Court File No. COA-23-CV-0838

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

VALERIE JACOB

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

INCOME SECURITY ADVOCACY CENTRE and the CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, INCOME SECURITY ADVOCACY CENTRE

March 1, 2024

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PART I – OVERVIEW

1. Many people with severe disabilities live in deep poverty. For them, every dollar can impact their ability to put food on the table, pay for their health needs, or stay in their home. Working to meet these needs is not always a real option. Workers living with disabilities face intersecting barriers to employment that many struggle to overcome.[1] The result is that some of the most vulnerable among us rely on income security programs as a "last resort" to meet their needs.[2]

2. However, well-intentioned, facially-neutral income security programs can be designed with "non-disabled workers" in mind. These programs can adversely impact disabled workers by devaluing or stigmatizing their work, and excluding them from essential economic relief. The impact of such exclusion on disabled workers' health, their dignity, and their ability to meet their basic needs can be devastating, especially in times of economic and public health crises.

3. In such circumstances, the Income Security Advocacy Centre ("**ISAC**") submits that the Court's scrutiny of these programs under s. 15(1) should be rooted in substantive equality, which accounts for the pre-existing barriers faced by vulnerable communities. Specifically, ISAC makes two submissions:

(a) Substantive equality requires the Court to conduct a contextual assessment of a law's actual impact on a *Charter*-protected group; and,

(b) This Court should apply two principles of substantive equality: (i) the government's design of an income security scheme need not be the sole or predominant cause of a disproportionate impact; and (ii) the Court need not be satisfied that the scheme impacts all members of a *Charter*-protected group in the same way.

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[1] Canadian Human Rights Commission, "Roadblocks on the career path: Challenges faced by persons with disabilities in employment", January 1, 2019, p. 10.

[2] *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240 at para 55.

PART II – THE FACTS

4. ISAC does not take a position on the facts of the appeal.

PART III – SUBMISSIONS

A. Substantive Equality Requires a Full Contextual Assessment

5. Context is key in any *Charter* claim.[3] This is especially so in this case for two reasons.

6. First, s. 15(1) requires an analysis to be rooted in substantive equality. Substantive equality, in turn, requires an analysis that centres on a full contextual assessment of the claimant group.

7. Section 15(1) proceeds along a two-part test. Claimants alleging inequality under the *Charter* must show that the impugned measure (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

8. This two-part test serves to protect substantive equality,[4] s. 15(1)'s "animating norm".[5] As early as *Andrews*, the Supreme Court rejected a formalistic approach to equality, which considered only "the equal application of the law to those to whom it has application",[6] in favour of substantive equality, "the philosophical premise of s. 15 and outlining a theory of equality centred on 'the impact of the law on the individual or the group concerned'."[7] The Supreme Court has since observed, "[a]t the end of the day, there is *only one question*: does the challenged law violate the norm of substantive equality in s. 15(1)?"[8]

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[3] *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 at para 3.
[4] *R v. Sharma*, 2022 SCC 39 at para 38 ["*Sharma*"].
[5] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 42 ["*Fraser*"].
[6] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 168 ["*Andrews*"].
[7] *Fraser*, at para 40.
[8] *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para 2 ["*Withler*"], quoted with Court's emphasis in *Quebec (Attorney General) v. A*, 2013 SCC 5, at para 325 ["*Quebec v. A*"].

9. Context is necessary to answering this question. Indeed, substantive equality is inherently contextual: it is a "methodological principle" that directs courts to analyze s. 15(1) in a way that invokes "the contextualization of equality claims."[9] The focus of the inquiry "is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group."[10]

10. The second reason for why a full contextual review is necessary is the subject matter of this appeal. In this case, this Court must determine whether the income threshold of three COVID-era income security program creates a distinction on the basis of disability, as the first step of the s. 15(1) test requires.[11] However, income security programs are usually facially neutral in how they allocate benefits.[12] The state will rarely, if ever, explicitly impose differential treatment on those living with disabilities.[13] Rather, facially neutral laws, like the one at issue here, can create distinctions in their impact, which the Supreme Court has described as "adverse effects discrimination".

11. This phenomenon occurs where "a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground…Instead of explicitly singling out those who are in the protected groups for differential treatment, the law

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[9] Anthony Robert Sanguiliano, "Substantive Equality As Equal Recognition: A New Theory of Section 15 of the Charter" (2015) 52:2 Osgoode Hall LJ 601 at 607.
[10] *Withler*, at para 39.
[11] *Jacob v. Attorney General of Canada*, 2023 ONSC 2382 at para 21 ["*Jacob*"].
[12] See, e.g., *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para. 41 ["*Granovsky*"].
[13] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 64 ["*Eldridge*"].

indirectly places them at a disadvantage."[14] Adverse effects discrimination is "a more subtle type of discrimination…[and] much more prevalent than the cruder brand of direct discrimination."[15]

12. A law's impact or "adverse effects" cannot be assessed in the abstract. Rather, the analysis is "grounded in the actual situation of the group."[16] Therefore, identifying the "subtle" means of discrimination in income security programs requires "taking full account" of an individual's barriers and lived experiences.[17] In cases involving low-income individuals with disabilities, that contextual analysis should acknowledge that "disabled" is not a monolith and people within this category not only have varied levels of physical and/or mental disabilities.

13. Moreover, people with disabilities face many barriers in securing and maintaining gainful employment, from societal attitudes on disability to a lack of adequate workplace accommodations.[18] Genuine substantive equality understands that these barriers intersect and compound each other to impair a disabled person's ability to find and maintain meaningful employment. A contextual approach would also consider that these intersecting disadvantages were heightened during the pandemic.[19]

14. In other words, understanding whether the impugned law or state action "creates a distinction" begins with understanding the "full context of the claimant group's situation".[20] The

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[14] *Fraser*, at para 30.
[15] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at para 29.
[16] *Withler*, at para 37.
[17] *Withler*, at para 39; *Quebec v. A*, 2013 SCC 5 at para 324.
[18] Canadian Heritage, "Literature Review: Systemic barriers to the full socio-economic participation of persons with disabilities and the benefits realized when such persons are included in the workplace," December 2020, pp. 10-15.
[19] Laura Pin, Leah Levac & Erin Rodenburg, "Legislated Poverty? An Intersectional Policy Analysis of COVID-19 Income Support Programs in Ontario, Canada", (2023) 27:5 Journal of Poverty at p. 405.
[20] *Withler*, at para 43; *Fraser*, at para 57.

Supreme Court has deployed this analysis to detect adverse effects discrimination in facially neutral schemes by peering "behind the façade of similarities":[21]

(a) In *Eldridge*, the Supreme Court recognized that providing formally equal services to all hospital patients prevented those with hearing impairment from obtaining the same quality of services as hearing individuals. Considered in isolation, the hospital provided the same services to everyone. Yet, in context, it was apparent that deaf individuals were not benefitting from the same treatment to the same extent;[22] and,

(b) In *Fraser*, the Supreme Court found that excluding job-sharing hours from pensionable benefits discriminated against women because the vast majority of those engaging in the job-sharing program – and thus the vast majority of those suffering a reduction in their pensionable benefits – were women with young children.[23] It was only when the Court considered the claimant group in context that the program's discriminatory impacts became clear.

15. These cases (and others)[24] involve well-intentioned laws. The impugned scheme did not expressly or intend to discriminate. However, a substantive equality approach requires that this Court's s. 15(1) analysis look beyond the facially neutral income threshold to its actual impact on those living with severe disabilities.

B. The Court Should Consider Two Principles of Substantive Equality

16. In adjudicating this appeal, this Court should consider two essential principles of substantive equality: (i) the government's design of an income security scheme need not be the sole or predominant cause of a disproportionate impact; and (ii) the Court need not be satisfied that the scheme impacts all persons with an enumerated/analogous characteristic in the same way.

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[21] *Withler*, at para 39.
[22] *Eldridge*.
[23] *Fraser*, at para 97.
[24] *Brooks v. Canada Safeway Ltd*, [1989] 1 SCR 1219 ["*Brooks*"]; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3.

17. The application judge's reasoning below demonstrates the importance of these two principles. That said, ISAC takes no position on the disposition of this appeal. Rather, in highlighting these two fundamental precepts, ISAC seeks to underscore that its clients – the most vulnerable among us, who rely on income security programs to survive – will suffer adverse consequences if this Court does not scrutinize the application judge's reasoning according to the well-established principles of substantive equality. Specifically, this Court must assess whether the application judge's reasoning may have *unintended consequences* for those meeting their needs through income support programs.

1. The government's design of an income security scheme need not be the sole or predominant cause of a disproportionate impact

18. ISAC emphasizes, as the Supreme Court recently did, that the first step of the s. 15(1) analysis does not require the claimant to show "the impugned law or state action was the *only* or the *dominant cause* of the disproportionate impact".[25] Rather, a claimant can demonstrate that state action creates a distinction by showing "a link or nexus" between the impugned state action and a disproportionate impact on the *Charter*-protected group.[26] In other words, the first prong of the s. 15(1) test requires only that the claimant show that the law affects the protected group differently than it affects other groups.[27]

19. This malleable standard of causation has always formed part of the s. 15(1) analysis. As McIntyre J. put it in *Andrews*, to realize "the ideal of full equality before and under the law…the main consideration must be the impact of the law on the individual or the group concerned".[28]

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[25] *Sharma*, at para 49(b).
[26] *Sharma*, at para 44.
[27] *Fraser*, at para 53.
[28] *Andrews*, at 165.

Decades later, in *Fraser*, Abella J. wrote "[t]o assess the adverse impact of these policies, courts looked beyond the facially neutral criteria on which they were based, and examined whether they had the effect of placing members of protected groups at a disadvantage".[29]

20. This approach to causation is essential to fulfilling the promise of substantive equality that underpins s. 15(1) because it allows the analysis to account for pre-existing societal issues – like the precarious attachment of those with severe disabilities to the workforce. Thus, this Court must not ask whether the income threshold *caused* a disproportionate impact on the claimant group, but whether it *contributed to* a disproportionate impact,[30] "taking full account of social, political, economic, and historical factors concerning the group."[31]

21. On the first branch of the section 15 test, the application judge found that:

> [T]he applicant was unable to qualify for CERB, CRB or CRSB given the existence of the $5,000.00 earnings threshold. She has been impacted and treated differently. However, the $5,000.00 threshold does not differentiate her from non-disabled workers who are also unable to meet the $5,000.00 earnings threshold. Logically, others not meeting the threshold could have been for any number of reasons, the most obvious ones being very recent entry into the workforce, reentry after a longer period of unemployment or so few hours of work over the previous year that the $5,000.00 threshold was not met.[32]

22. This reasoning does not reflect the flexible standard of causation required by s. 15(1).

23. A focus on "sole" or "predominant" cause disregards the intersectional disadvantages that permeate the lives of those living with a severe disability in deep poverty; there is no single "cause". Thus, to insist that disability be the *sole* or *predominant* reason why a claimant cannot meet the threshold for an income security program imposes an impossible hurdle, which misapprehends the barriers faced by the most vulnerable among us.

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[29] *Fraser*, at para 53.
[30] *Sharma*, at para 45.
[31] *Withler*, at para 39.
[32] *Jacob*, at para 19.

24. Further, a formalistic analysis of "sole" or "predominant" cause will have adverse evidentiary challenges. Asking the poorest among us to show that just *one* of the many barriers in their intertwined web of disadvantage is *the cause* of a law's disproportionate impact is an unduly difficult evidentiary burden.[33] Such an approach risks making the constitutional guarantee of equality illusory for those arguably most in need of its protection.

2. The Court need not be satisfied that the scheme impacts all persons within a *Charter*-Protected Group in the same way

25. Section 15(1) does not require a claimant to show that the state action affects all members of a protected group, or that all members are affected in the same way.[34]

26. In this case, the application judge found that the section 15 test was not met, in part, because "while evidence was tendered about disadvantages which exist in the labour market for disabled workers, the fact remained that those disabled workers who did earn $5,000.00 of income in the year before the shutdown were eligible for one or more of the CERB, CRB and CRSB."[35]

27. This reasoning does not reflect the principle of substantive equality that gives life to s. 15(1), and risks returning "equality before the law" to its formalistic pre-*Charter* constraints. Such reasoning unnecessarily heightens the s. 15(1) threshold, negatively impacting the ability of *Charter*-protected groups to challenge income security programs on constitutional grounds.

28. Requiring that every individual in the affected group be treated identically would "deny the existence of discrimination in any situation where discriminatory practices are less than

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[33] *Sharma*, at para 49; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, at para 26.
[34] *Fraser*, at paras 72-75; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para 76 ["*Martin*"].
[35] *Jacob*, at para 23.

perfectly inclusive."[36] That is not the law. As the Supreme Court wrote in *Martin*, "differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated."[37]

29. This principle has deep jurisprudential roots. In *Brooks*, the Court held that a corporate plan which denied benefits to employees during pregnancy discriminated on the basis of sex. The employer argued that the plan did not deny benefits to "women", but only to "women who are pregnant". The Supreme Court explained that practices amounting to "partial discrimination" are no less discriminatory than those in which all members of a protected group are affected.[38] In doing so, the Court explicitly distanced itself from its pre-*Charter* decision in *Bliss*, where it had found that a similar law did not draw a distinction on the basis of sex, but on the basis of pregnancy. And, within that class, all persons were treated equally.[39]

30. There is significant diversity among those living with disabilities and, accordingly, legislative preconditions to income benefit programs will not affect everyone within that group in the same way.[40] Consequently, requiring claimants to prove that a particular state action affects all members of the group in the same way is problematic in at least two ways.

31. First, requiring proof that all members of a *Charter*-protected are affected identically can perpetuate the very stereotypes that s. 15 was designed to prevent. For example, it is a stereotype that because *some* persons with disabilities are able to work and earn an adequate income, that other persons with disabilities who are unable to do so are exaggerating.[41] This undermines the

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[36] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252 at 1289.
[37] *Martin*, at para 76.
[38] *Brooks*, at p. 1249.
[39] *Brooks*, at pp. 1242-1244.
[40] *Martin*, at para 76.
[41] *Granovsky*, at paras 27-29.

real and diverse lived experiences of persons with disabilities and the barriers they experience in their daily lives, resulting in a thin and impoverished vision of s. 15.[42]

32. Second, such reasoning heightens a claimant's evidentiary threshold. As the Supreme Court recognized, "[w]hen evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented."[43] To require that marginalized groups prove perfectly inclusive discrimination imposes an impossible evidentiary threshold, requiring information and data that they do not have, and cannot reasonably gather or afford to obtain. It may also be the case that only the government has access to data about whether an impugned group is identically affected by a course of state action.[44] To insist on such evidence to show that a policy contributes to a disproportionate impact imposes an unduly difficult evidentiary burden and fails to "give proper effect to the promise of s. 15(1)".[45]

PART IV – CONCLUSION

33. This appeal will have a significant impact on those living with severe disabilities. While ISAC takes no position on the outcome of this appeal, this Court should scrutinize whether the reasoning of the application judge aligns with and promotes substantive equality—the *raison d'etre* of section 15. Otherwise, the Court risks hollowing section 15 jurisprudence and unintentionally creating additional barriers for the most vulnerable among us in seeking the constitutional review of income security programs. For many people living in deep poverty, these programs differentiate between having access to the basic necessitates of life—or not.

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[42] *Fraser*, at para 134, citing *Eldridge*, at para 73.
[43] *Fraser*, at para 57.
[44] *Sharma*, at para 49.
[45] *Sharma*, at para 49.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: March 1, 2024

Mannu Chowdhury

_____

Per: Ewa Krajewska / Mannu Chowdhury /
Anu Bakshi / Érik Arsenault

CERTIFICATE

I, Mannu Chowdhury, counsel for the Intervener, Income Security Advocacy Centre, certify that:

(i) that an order under subrule 61.09 (2) is not required,

(ii) that, in accordance with this Court's Order in the Reasons for Decision (Court File No's. M54745 and M54738), released February 5, 2024, paragraph 13 (5), the oral argument on behalf of the ISAC will take 15 minutes,

(iii) that the factum complies with subrule (3),

(iv) Parts I to V contain 2,574 words inclusive of words used in citations, footnotes, headings or charts, diagrams or other visual aids, and

(v) I am satisfied as to the authenticity of every authority listed in Schedules A and B.

Mannu Chowdhury

_____

Per: Ewa Krajewska / Mannu Chowdhury / Anu Bakshi / Érik Arsenault

SCHEDULE "A" – LIST OF AUTHORITIES

Case Law

1. *Andrews v. Law Society (British Columbia)*, [1989] 1 SCR 143
2. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3
3. *Brooks v. Canada Safeway Ltd*, [1989] 1 SCR 1219
4. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624
5. *Fraser v. Canada (Attorney General)*, 2020 SCC 113
6. *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28
7. *Jacob v. Attorney General of Canada*, 2023 ONSC 2382
8. *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252
9. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504
10. *Quebec (Attorney General) v. A*, 2013 SCC 5
11. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17
12. *R v. Sharma*, 2022 SCC 39
13. *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240
14. *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21
15. *Withler v. Canada (Attorney General)*, 2011 SCC 12

Secondary Sources

1. Canadian Heritage, "Literature Review: Systemic barriers to the full socio-economic participation of persons with disabilities and the benefits realized when such persons are included in the workplace," December 2020

2. Laura Pin, Leah Levac & Erin Rodenburg, "Legislated Poverty? An Intersectional Policy Analysis of COVID-19 Income Support Programs in Ontario, Canada", (2023) 27:5 Journal of Poverty

3. Anthony Robert Sanguiliano, "Substantive Equality As Equal Recognition: A New Theory of Section 15 of the Charter" (2015) 52:2 Osgoode Hall LJ 601

4. Canadian Human Rights Commission, "Roadblocks on the career path: Challenges faced by persons with disabilities in employment", January 1, 2019

SCHEDULE "B" – STATUTES RELIED UPON

The Constitution Act, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Equality before and under law and equal protection and benefit of law

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.

Court File No.COA-23-CV-0838

Valerie Jacob Appellant	-and-	**Attorney General of Canada** Respondents

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
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