*, note 11. [↑](#footnote-ref-69)
70. *Kanyinda*, *supra*, note 11, at para. 88. [↑](#footnote-ref-70)
71. *Kanyinda*, *supra*, note 11, at para. 88. [↑](#footnote-ref-71)
72. See *supra*, paras. [66] and [67]. [↑](#footnote-ref-72)
73. CQLR, c. S-4.1.1. [↑](#footnote-ref-73)
74. *Eldridge*, *supra*, note 31. [↑](#footnote-ref-74)
75. *Fraser*, *supra*, note 68, at para. 54 (*per* Abella, J. for the majority). [↑](#footnote-ref-75)
76. *Law*, *supra*, note 45, at paras. 39 and 88, point 3A). [↑](#footnote-ref-76)
77. Testimony of expert witness Sylvie Lévesque, stenographic notes of November 27, 2019, at pp. 41-42. In her testimony, Dr. Lévesque noted that there may also be regional differences in access to abortion, mainly between remote regions and large urban centres (*id.*, at pp. 61-63). [↑](#footnote-ref-77)
78. Sylvie Lévesque, “L’accès à l’avortement : quels enjeux pour le bien-être des femmes?”, expert report, May 15, 2019, Exhibit P-9 [“Lévesque Report”], at p. 10. [↑](#footnote-ref-78)
79. The adjective “free” is used here to signify that a woman who wishes to interrupt her pregnancy will not have to pay the cost of the intervention out of pocket, although she does help fund the intervention through her tax contributions, as any person insured under the *HIA*, such contributions supporting the health system and the health insurance scheme as a whole. [↑](#footnote-ref-79)
80. There appear to be exceptions to that statement, notably in Prince Edward Island and New Brunswick, where there is limited availability to VTP, and this procedure is governed in a way that restricts access (although New Brunswick's rules have apparently been relaxed lately). But this is not relevant to the debate here. See, *inter alia*: Rachael Johnstone and Emmett Macfarlane, “Public Policy, Rights and Abortion Access in Canada”, (2015) 51 *International Journal of Canadian Studies* 97, notably at pp. 108-109; Louise Langevin, *Le droit à l’autonomie procréative des femmes : entre liberté et contrainte*, Montréal, Éditions Yvon Blais, 2020, at para. 67 [appellant’s Book of Authorities, Tab 44]. See also: Abortion Services | Government of Prince Edward Island (https://www.princeedwardisland.ca/en/information/health-pei/abortion-services); (Abortion - Vitalité | Francophone leader serving its communities (https://vitalitenb.ca/en/services-and-locations/service-directory/abortion).

    We could also talk about access to VTP or reproductive health care generally in remote regions, but, again, this is not what is at issue here, given that the appellant’s situation does not engage the availability of termination of pregnancy services. [↑](#footnote-ref-80)
81. Lévesque Report, at pp. 18-19. [↑](#footnote-ref-81)
82. This appears from her testimony before the TAQ, but also from her December 15, 2016 letter to the Board, when she submitted her initial reimbursement application (Exhibit P-3, *Applicant’s Application for Reimbursement, dated December 15, 2016*, third page). [↑](#footnote-ref-82)
83. *A.P. c. Régie de l’assurance maladie du Québec*, *supra*, note 6, at para. 96 ([translation] “It [the Lévesque Report] shows the impact of costs on access to abortion, but that impact would be the same, in the Tribunal’s view, for any type of medical care. It is not peculiar to abortion.”) [↑](#footnote-ref-83)
84. Lévesque Report, at p. 20. [↑](#footnote-ref-84)
85. Lévesque Report, at p. 24. [↑](#footnote-ref-85)
86. See, generally: L. Langevin, *Le droit à l’autonomie procréative des femmes : entre liberté et contrainte*, *supra*, note 80; Joanna N. Erdman, Vanessa Gruben and Erin Nelson, *Canadian Health Law and Policty*, 5th ed., Toronto, Lexis Nexis, chap. 17 (“Regulating Reproduction”), at pp. 399 et seq. [↑](#footnote-ref-86)
87. *Auton (Guardian at litem of) v. British Columbia* *(Attorney General)*, 2004 SCC 78, at para. 27 [“*Auton”*]. [↑](#footnote-ref-87)
88. *Supra*, note 68. [↑](#footnote-ref-88)
89. 2018 SCC 17. [↑](#footnote-ref-89)
90. 2018 SCC 18. [↑](#footnote-ref-90)
91. *Law*, *supra*, note 45, at para. 39 and para. 88, point 3A). [↑](#footnote-ref-91)
92. Terms borrowed from *Withler*, *supra*, note 32, at para. 43 (see also para. 39), cited by Brown and Rowe, JJ. in *Sharma*, *supra*, note 15, at para. 57. [↑](#footnote-ref-92)
93. On that subject, see the preamble and s. 3 of the *Canada Health Act* as well as s. 1 of the *Act respecting health services and social services*, CQLR, c. S-4.2, s. 2 of the *Hospital Insurance Act*, and s. 2 of *An Act to make the health and social services system more effective*, S.Q. 2023, c. 34. See also, to the same effect, s. 2 of the *Act respecting prescription drug insurance*. [↑](#footnote-ref-93)
94. I use the term “disadvantageous” with a degree of circumspection because, of course, the legislative decision to provide for limited reimbursement of the costs of medical services obtained outside Quebec is preferable to the decision to allow none at all and is, in that sense, a net benefit. [↑](#footnote-ref-94)
95. What is more, the idea of obtaining such insurance will not necessarily occur to a person from Quebec who is travelling a day or two in a neighbouring province, Ontario for instance, or in a contiguous American state, or who is driving through New Brunswick and Prince Edward Island to reach the Magdalen Islands. [↑](#footnote-ref-95)
96. And not only in the case of the most indigent. [↑](#footnote-ref-96)
97. It should further be added that the actual disadvantage can vary according to the individual and the circumstances of the situation that leads them to receive health care outside Quebec. It could thus differ according to the location where the care is received, the impact of the limit, on whomever does not have private insurance, being greater if the care is provided in the United States, where medical costs are notoriously high, rather than in a Canadian province. The nature of the service required, and its urgency also count in the equation: treatment of a heart attack will be costlier and potentially more burdensome than a routine pregnancy checkup. [↑](#footnote-ref-97)
98. *Amended Application for Judicial Review, August 13, 2021*, at para. 40. [↑](#footnote-ref-98)
99. *Amended Notice to the Attorney General of Quebec, November 1, 2017*. [↑](#footnote-ref-99)
100. A possibility that was contemplated favourably, but without deciding the issue, in *R.O. c. Ministre de l'Emploi et de la Solidarité sociale*, 2021 QCCA 1185 (application for leave to appeal to the Supreme Court denied, March 31, 2022, No. 39880). [↑](#footnote-ref-100)
101. *Auton*, *supra*, note 87. [↑](#footnote-ref-101)
102. *Auton*, *supra*, note 87, at para. 47. [↑](#footnote-ref-102)
103. *Id.*, at paras. 57-62. [↑](#footnote-ref-103)
104. *Sharma*, *supra*, note 15, at para. 28 – Point (a). [↑](#footnote-ref-104)
105. An argument that she expresses as follows in para. 8 of the supplementary submissions addressed to the Court following *Kanyinda*: “In fact, a finding of disproportionate impact is even clearer in this case than in *Kanyinda*: there, women were disproportionately (through [*sic*] not exclusively) affected by the law. Here, since only women can become pregnant, only women will require pregnancy-related healthcare. The financial burden of pregnancy-related care imposed by para. 4 of s. 10 *HIA* will thus be borne disproportionately, if not exclusively, by women […]”. [↑](#footnote-ref-105)
106. It should be noted here that s. 7(d) of the *Canada Health Act* conditions payment of the full amount of the federal government’s cash contribution on the portability of provincial health plans. Section 11 of that Act, which defines portability, states, in part:

     |  |  |
     | --- | --- |
     | **11**  **(1)**  In order to satisfy the criterion respecting portability, the health care insurance plan of a province | **11** **(1)**  La condition de transférabilité suppose que le régime provincial d’assurance-santé : |
     | […] | […] |
     | **(b)** must provide for and be administered and operated so as to provide for the payment of amounts for the cost of insured health services provided to insured persons while temporarily absent from the province on the basis that | **b)** prévoie et que ses modalités d’application assurent le paiement des montants pour le coût des services de santé assurés fournis à des assurés temporairement absents de la province : |
     | **(i)** where the insured health services are provided in Canada, payment for health services is at the rate that is approved by the health care insurance plan of the province in which the services are provided, unless the provinces concerned agree to apportion the cost between them in a different manner, or | **(i)** si ces services sont fournis au Canada, selon le taux approuvé par le régime d’assurance-santé de la province où ils sont fournis, sauf accord de répartition différente du coût entre les provinces concernées, |
     | **(ii)** where the insured health services are provided out of Canada, payment is made on the basis of the amount that would have been paid by the province for similar services rendered in the province, with due regard, in the case of hospital services, to the size of the hospital, standards of service and other relevant factors; and | **(ii)** s’ils sont fournis à l’étranger, selon le montant qu’aurait versé la province pour des services semblables fournis dans la province, compte tenu, s’il s’agit de services hospitaliers, de l’importance de l’hôpital, de la qualité des services et des autres facteurs utiles; |
     | […] | […] |

     As we know, s. 10, para. 4 *HIA* provides that the amount reimbursed or paid shall not exceed the amount “established by the Board for such services paid in Québec”, whereas subs. 11(1)(b)(i) of the *Canada Health Act* provides, rather, for the reimbursement or payment equal the rate provided by the plan of the province where the service was provided, unless an agreement has been reached. However, Quebec is apparently not a party to any agreement on medical services, although, as discussed above, it is for hospital services. I recall that the parties did not argue the issue of whether s. 10, para. 4 *HIA* complies or not with subs. 11(1)(b)(i) of the *Canada Health Act* (see *supra*, at para. [55]), the sanction for non-compliance being a reduction or withholding of the federal contribution to the funding of health care in the province or territory in question, pursuant to ss. 7 and 15 of the *Canada Health Act*. However, *a priori*, s. 10, para. 4 *HIA* appears to be in compliance with subs. 11(1)(b)(ii) as regards services provided abroad, i.e., outside Canada (a point that the parties did not discuss either, but that appears on its face upon a side by side reading of both provisions). [↑](#footnote-ref-106)
107. *A.P. c. Régie de l’assurance maladie du Québec*, *supra*, note 6, at para. 103. [↑](#footnote-ref-107)
108. It also constitutes a substantial part of its annual budget: Nicholas-James Clavet, Jean-Yves Duclos, Bernard Fortin, Steeve Marchand, Pierre-Carl Michaud, *Les dépenses en santé du gouvernement du Québec, 2013-2030 : projections et déterminants*, Série scientifique n°2013s-45, Montréal, Cirano, December 2013; Ministère de la Santé et des Services sociaux, *Comptes de la santé 2020-2021, 2021-2022, 2022-2023*, Québec, Gouvernement du Québec, 2023. [↑](#footnote-ref-108)
109. One might add to this the *Act respecting prescription drug insurance*, enacted in 1996. [↑](#footnote-ref-109)
110. 2013 SCC 43, at paras. 28-31 (majority reasons). [↑](#footnote-ref-110)
111. *Chaoulli* *v. Quebec (Attorney General),* 2005 SCC 35. [↑](#footnote-ref-111)
112. *Supra*, note 31. [↑](#footnote-ref-112)
113. *Supra*, note 87. [↑](#footnote-ref-113)
114. Given the weakness of the appellant’s argument with respect to s. 7 of *Canadian Charter*, the Supreme Court did not consider it to be an infringement of that provision either. [↑](#footnote-ref-114)
115. *R. c. C.P.*, *supra*, note 36, at para. 145. [↑](#footnote-ref-115)
116. *Id.*, at para. 144. [↑](#footnote-ref-116)
117. *Withler*, *supra*, note 32, at para. 38, quoted by Brown and Rowe, JJ. in *Sharma*, *supra*, note 15, at para. 57 (quoted *supra*, at para. [35]). [↑](#footnote-ref-117)
118. Lorne Giroux, “L’assurance-maladie”, (1970) 11 *C. de D.* 535, p. 535. See also: Marco Laverdière, “Le cadre juridique canadien et québécois relatif au développement parallèle de services privés de santé et l’art. 7 de la *Charte canadienne des droits et libertés*”, (1998-99) 29 *R.D.U.S.* 117, at p. 133 ([translation] “It is easy to identify and understand the objective of introducing a public health system such as the one that exists in Canada and Quebec. It is easy to see that the aim of such a measure is to ensure that every citizen, regardless of their ability to pay, has access to the health and social services they require. This was the main motivation of the architects of the public system. It is also spelled out in the reports of the major commissions of enquiry that laid the foundations for the system we know today.”). See also the dissenting reasons of Binnie and Lebel, JJ. in *Chaoulli*, *supra*, note 111, at para. 164 (“The policy of the *Canada Health Act*, R.S.C. 1985, c. C-6, and its provincial counterparts is to provide health care based on need rather than on wealth or status.”) [↑](#footnote-ref-118)
119. And likewise, each province governs the health services provided within its boundaries. [↑](#footnote-ref-119)
120. S.C. 1966-67, c. 64, a provision restated in the consolidated version of the Act (R.S.C. 1970, c. M-8). Paragraph 4(1)(d) of that Act stipulated, *inter alia*, that a province’s health insurance plan, to the extent that the federal government contributed to it financially, “provides for and is administered and operated so as to provide for the payment of amounts in respect of the cost of insured services furnished to insured persons while temporarily absent from the province*”* / « *doit prévoir, et ses modalités d’administration et d’application doivent assurer, le paiement de montants relatifs aux frais des services assurés dispensés aux personnes assurées alors qu’elles sont temporairement absentes de la province* ». That provision was the predecessor of s. 11(b) of the *Canada Health Act*. [↑](#footnote-ref-120)
121. S.Q. 1970, c. 37. [↑](#footnote-ref-121)
122. It should be noted that most provinces have also enacted provisions (statutory and/or regulatory) analogous to the regulatory provisions enacted under s. 10, para. 5 *HIA*, in the case of medical services provided outside the province or country, but with the approval of the relevant authorities thereof. As discussed above, such a case is not at issue here. [↑](#footnote-ref-122)
123. *Medical Benefits Regulation*, Alberta Regulation 84/2006, s. 4(3)(a) (except if the service received in the other province or territory is not an insured service, but is in Alberta, in which case the maximum reimbursement will be limited to the cost established by the Alberta scales, s. 4)3)(b)). [↑](#footnote-ref-123)
124. *Medical Services Insurance Regulation*, 49/93, s. 7(1). [↑](#footnote-ref-124)
125. New Brunswick *General Regulation 84-20* under the *Medical Services Payment Act* (O.C. 84-64), s. 13.1(b) and s. 14(4)(a). [↑](#footnote-ref-125)
126. *Medical Care Act*, C.S.Nu., c. M-40, s. 4(2). [↑](#footnote-ref-126)
127. *Physicians and Fee Regulations under the Medical Care Insurance Act, 1999*, Newfoundland and Labrador Regulation 69/03, s. 7(1). [↑](#footnote-ref-127)
128. *Medical Care Act,* RSNWT 1988, c. M‑8, s. 4(2). [↑](#footnote-ref-128)
129. *Health Services Payment Act Regulations*, ss. 1(c) and 11(1) (regulation enacted under the *Health Services Payment Act*, R.S.P.E.I. 1988, cap. H-2). [↑](#footnote-ref-129)
130. *Health Insurance Act*, R.R.O. 1990, *Regulation 552*, s. 29 (2)(3). [↑](#footnote-ref-130)
131. *The Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29, ss. 14(3)(3.1) and 18.1; *The Saskatchewan Medical Care Insurance Payment Regulations, 1994*, chapter S-29 Reg 19, ss. 7(4) and 8. [↑](#footnote-ref-131)
132. *Regulations Respecting Health Care Insurance Services*, C.O. 1971/275 (Yukon), s. 7(14) (see also s. 10). [↑](#footnote-ref-132)
133. *Hospital Insurance Regulations made under Section 17 of the Health Services and Insurance Act R.S.N.S. 1989, c. 197*, N.S. Reg. 11/1958 (December 1, 1958), amended to O.I.C. 2023-45 (effective February 7, 2023), N.S. Reg. 33/2023, ss. 7(1)(a) and 7(3), (4) and (7). [↑](#footnote-ref-133)
134. *Medicare Protection Act*, RSBC 1996, c. 286, s. 29. According to the official website Medical Benefits Outside of B.C. - Province of British Columbia (gov.bc.ca) official website (https://www2.gov.bc.ca/gov/content/health/health-drug-coverage/msp/bc-residents/benefits/services-covered-by-msp/medical-benefits/medical-benefits-outside-of-british-columbia), it appears that the amounted thus reimbursed does not exceed that which the Province would pay to its own health professional (“If you are eligible for coverage while temporarily absent from B.C., MSP will help pay for unexpected medical services provided the services are medically required, rendered by a licensed physician and normally insured by MSP. Reimbursement for physician services will be made in Canadian funds and payment will not exceed the amount payable had the same services been performed in B.C. Any excess cost is the responsibility of the beneficiary”). [↑](#footnote-ref-134)
135. That is the case in British Columbia pursuant to the *Medicare Protection Act*, RSBC 1996, c. 286, s. 29(4)(a) (“the need for the service arose unexpectedly”), in Prince Edward Island, pursuant to the *Health Services Payment Act Regulations*, s. 11 (the latter provision referring to medical services required outside the Province “as a result of a sudden illness or accident*”*), in Manitoba, pursuant of the *Medical Services Insurance Regulation*, 49-93, s. 7(2)(a) (services “required because of an accident or sudden attack of illness”), in Nova Scotia, pursuant to the *Hospital Insurance Regulations made under Section 17 of the Health Services and Insurance Act R.S.N.S. 1989, c. 197*, N.S. Reg. 11/1958, s. 7(4) (the service had to be required “because of an accident or sudden attack of illness”). [↑](#footnote-ref-135)
136. See: *Medical Benefits Regulation*, Alberta Regulation 84/2006, s. 5 (Alberta); *Health Services Payment Act Regulations*, ss. 1(c) and 11(1)(b) (Prince Edward Island); *Medical Services Insurance Regulation*, 49-93, s. 7(2) (Manitoba); *New Brunswick Regulation 84-20 under the Medical Services Payment Act*, (O.C. 84-64), ss. 13.1(b) and. 14(4)(b)(i) (New Brunswick); *Medical Care Act*, C.S. Nu., c. M-40, s. 4(3) and *Medical Care Regulation*, R.R.N.W.T. 1990, c. M-4, s. 4(2) (Nunavut); *Health Insurance Act*, R.R.O. 1990, *Regulation 552*, s. 29 (Ontario); *The Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29, s. 14(3)(3.1), and *The Saskatchewan Medical Care Insurance Payment Regulations, 1994*, *c. S-29*, Reg 19, ss. 7(4) and. 8 (Saskatchewan); *Medical Care Act*, LRTN-O 1988, c. M-8, s. 4(3) (Northwest Territories); *Newfoundland and Labrador Regulation 69/03*, s. 7(2)(3) (Newfoundland and Labrador); *Regulations Respecting Health Care Insurance Services*, C.O. 1971/275, s. 10(3) (Yukon). [↑](#footnote-ref-136)
137. *Medicare Protection Act*, RSBC 1996, c. 286, s. 29, and note 134 *supra*. [↑](#footnote-ref-137)
138. *Hospital Insurance Regulations made under Section 17 of the Health Services and Insurance Act R.S.N.S. 1989, c. 197*, N.S. Reg. 11/1958, s. 7(4)(5). [↑](#footnote-ref-138)
139. In this regard, the situation here is very different from that which was at issue in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, where the Supreme Court, per Wagner, C.J., excludes the consideration of the budgetary implications of an order pronounced by the Court of Quebec, under the *Youth Protection Act* (CQLR, c. P-34.1), in the examination of the question of whether such order is consistent with the statutory enablement: “There is no rule whereby the legislature is presumed to intend to limit the powers it confers on a statutory tribunal on the basis of the magnitude of the budgetary impact of their exercise” (para. 27), “such a validity criterion ha[ving] no basis in the *YPA*” (para. 94). [↑](#footnote-ref-139)
140. As earlier noted, the issue of the validity of that choice under the *Canada Health Act* was not argued on this appeal. [↑](#footnote-ref-140)