Court File No. A-99-26

FEDERAL COURT OF APPEAL

B E T W E E N:

RANDI LOTSBERG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND

September 21, 2026

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OVERVIEW

1. Can a complex benefit scheme be found to discriminate against some of the individuals it is designed to benefit? The answer is obviously yes: courts have repeatedly found this to be so. But how should a Court approach the s. 15(1) analysis in such situations? The analysis is often fraught—not only by the complexity of the scheme at issue, but also by the confusing and at times contradictory jurisprudence.

2. LEAF addresses two significant questions raised in this case about the interpretation of s. 15(1), particularly when that section is applied to complex benefit schemes. First, LEAF submits that where a claimant challenges a limitation within a benefit-conferring measure, the impugned "law or state action" is the exclusion or limitation, not the adoption of the benefit as a whole. This approach is consistent with the jurisprudence, and it ensures that the s. 15(1) analysis focuses on the practical impacts of the limitation on the claimant group. Second, LEAF submits that "legislative context" is shorthand for several contextual elements, none of which are standalone criteria in the analysis. Rather, under the modern s. 15(1) test, legislative context is relevant only insofar as it sheds light on the impacts of the limitation at issue.

PART I – STATEMENT OF FACTS

3. LEAF takes the facts as presented in the record.

PART II – POINTS IN ISSUE

4. As an intervener, LEAF argues the following points of law:

   (a) **When examining a benefits scheme, how should the impugned law or measure be identified?** When the challenge is to a limitation within a benefit-conferring measure, the analysis must focus on the limitation and its practical impacts.

   (b) **What role does "legislative context" play in the analysis?** "Legislative context" is relevant at step two of the s. 15(1) test, but only insofar as it sheds light on the practical impacts of the limitation.

PART III – STATEMENT OF SUBMISSIONS

A. When the s. 15(1) challenge is to a limitation within a benefit-conferring measure, the analysis must focus on the limitation and its practical effects

5. The s. 15(1) test requires assessing whether "the challenged law or state action" (1) creates a distinction based on enumerated or analogous grounds, and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.[1] When the impugned provision delivers benefits but also contains a restriction within it that affects members of a protected group, how are decision-makers to characterize the "challenged law or state action" to which the test is applied? Should they focus on the impact of the benefit-conferring provision as a whole, on only the limit or exclusion at issue, or on something in between?

6. This choice matters. The General Division focused on the limitation (in this case, limiting the hours credit "only to the first claim, even if it was not needed to qualify") and, in applying the first step of the s. 15(1) test, found that this limitation created a disproportionate distinction based on sex.[2] Implicitly, the General Division undertook an analysis of "underinclusiveness": the alleged *Charter* violation can be defined in terms of what the measure "wrongly excludes rather than what it wrongly includes".[3] In contrast, the Appeal Division expressly defined the state action at issue as the benefit-conferring provision as a whole ("adding a one-time hours credit on all first claims after September 2020"; "the one-time credit").[4] By asking different questions, the decision-makers arrived at different answers.

7. The provision of benefits is not immune from s. 15 scrutiny: s. 15(1) declares that every individual has the right to "equal benefit of the law" without discrimination.[5]

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[1] *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7 at para. 48 [*Kanyinda*].
[2] See e.g. *R.L. v. Canada Employment Insurance Commission*, 2023 SST 2056 at para. 96, 102 [General Division].
[3] *Kanyinda* at para. 109, in the context of remedies for underinclusive benefits, citing *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 113, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 698 (emphasis in original).
[4] *Canada Employment Insurance Commission v. R.L.*, 2026 SST 76 at paras. 87, 97–98 [Appeal Division].
[5] *Canadian Charter of Rights and Freedoms,* s. 15 (emphasis added).

As this Court recently reaffirmed in *Chalifour-Racine v. Canada* ("***Chalifour-Racine***"), the state "may not distribute statutory benefits in a discriminatory manner."[6] Similarly, as Rowe J. explained in his concurring reasons in *Kanyinda*, when states choose to provide benefits, s. 15(1) imposes an obligation to "remedy discriminatory underinclusion".[7] Since s. 15(1) includes protection against discrimination through the underinclusive distribution of benefits, the analysis of such a claim must be focused on the impact of the exclusion: who is excluded from accessing the benefit, how the exclusion arises and what impact it has on the claimant group relative to others.

8. Another way to consider the proper focus is by looking to the wording of the s. 15(1) test: at step two, the operative question is whether the measure "imposes a burden or denies a benefit" in a way that reinforces disadvantage.[8] In the context of a benefit-conferring measure, the claim is generally not that a burden is being imposed, but that the benefit is being <u>fully</u> or <u>partially</u> denied to members of a claimant group. It makes sense, then, that the focus of the inquiry is on the part of the measure that is alleged to <u>limit or deny</u> the benefit.

9. Focusing on the limitation is especially necessary in complex schemes, because a benefit might benefit <u>some</u> members of a group, while reinforcing the disadvantage of <u>other</u> members of that same group. For example, in *Eldridge v. British Columbia (Attorney General)* ("***Eldridge***"), British Columbia's Medical Services Plan benefitted both non-disabled persons and many disabled persons, as they did not have to pay for their doctor's services.[9] However, Deaf persons could not benefit to the same extent without paying for interpretation services. The Supreme Court focused the inquiry on

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[6] *Chalifour-Racine v. Canada*, 2026 FCA 145 at para. 136 [*Chalifour-Racine*].
[7] *Kanyinda* at para. 124, per Rowe J. (concurring); *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para. 41.
[8] *R. v. Sharma*, 2022 SCC 39 at para. 28 [*Sharma*].
[9] [1997] 3 S.C.R. 624 [*Eldridge*].

the denial of medical interpretation services for the Deaf.[10] In *Quebec v. Kanyinda* ("***Kanyinda***"), the provision of subsidized childcare services most likely benefitted more women than men, given the "unequal distribution of childcare responsibilities between women and men".[11] But the challenge was to the exclusion of refugees from the benefit, and the Court focused the inquiry on whether that limitation disproportionately impacted a subset of women who were refugee claimants.[12]

10. In this appeal, the Appeal Division's difficulty reconciling "the fact that women benefitted more from the credit applying to the first claim with [the General Division's] finding that this design also disadvantaged women" makes sense in light of its focus on the benefit-conferring scheme as a whole.[13] However, it illustrates how, when the s. 15(1) analysis is not focused squarely on the limitation, the benefits obtained by some members can obscure the practical impact of limits imposed on the claimant group.

11. Such obscuring impedes a decision-maker's ability to properly apply the s. 15(1) test. Substantive equality demands that a decision-maker examine not the law in the abstract, but its real-world impact on disadvantaged groups.[14] As such, a decision-maker faced with a s. 15(1) claim "must examine the practical operation of the legislative scheme"[15] while "taking full account of social, political, economic and historical factors concerning the group".[16] To see and be able to grapple with what Gleason J.A. calls the "practical operation" of the impugned provisions, a decision-maker must centre the <u>limitation</u> in the s. 15(1) analysis, focused on the actual operation of that limitation on the claimant and the group at issue. Indeed, as will be shown below, the Supreme Court has repeatedly emphasized that discrimination must be assessed by reference to actual impact of the impugned law on the claimant group.

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[10] *Eldridge* at paras. 60–61, 68–69, 71.
[11] *Kanyinda* at para. 53.
[12] *Kanyinda* at paras. 8–11, 71–74.
[13] Appeal Division at para. 84.
[14] *Kanyinda* at para. 36; *Chalifour-Racine* at para. 112.
[15] *Chalifour-Racine* at para. 122.
[16] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 39.

12. Governments can and do legislate to alleviate inequality. The history of employment insurance in Canada, including the development and expansion of benefits to support caregiving, is a case in point.[17] Quebec's public funding for daycare was likewise based in the state's efforts to improve the equality of women.[18] In the same vein, the job-sharing program whose pension benefits were found to be discriminatory in *Fraser v. Canada (Attorney General)* was originally established to better accommodate RCMP members with childcare obligations.[19] Yet as *Chalifour-Racine*, *Kanyinda*, and *Fraser* illustrate, even legislation that seeks to advance equality through the provision of social benefits may, in its application to certain protected groups, discriminate. Even pay equity legislation, which has closing the gender wage gap as its clear purpose, has been found to discriminate through provisions that entrenched and perpetuated women's pre-existing disadvantage.[20] For this reason, the s. 15(1) analysis must be squarely focused on the limitation or exclusion as experienced by the claimant group. Such an analytical approach is necessary to ensure that, in taking ameliorative action, the government does not become the source of further inequality.

13. A methodology that looks squarely at the limitation or exclusion at issue also guards against arguments about who is to blame for the alleged disadvantage. This was precisely the issue that divided the majority from the dissent in *Quebec (Attorney General) v. Alliance du personnel professionel et technique de la santé et des services sociaux* ("***Alliance***"). The majority characterized the dissent as finding no breach of s. 15 because the Quebec legislature did not cause pay discrimination against women. The majority held that, while the Quebec legislature did not cause pay discrimination against women, this was irrelevant: "when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused

[17] *Chalifour-Racine* at paras. 137–44.
[18] *Kanyinda* at paras. 2–3.
[19] 2020 SCC 28 at paras. 8–10, 91 [*Fraser*].
[20] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at paras. 38–40 [*Alliance*].

their disadvantage, the legislation is subject to review for s. 15 compliance”.[21]

14. The benefit as a whole does not disappear from view: the elements of the scheme are part of the legislative context within which the challenged limitation is considered. Nor does focusing on the limitation presuppose that the claimant will succeed at either step of the s. 15(1) test. Rather, the integrity of the s. 15 analysis requires that, when faced with a challenge to a benefit-conferring scheme, a decision-maker must identify and apply the s. 15(1) test to the limitation at issue, recognizing that limits on access to a remedial program may themselves be discriminatory.

B. “Legislative context” is relevant at step two of the test, but only insofar as it sheds light on the practical impact of the measure

15. Uncertainty persists over how, and how much, legislative context can be considered under s. 15(1)—in this appeal and in the law generally. Legislative context was central to the Appeal Division’s conclusion that the General Division erred in law.[22] The applicant notes that while the legislative context is a “relevant consideration”, attention to context does not mean that a scheme’s “ameliorative purpose or features cancel out any discriminatory impact”, nor does it permit “weighing whether a distinction is justified” prior to the s. 1 stage.[23] The respondent, by contrast, emphasizes that consideration of legislative context is a “requirement at step two” and places significant weight on these considerations.[24] This case presents an important opportunity to clarify the role of “legislative context” in the s. 15(1) analysis.

16. This Court’s comments on this issue in *Chalifour-Racine* are instructive:

> While legislative context is relevant at the second stage of the section 15 analysis, it cannot obscure the discriminatory effect of the provisions under challenge. As the Supreme Court emphasized in *Kanyinda*, legislative context may assist in understanding the operation of the scheme, but it cannot become a surrogate for the justification analysis

[21] *Alliance* at para. 41 (emphasis added).
[22] Appeal Division at para. 118.
[23] Applicant’s Memorandum of Fact and Law at para. 34 [A.M.].
[24] Respondent’s Memorandum of Fact and Law at paras. 44, 56 [R.M.].

> required under section 1; nor does the existence of ameliorative features elsewhere in a statutory scheme immunize another provision within that scheme from constitutional scrutiny. [Citations omitted.][25]

17. Legislative context is not a freestanding inquiry, nor is it a way to introduce justification arguments. The term "legislative context" is merely a shorthand way of describing several elements that may help to understand a legislative scheme—notably, the surrounding provisions which interact with the impugned measure ("**statutory context"**); the way in which the scheme has evolved over time ("**historical legislative context**"); what Parliament sought to achieve ("**legislative purpose**"); and policy questions concerning the allocation of limited resources, the many interests considered and the mindfulness of the lines drawn ("**allocation between competing priorities**").[26]

18. These elements are not criteria in and of themselves. They are useful only insofar as they shed light on whether the legal test is satisfied. As the Supreme Court noted in *R. v. Sharma* ("***Sharma***"), discussing substantive equality, "a court's focus must ultimately be directed to *the test*, as stated by the jurisprudence."[27]

19. The s. 15(1) test has undergone a series of transformations, and the role played by legislative context has changed in tandem. The approach to legislative context in the jurisprudence must therefore be understood in light of the legal questions required by the s. 15 test at the relevant time. As explained below, some ways in which legislative context was employed in the past are now properly reserved for the justification stage after a s. 15 infringement has been made out, namely at s. 1.

1. 1989–1995: Andrews serves as a foundation for s. 15(1) jurisprudence

20. The lodestar for understanding s. 15(1) remains the Supreme Court's first s. 15(1) decision in *Andrews v. Law Society of British Columbia* ("***Andrews***"). In articulating the general approach to s. 15(1), McIntyre J. recognized that not all

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[25] *Chalifour-Racine* at para. 135.
[26] See e.g. *Chalifour-Racine*'s use of statutory context (paras. 29–44), historical legislative context (paras. 9–28, 137–44) and legislative purpose (para. 96, citing *Kanyinda* at para. 68; para. 134–35, 143; paras. 145ff at s. 1 stage).
[27] *Sharma* at para. 38 (majority reasons) (emphasis in original).

distinctions were discriminatory. At the same time, he rejected an approach that would evaluate the "reasonableness" or "fairness" of the distinction drawn by the legislation, underscoring that "any justification, any consideration of the reasonableness of the enactment… would take place under s. 1."[28]

21. From the Supreme Court's earliest jurisprudence, it was thus clear that a government could not defend a s. 15(1) claim on the basis that its approach was reasonable or that the way it drew lines was fair. Recourse to "legislative context" is not a magic formula to justify a discriminatory measure.

2. 1995–2008: Specific tests focused on "functional values" and "human dignity" have been overtaken by subsequent jurisprudence

22. While *Andrews* set out the approach to s. 15(1), it did not settle on a precise test. In a 1995 trilogy,[29] the Court splintered into several approaches, none of which secured a majority. The test advanced by Lamer C.J. and others accorded far more weight to the legislature's purpose and choices than the test advanced by McLachlin J. (as she then was) and others.

23. Under Lamer C.J.'s approach, adverse treatment was discriminatory only if the disadvantage was attributable to a protected characteristic that was irrelevant to the "functional values underlying the law" (unless the underlying values themselves were discriminatory).[30] For example, in *Egan v. Canada*, the Court considered an old age security provision that denied the spousal allowance to same-sex couples. While acknowledging that the measure made a distinction based on sexual orientation, Lamer C.J. viewed this distinction as relevant to the functional values of the legislation, because they served Parliament's objective of "differentiat[ing] the couples described in the statute from all couples that do not serve the social purposes for which the legislature has made the distinction".[31] McLachlin J. recognized that this logic is

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[28] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 181–82.
[29] *Miron v. Trudel*, [1995] 2 S.C.R. 418 [*Miron*]; *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*]; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.
[30] *Miron* at para. 17.
[31] *Egan* at para. 27.

circular: rather, "[t]he only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group".[32] This vision of s. 15(1) is far closer to the current articulation of the s. 15(1) test.

24. The Court made an attempt at consensus in *Law v. Canada (Minister of Employment and Immigration)* ("***Law***").[33] Under the *Law* test, assessing whether a distinction was discriminatory hinged on whether the impugned measure impaired "human dignity", examined from the perspective of a "reasonable person" in similar circumstances.[34] *Law* provided a non-exhaustive list of factors that heavily weighted legislative context, including the correspondence between the legislature's differential treatment and the claimant group's reality and the law's "ameliorative purpose or effect".[35] The Court added in *Gosselin v. Québec (Attorney General)* that "where the legislature is responding to certain concerns, and where those concerns appear to be well founded, it is legitimate to consider the legislature's purpose as part of the overall contextual evaluation of a challenged distinction from the claimant's perspective".[36]

25. The outsized role given to legislative context in the *Law* era was criticized as permitting the measure's reasonableness to overwhelm the analysis (an approach rejected in *Andrews*).[37] Cases from the *Law* era should be read with great caution. For example, in *Sollbach v. Canada* ("***Sollbach***"), McDonald J.A. focused heavily on the legislative context to colour what a "reasonable person would appreciate" about the scheme.[38] As this Court correctly noted in *Chalifour-Racine*, *Sollbach* "represent[s]

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[32] *Miron* at para. 134 (emphasis added).
[33] [1999] 1 S.C.R. 497 [*Law*].
[34] *Law* at para. 61.
[35] *Law* at paras. 69–73.
[36] [2002] 4 S.C.R. 429 at para. 27.
[37] Peter W. Hogg et al., *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, Release 2026-1) at §55:19.
[38] *Sollbach v. Canada*, 1999 CanLII 9146 (FCTAD) at para. 14.

the type of formalistic analysis that has been eschewed by the Supreme Court of Canada".[39]

26. Similarly, in *Canada v. Lesiuk* ("***Lesiuk***"), this Court considered requirements regarding the minimum hours a claimant must work to access maternity and regular Employment Insurance ("**EI**") benefits. In finding that the minimum did not harm human dignity,[40] the Court relied on *Law* considerations such as the measure's ameliorative purpose and the attitude promoted by the measure. As well-explained in *Chalifour-Racine*, "this Court followed the framework for analysis in *Law*", but subsequent case law has now done away with *Law*'s focus on the view or attitude promoted by the law, in favour of focusing on its impact.[41] Thus, cases like *Lesiuk* have more limited precedential value today.

3. The Kapp Test (2008–2018): Legislative context is relevant to discriminatory attitude and discriminatory impact

27. For a unanimous court in *Kapp*, McLachlin C.J. and Abella J. removed *Law*'s "human dignity" concept as a focal point and reformulated the s. 15(1) test into two steps: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[42] While the Court did not fully do away with the *Law* factors, it constrained the role that legislative purpose plays. First, the Court noted that consideration of the law's "ameliorative purpose or effect" was primarily relevant to s. 15(2), not s. 15(1).[43] Second, the Court noted that the degree of correspondence between the differential treatment and the claimant group's reality "deals with

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[39] *Chalifour-Racine* at para. 105.
[40] *Canada (Attorney General) v. Lesiuk (C.A.)*, 2003 FCA 3 at para. 40.
[41] *Chalifour-Racine* at para. 106.
[42] *R. v. Kapp*, 2008 SCC 41 at para. 17 [*Kapp*].
[43] *Kapp* at para. 23. However, it did not fully close the door to considering this element of legislative context under s. 15(1).

stereotyping"[44], thereby tying this factor to a specific part of the s. 15(1) test—one from which the Supreme Court has since moved away.[45]

28. However, by maintaining the *Law* factors and the emphasis on discriminatory attitudes, the test cobbled together conflicting guidance from different jurisprudential eras. Its application was unpredictable—sometimes heavily relying on *Law*, sometimes not mentioning the considerations at all.[46] Like jurisprudence from the preceding period, jurisprudence from this period should also be read carefully, particularly where it relies on *Law*-era considerations.[47]

4. The Current Test (2018–Present): Legislative context is relevant only insofar as it sheds light on the practical impact of the measure

29. Since *Alliance*, *Centrale des syndicats du Québec v. Quebec* ("***Centrale***") and *Fraser*, the s. 15(1) framework has settled on the following: the claimant must show that the measure (1) "on its face or in its impact, creates a distinction based on listed or analogous grounds"; and (2) "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage".[48]

30. The Supreme Court's recent decisions—*R v. C.P.*, *Sharma* and *Kanyinda*—directly address the role that legislative context plays. *Sharma* and *Kanyinda* make clear that legislative context should be considered at the second step, not the first step.[49] Legislative context serves to illuminate the practical *impact* of the measure.

31. The role of **statutory context** is the easiest to articulate. As a matter of basic statutory construction, a provision often operates in conjunction with others. Indeed, in the present case, it is impossible to describe what benefit s. 153.17 offers or denies without referencing other provisions. In *Sharma,* the majority harkened back to *Vriend*

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[44] *Kapp* at para. 23.
[45] See e.g. *Kanyinda* at para. 67.
[46] See e.g. no mention of *Law* in *Ermineskin Indian Band v. Canada*, 2009 SCC 9.
[47] See e.g. *Chalifour-Racine* at para. 107.
[48] *Kanyinda* at para. 48; *Sharma* at para. 28; *Fraser* at para. 27.
[49] *Sharma* at para. 56; *Kanyinda* at para. 65.

v. Alberta's guidance that the "[t]he comprehensive nature of the Act" is taken into account when "considering the effect of excluding one ground from its protection".[50]

32. This approach to statutory context is anchored in practical impact and is therefore distinct from prior approaches. Lack of access to one benefit might be offset by benefits more tailored to the claimant group elsewhere in the scheme, such that the actual impact does not place members at a disadvantage. Rowe J. explained this point in his concurring reasons in *Kanyinda*: "[l]ack of access to a benefit may be part of a broader scheme that reflects a tailored response to the distinct circumstances of the group, not a denial of equal treatment".[51] Thus, in *R v. C.P.*, Wagner C.J. (for a plurality of four) recognized that a leave requirement within the *Youth Criminal Justice Act*[52] was intrinsically connected to a series of measures that had the combined effect of addressing young persons' distinct needs.[53]

33. The mere fact that a scheme is complex and multifaceted does not relax the level of scrutiny in the s. 15(1) test, as it might have in the *Law* era. Legislative context is not a "shibboleth for deference"; the point of analyzing the statutory scheme under the modern s. 15(1) approach is "to understand how a legislative provision's legal effects are transformed and conditioned by other legislative provisions", as a "matter of legal fact rather than normative value".[54] By understanding the practical operation of the scheme, courts can address whether it reinforces disadvantage.

34. The fact that the measure, in its statutory context, allows some members of the protected group to take full advantage of a benefit does not preclude a finding that it exacerbates a disadvantage for other members of that group. For example, in *Kanyinda*, many women could take advantage of subsidized daycare. However, women refugee claimants could not. Rowe J. and Karakatsanis J. agreed that "s. 3 of the [impugned

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[50] *Sharma* at para. 57, citing *Vriend v. Alberta* at para. 96 (emphasis added).
[51] *Kanyinda* at para. 142.
[52] S.C. 2002, c. 1.
[53] *R. v. C.P.*, 2021 SCC 19 at paras. 147ff. [*C.P.*].
[54] Mark Mancini, "Legislative Context in Sentencing: A Closer Look at *R v Sharma*" (2024) 33:1 Constitutional Forum 19 at 31.

regulation] … exclude[d] the category of women refugee claimants in a discriminatory fashion" and reinforced their inequality relative to men.[55]

35. In *Chalifour-Racine,* this Court focused on the "practical operation" of the legislative scheme, which reflects the modern approach to statutory context within the s. 15(1) inquiry. Gleason J.A. considered how the impugned measures operated in their statutory context to find that the "combined effect of subsections 8(2), 8(5), 10(2), 10(10), 12(6) and paragraph 10(8)(a) of the *EI Act* is to deny some or all regular EI benefits to individuals who received maternity and/or parental benefits" until they returned to work and banked sufficient hours to establish a new qualifying period.[56]

36. The role of **legislative history** is also relatively straightforward. In this case, it would be difficult to understand s. 153.17's effects without placing it in the chronology of government responses to a pandemic. Similarly, in *Chalifour-Racine*, the legislative history of maternity benefits under the *EI Act* helped the Court understand the practical impact of the impugned provisions, since the expanded support for pregnancy and childbirth had the perverse effect of, "at the same time, operat[ing] to diminish the income protection otherwise available under the employment insurance scheme."[57]

37. The role of **legislative purpose** or competing legislative objectives has been significantly reduced by the removal of the *Law*-era factors from the analysis. In *Alliance* and *Centrale,* the Court made clear that an ameliorative purpose was <u>not</u> an exit-ramp from the s. 15(1) analysis. Abella J. recognized that a law's ameliorative purpose is no answer to a claim that the law, in its impact, exacerbates the disadvantage faced by a group it was intended to benefit. Similarly, Côté, Brown and Rowe JJ. recognized that "even though a law genuinely has the amelioration of a group's conditions as its object, its *effect* might be to widen the prejudicial and discriminatory

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[55] *Kanyinda* at paras. 91, 143–44.
[56] *Chalifour-Racine* at para. 44.
[57] *Chalifour-Racine* at para. 144.

gap in relation to the rest of society”.[58] An ameliorative purpose simply does not answer the question posed by the s. 15(1) test, which is focused on a law’s effects.

38. In Wagner C.J.’s reasons in *R v. C.P.* (to which Brown and Rowe JJ. subscribed), he rejected justifying disadvantage “on the basis that it is relevant to a legitimate state objective or on the basis of the ameliorative effect of the [scheme] as a whole — such concerns are properly left to the inquiry under s. 1”; rather, the scheme’s objects and policy choices are relevant insofar as they illuminate the “*actual* impact of the law on [members of the claimant group]”.[59] In *Sharma*, Brown and Rowe JJ. endorsed this approach, and this is the context in which they cited the scheme’s objects and particular policy goals as relevant considerations.[60] As Karakatsanis J. explained in *Kanyinda*, consideration of legislative context in the s. 15(1) test must be focused on the “discriminatory *impact* of a measure on a disadvantaged group”, not whether the distinction is “*justified* based on legislative objectives”.[61]

39. Finally, the **allocation of resources between competing legislative priorities** was the subject of significant disagreement in the decisions below.[62] Rowe J.’s concurrence in *Kanyinda* helps to dispel any confusion engendered by the reference to this concept in cases like *Sharma* and *Weatherley v. Canada (Attorney General)*.[63] Courts recognize that public resources are “always limited”, and thus s. 15 does not impose a “free-standing obligation” to fully remedy social inequality—but the way to avoid this concern is “apply the two-step s. 15 test carefully and methodically”.[64] The throughline in both *Sharma* and *Kanyinda* is that courts must squarely focus on the test.

40. The cost of extending an underinclusive benefit is addressed under s. 1. As far back as *Eldridge*, the Supreme Court recognized that “if there are policy reasons in favour of limiting the government's responsibility… those policies are more

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[58] *Alliance* at para. 76 (emphasis in original).
[59] *C.P.* at paras. 153, 145 (emphasis in original).
[60] *Sharma* at paras. 58–59.
[61] *Kanyinda* at para. 65.
[62] Appeal Division at paras. 107–17, 119, 134–36; General Division at paras. 54, 123.
[63] 2021 FCA 158 at paras. 23, 27, 79; *Sharma* at para. 59.
[64] *Kanyinda* at paras. 133–34

appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*."[65] Thus, in *Kanyinda*, Rowe J.'s s. 1 analysis took seriously the objective to "fairly allocate limited public resources", but he nevertheless concluded that the deleterious effects of the restriction outweighed the salutary effects.[66]

41. In *Chalifour-Racine*, this Court made similar remarks at the s. 1 stage concerning the financial consequences of extending a benefit:

> Employment insurance is a complex contributory insurance program
>
> funded through employee and employer premiums. Questions concerning the financial consequences of expanding eligibility or extending entitlement are inherently empirical… It is precisely the sort of question that requires evidentiary support.[67]

42. Thus, the "allocation of resources" is not a free-floating criterion to save measures that exacerbate disadvantage.

C. Conclusion

43. Section 15(1) reflects values which are "essential to a free and democratic society".[68] The modern s. 15(1) test gives these values practical effect by focusing on a measure's impact. Where the challenge is to a limitation within a benefit-conferring measure, the question is whether the challenged limitation disproportionately impacts a protected group or subset thereof, and, if so, whether it exacerbates their disadvantage. Legislative context can assist with understanding the practical impact of the limitation. However, recourse to "legislative context" is not a magic formula to shield complex schemes from scrutiny or to introduce considerations reserved for s. 1.

PART IV – STATEMENT OF THE ORDER SOUGHT

44. LEAF takes no position on the outcome of this application.

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[65] *Eldridge* at para. 77.
[66] *Kanyinda* at paras. 187–88, 199–202.
[67] *Chalifour-Racine* at para. 161.
[68] *Kanyinda* at para. 32.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on September 21, 2026

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Logan Stack

Solicitors for the Intervener,
Women's Legal Education and Action Fund

PART V - LIST OF AUTHORITIES

Tab	Description
Appendix A. Statutes and Regulations	
1.	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11
Appendix B. Case Law	
2.	*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
3.	*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78
4.	*Canada Employment Insurance Commission v. R.L.*, 2026 SST 76
5.	*Canada (Attorney General) v. Lesiuk (C.A.)*, 2003 FCA 3
6.	*Chalifour-Racine v. Canada (Attorney General)*, 2026 FCA 145
7.	*Egan v. Canada*, [1995] 2 S.C.R. 513
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9.	*Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9
10.	*Fraser v. Canada (Attorney General)*, 2020 SCC 28
11.	*Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429
12.	*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
13.	*Miron v. Trudel*, [1995] 2 S.C.R. 418
14.	*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17
15.	*Ontario (Attorney General) v. G*, 2020 SCC 38
16.	*Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7
17.	*R. v. C.P.*, 2021 SCC 19
18.	*R. v. Kapp*, 2008 SCC 41
19.	*R. v. Sharma*, 2022 SCC 39
20.	*R.L. v. Canada Employment Insurance Commission*, 2023 SST 2056
21.	*Schachter v. Canada*, [1992] 2 S.C.R. 679

22.	*Sollbach v. Canada*, 1999 CanLII 9146 (FCTAD)
23.	*Thibaudeau v. Canada*, [1995] 2 S.C.R. 627
24.	*Vriend v. Alberta*, [1998] 1 S.C.R. 493
25.	*Weatherley v. Canada (Attorney General)*, 2021 FCA 158
26.	*Withler v. Canada (Attorney General)*, 2011 SCC 12
Appendix C. Secondary Sources	
27.	Mark Mancini, "*Legislative Context in Sentencing: A Closer Look at R v Sharma*" (2024) 33:1 Constitutional Forum 19
28.	Peter W. Hogg et al., *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, Release 2026-1)