

FEDERAL COURT OF APPEAL

B E T W E E N :

NING JING ZHANG

Appellant

and

HIS MAJESTY THE KING

Respondent

and

JUSTICE FOR CHILDREN AND YOUTH

Intervener

**MEMORANDUM OF FACT AND LAW OF THE INTERVENER,
JUSTICE FOR CHILDREN AND YOUTH**

January 24, 2025

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PART I – OVERVIEW

1. Children of refugee claimants in Canada are a fundamentally disadvantaged group who live in conditions of deep poverty and deprivation.¹ These predominantly racialized children face intersecting barriers rooted in poverty, racial discrimination, and their families’ precarious immigration status.² For these children, even modest financial support can significantly impact their ability to meet basic needs and improve developmental outcomes. Direct cash transfer benefits like the Canada Child Benefit (the “CCB”) can measurably alleviate child poverty.³ However, section 122.6 of the *Income Tax Act* (the “Impugned Provision”) bars this group from accessing the security, stability, and opportunities afforded by these monthly payments solely due to their parents’ status as refugee claimants.⁴

2. In this factum, Justice for Children and Youth (“JFCY”) will assist this Honourable Court by providing a child rights perspective on the application of the two-part section 15(1) test to determine whether the Impugned Provision infringes the rights of refugee claimants’ children. Substantive equality requires the Court to conduct a contextual assessment of the law’s actual impact on this group, taking into account Canada’s international law obligations, the best interests of the child principal, and the inherent vulnerabilities and intersecting disadvantages faced by these children.

PART II – SUBMISSIONS

A. Children are Individual Rights Holders with Distinct *Charter* rights

3. As the Trial Judge did not make a ruling on the *Charter* rights of refugee claimants’ children, it is important to first underscore the robust recognition and protection of children’s rights in Canadian and international law. Unlike the paternalistic approach of the past, children are now widely recognized as rights-bearing individuals entitled to not only legal rights but enhanced protections to accommodate their inherent vulnerability.⁵ The Supreme Court recently affirmed that “today, children are viewed as individuals who, as full rights bearers and members of a group

¹ The Judgment and Reasons of the Honourable Justice Boccock of the Tax Court of Canada, 2024 TCC 19 (February 15, 2024) (“Reasons for Judgment”) at paras 100(b), 206-207: Public Appeal Book (“PAB”) Vol. 1, Tab 3, pp 49, 78-79.

² Reasons for Judgment, *supra* note 1 at para 216: PAB Vol. 1, Tab 3, pp 80-81.

³ Reasons for Judgment, *supra* note 1 at paras 83, 100(h), 208: PAB Vol. 1, Tab 3, pp 44, 49, 79.

⁴ Reasons for Judgment, *supra* note 1 at para 206: PAB Vol. 1, Tab 3, p 78.

⁵ *R v CP*, [2021 SCC 19](#) at [paras 68, 99](#) [CP]; *R v Pike*, [2024 ONCA 608](#) at [para 154](#).

made vulnerable by dependency, age, and need, merit society’s full protection.”⁶ This principle is also reflected in international law instruments concerning the rights of children.⁷

4. The *Charter* rights of refugee claimants’ children, therefore, cannot be conflated with or subsumed under those of their parents. Substantive equality requires attention to the “full context” of the affected group’s situation and the actual impact of the law on that situation, taking full account of social, economic, and historical factors concerning the group.⁸ Exclusion from the CCB affects refugee claimants and their children differently, given the heightened vulnerabilities of the latter. Therefore, a determination that the Impugned Provision does not discriminate against adult refugee claimants does not necessarily mean that their children’s s. 15(1) rights are likewise unaffected.

B. Canada’s International Law Obligations Must Inform *Charter* Interpretation

5. The Supreme Court recently reaffirmed the long-standing principle of *Charter* interpretation that the *Charter* is presumed to provide at least as much protection as found in international human rights instruments ratified by Canada.⁹ This presumption establishes a baseline or “floor” for *Charter* protections based on binding international human rights instruments and goes beyond the presumption of conformity applied to ordinary statutory interpretation.¹⁰ By ratifying these instruments, Canada commits to ensuring that the fundamental rights enshrined in international law are protected within its borders and inform the breadth and scope of *Charter* rights.¹¹

6. Thus, Canada’s international law obligations under the *United Nations Convention on the Rights of the Child* (the “*UNCRC*”), ratified in 1991, must inform judicial consideration of *Charter* rights. Since its ratification, Parliament and provincial legislatures have incorporated the *UNCRC*

⁶ *Michel v Graydon*, 2020 SCC 24 at para 77, per Wagner CJ and Martin J (concurring) [*Michel*].

⁷ *United Nations Convention on the Rights of the Child*, Can TS 1992 No 3 at Article 12 [*UNCRC*]; Committee on the Rights of the Child, *General Comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), adopted 14 January – 1 February 2013, UN Doc CRC/C/GC/14 at paras 12, 15-16 [GC No. 14].

⁸ *Fraser v Canada*, 2020 SCC 28 at para 42 [*Fraser*]; *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 39, 43 [*Withler*].

⁹ *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 31 [9147-0732 *Québec inc*]; *R v McGregor*, 2023 SCC 4 at para 68, per Karakatsanis and Martin JJ (concurring) [*McGregor*] – both cases cite Dickson C.J.’s dissenting opinion in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at p 349.

¹⁰ *McGregor*, *supra* note 9.

¹¹ 9147-0732 *Québec inc*, *supra* note 9 at paras 32-34.

into key domestic legislation by reference.¹² The *UNCRC* is the most universally accepted human rights instrument in history.¹³ Its widespread adoption – both domestically and internationally – reflects the recognition that children are uniquely vulnerable and require special protections.¹⁴

7. The Supreme Court has consistently recognized the *UNCRC* as an important interpretative tool for evaluating the *Charter* compliance of legislation affecting children.¹⁵ The *UNCRC*, along with the general comments adopted thereunder,¹⁶ inform the contextual approach to interpreting domestic law, including the *Charter*, with a focus on the best interests of the child (“BIOC”).¹⁷ These international human rights law instruments require BIOC to be a primary consideration in all legislative and judicial actions concerning children.¹⁸ Additionally, the principle of non-discrimination obliges governments to ensure that all children have equal access to rights, regardless of their or their parent’s race, national origin, or other status.¹⁹

8. Accordingly, when a state government implements financial support programs to assist families with the cost of raising children,²⁰ these programs must be applied equitably to ensure that all children within its borders have equal access, regardless of their parents’ status. This baseline protection established in international law must guide the Court’s interpretation of whether excluding refugee claimants’ children from accessing the CCB is discriminatory.

9. Further, the *UNCRC* and its General Comment No. 5 recommend that governments adopt measures to promote optimal child development, ensuring children have equal opportunities to

¹² *Youth Criminal Justice Act*, [SC 2002, c 1](#) at Preamble [“YCJA”]; *Immigration and Refugee Protection Act*, [SC 2001, c 27](#) at [s 3\(3\)\(f\)](#) [“IRPA”]; *An Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#) at Preamble.

¹³ *R v Sharpe*, [2001 SCC 2](#) at [para 177](#), per L’Heureux-Dubé, Gonthier and Bastarache JJ (concurring) [Sharpe].

¹⁴ Sharpe, *ibid*.

¹⁵ *R v DB*, [2008 SCC 25](#) at [paras 4, 60](#) [DB]; *CP*, *supra* note 5 at [para 148](#); *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004 SCC 4](#) at [paras 31-32](#) [JFCY].

¹⁶ For examples of Canadian courts citing General Comments under the *UNCRC*, see: *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](#) at [paras 62-63](#); *JESD v YEP*, [2018 BCCA 286](#) at [paras 38-44](#); *Lewis v Canada (Public Safety and Emergency Preparedness)*, [2017 FCA 130](#) at [para 78](#); *Justice for Children and Youth v JG*, [2020 ONSC 4716](#) at [para 62](#).

¹⁷ Michel, *supra* note 6 at [para 103](#), citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999 SCC 699](#) at [paras 69-71](#) [Baker]; see also: *Ontario (Children’s Lawyer) v Ontario (Information and Privacy Commissioner)*, [2018 ONCA 559](#) at [para 51](#).

¹⁸ *UNCRC*, *supra* note 7 at [Article 3\(1\)](#); GC No. 14, *supra* note 7 at [para 14](#).

¹⁹ *UNCRC*, *supra* note 7 at [Article 2](#).

²⁰ Parliament created the CCB to help eligible families with the cost of raising children: Reasons for Judgment, *supra* note 1 at [para 1](#): PAB Vol. 1, Tab 3, p 25.

grow up in conditions conducive to their physical, mental, and social well-being.²¹ These include implementing material support programs to assist parents in fulfilling their child-rearing responsibilities and maintaining standards of living that support child development.²²

C. The Best Interests of the Child Principle Must be a Primary Consideration in Assessing Children’s Section 15(1) Rights

10. The Supreme Court has long recognized the best interests of the child as an established legal principle in both international and domestic law.²³ It encompasses a three-fold concept, functioning as a substantive right, an interpretative principle, and a rule of procedure.²⁴

11. As a substantive right, BIOC ensures that a child’s best interests are assessed as a primary consideration in decisions affecting them.²⁵ This principle underpins all rights in the *UNCRC*, is aimed at the child’s holistic development, and requires a rights-based approach that promotes their dignity.²⁶ If a legal provision allows for multiple interpretations, BIOC mandates selecting the one that most effectively serves the child’s best interests.²⁷ Procedurally, BIOC requires decisions concerning children to be fully justified and explained. Decision-makers must consider the child’s factual circumstances and weigh relevant BIOC factors to determine their best interests.²⁸

12. BIOC is imbedded as a substantive right in statutes governing immigration law, youth criminal justice, and family law, among others.²⁹ Provincial legislatures have elevated BIOC to a guiding principle, ensuring that laws are interpreted with BIOC as a paramount purpose.³⁰

²¹ *UNCRC*, *supra* note 7 at [Article 6](#); Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, adopted 19 September – 3 October 2003, UN Doc [CRC/GC/2003/5](#) at para 12.

²² *UNCRC*, *ibid* at [Articles 18 and 27](#).

²³ *JFCY*, *supra* note 15 at [para 9](#); *Sharpe*, *supra* note 13 at [para 174](#).

²⁴ GC No. 14, *supra* note 7 at [para 6](#).

²⁵ *UNCRC*, *supra* note 7 at [Article 3\(1\)](#); GC No. 14, *ibid*.

²⁶ GC No. 14, *supra* note 7 at [paras 4, 5](#).

²⁷ GC No. 14, *ibid* at [para 6](#).

²⁸ GC No. 14, *ibid* at [paras 6\(c\), 97](#).

²⁹ See e.g.: *IRPA*, *supra* note 12 at [ss 25\(1\), 25.1\(1\), 28\(2\)\(c\), 60, 67\(1\)\(c\), 68\(1\), 69\(2\)](#); *Citizenship Act*, [RSC, 1985, c C-29](#) at [ss 5.1\(1\)\(a\) and 10\(3.1\)\(a\)](#); *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#) at [ss 7.1, 16, 22.1\(1\)\(d\)](#); *YCJA*, *supra* note 12 at [ss 25\(8\), 27\(1\), 30\(3\), 42\(2\)\(b\), 76\(9\)](#); *International Transfer of Offenders Act*, [SC 2004, c 21](#) at [s 10\(4\)](#).

³⁰ See e.g.: *Child, Youth and Family Services Act*, 2017, [SO 2017, c 14, Sched 1](#) at [s 1](#); *Child, Family and Community Service Act*, [RSBC 1996, c 46](#) at [ss 2, 4](#); *Child, Youth and Family Enhancement Act*, [RSA 2000, c C-12](#) at [ss 1.1, 2\(1\)](#).

13. The BIOC principle also has deep jurisprudential roots in Canadian law.³¹ The Court in *Baker* recognized the importance of being attentive to the best interests of children when making decisions that affect this group, who are entitled to “special care and assistance.”³² In *Kanthasamy*, the Supreme Court clarified that the principle is “highly contextual because of the multitude of factors that may impinge on the child’s best interests.”³³ The primacy of the BIOC principle was recently affirmed in *Michel v Graydon*,³⁴ which held that “the best interests of the child is at the heart of any interpretive exercise.”³⁵

14. In determining whether the Impugned Provision infringes the *Charter* rights of refugee claimants’ children, this Court should center its analysis on the best interests of these children, whose equality interests are directly at stake. The constitutionality of excluding this particularly vulnerable group from the CCB must be assessed through the lens of the following BIOC factors, which complement the two-part s. 15(1) test: their care and protection and their situation of vulnerability.³⁶

15. When assessing a child’s best interests, their care and protection must be considered, including the potential impact of a decision on their well-being and development.³⁷ In particular, courts must assess whether an action or decision would negatively impact a child’s ability to meet their basic material, physical, mental, and emotional needs.³⁸

16. Since BIOC analysis is highly contextual, the specific vulnerabilities of a group of children must be given significant weight in determining their best interests. A child’s vulnerability may be heightened by factors such as belonging to a minority group, being a refugee claimant, or

³¹ See e.g.: *Gordon v Goertz*, [1996] 2 SCR 27 at paras 17-25; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 93, citing the UNCRC at Articles 3, 5, 12, 14 [AC]; *AMRI v KER*, 2011 ONCA 417 at para 82.

³² *Baker*, *supra* note 17 at para 71.

³³ *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 35 [Kanthasamy], citing *JFCY*, *supra* note 15 at para 11.

³⁴ *Michel*, *supra* note 6 at para 47.

³⁵ *Michel*, *ibid* at para 102.

³⁶ GC No. 14, *supra* note 7 at paras 52, 55-57, 71-76.

³⁷ GC No. 14, *supra* note 7 at paras 52 and 71; *Barendregt v Grebliunas*, 2022 SCC 22 at para 152; *Sharpe*, *supra* note 13 at para 174.

³⁸ GC No. 14, *supra* note 7 at paras 50, 71; *AC*, *supra* note 31 at para 131, per McLachlin CJ and Rothstein J (concurring).

experiences of deprivation or abuse.³⁹ Race, in particular, can be a factor in determining the best interests of the child, as it is connected to their identity and emotional well-being.⁴⁰

17. In the present case, assessing the best interests of refugee claimants' children requires consideration of their specific vulnerabilities and lived experiences in Canada. These children, who are predominantly racialized,⁴¹ often arrive in Canada with their parents after fleeing their home countries with few material possessions. Upon arrival, they face severe poverty and limited access to resources.⁴² The harmful effects of poverty – such as deprivation of basic needs – are compounded by the additional stressors of precarious immigration status and racial discrimination.⁴³

18. Together, these disadvantages significantly harm child well-being and development, affecting their health, emotional, behavioural, and social outcomes.⁴⁴ These adverse experiences have lasting, even lifelong, impacts.⁴⁵ Exclusion from the CCB deprives this highly vulnerable group of children of stable financial support that could measurably improve their living conditions and overall well-being.⁴⁶

D. Substantive Equality Requires a Full Contextual Assessment

19. Context is the key to understanding the scope and impact of a limit on a *Charter* right.⁴⁷ In section 15 claims, context is centered on the claimant group's situation, the impact of the law on that situation, and the persistent systemic disadvantages experienced by the group, as required by substantive equality.⁴⁸ Substantive equality, the “animating norm” of s. 15, is also the core value

³⁹ GC No. 14, *supra* note 7 at [para 75](#).

⁴⁰ *Van de Perre v Edwards*, [2001 SCC 60](#) at [para 40](#).

⁴¹ Reasons for Judgment, *supra* note 1 at paras 100(d) and 192: PAB, Vol. 1, Tab 3, pp 49 and 74.

⁴² Reasons for Judgment, *supra* note 1 at paras 100(b), 207, 216: PAB, Vol. 1, Tab 3, pp 49, 78-79, 80-81.

⁴³ Transcript of Proceeding held June 1, 2022 (“Roos Transcript”) at p 85: PAB Vol. 1, Tab 20, p 874.

⁴⁴ Reasons for Judgment, *supra* note 1 at paras 100(g), 207, 216: PAB, Vol. 1, Tab 3, pp 49, 78-79, 80-81; Roos Transcript, *ibid* at pp 65-74, 81-87: PAB Vol. 1, Tab 20, pp 854-863, 870-876; Statutory Declaration of Leslie Roos Sworn December 15, 2011 (“Roos Statutory Declaration”) at paras 21-25: PAB, Vol. 7, Tab 22(K), pp 6551-6553; Transcript of Proceedings held April 12, 2022 (“Goldring Transcript”) at pp 83-85: PAB Vol. 1, Tab 18, pp 657-659.

⁴⁵ Reasons for Judgment, *supra* note 1 at para 216: PAB, Vol. 1, Tab 3, pp 80-81; Roos Transcript, *supra* note 43 at pp 74-75, 89: PAB Vol. 1, Tab 20, pp 863-864, 878; Roos Statutory Declaration, *ibid* at paras 21-23, 25: PAB, Vol. 7, Tab 22(K), pp 6551-6553.

⁴⁶ Reasons for Judgment, *supra* note 1 at paras 100(h) and 208: PAB, Vol. 1, Tab 3, pp 49 and 79; Roos Transcript, *supra* note 43 at 59-61, 75-76, 98: PAB Vol. 1, Tab 20, pp 848-850, 864-865, 887.

⁴⁷ *Toronto Star Newspapers Ltd v Canada*, [2010 SCC 21](#) at [para 3](#).

⁴⁸ *Fraser*, *supra* note 8 at [paras 40, 42](#); *Withler*, *supra* note 8 at [para 43](#).

engaged in cases of adverse effects discrimination.⁴⁹ In such cases, the application of a seemingly neutral law fails to produce substantive equality for disadvantaged groups, who often face a “unique constellation of physical, economic and social barriers.”⁵⁰ Laws that distribute benefits without accounting for these persistent systemic disadvantages can often fall prey to adverse effects discrimination.⁵¹

20. Income security programs, such as the CCB, are usually facially neutral in how they distribute benefits and rarely, if ever, explicitly bar access on the basis of a prohibited ground.⁵² Thus, an inquiry into whether the Impugned Provision infringes s. 15(1) must focus on the actual impact of the exclusion on the children of refugee claimants, who are predominantly racialized.⁵³

i. Step One: The Outcome of the Law in Practice: Are the Children Excluded from the CCB on the Basis of Their Parents’ Refugee Status Disproportionately Racialized?

21. As the Supreme Court recently affirmed in *Sharma*, at the first step of the s. 15(1) test, claimants must prove the impugned law creates or contributes to a disproportionate impact on the basis of a protected ground.⁵⁴ Two types of contextual evidence help establish disproportionate impact: evidence about the claimant group’s situation and evidence about the outcomes that the impugned law has produced in practice.⁵⁵ While, ideally, claims of adverse impact discrimination should be supported by both,⁵⁶ “clear and consistent statistical disparities in how a law affects a claimant group” alone can establish disproportionate impact.⁵⁷

22. For example, statistical evidence showing the pool of people adversely affected by a criterion includes *both* members of a protected group *and* those outside of it can provide concrete

⁴⁹ *R v Sharma*, [2022 SCC 39](#) at [para 37](#) [*Sharma*]; *Fraser*, *supra* note 8 at [paras 42, 48](#); *Withler*, *supra* note 8 at [para 2](#).

⁵⁰ *Sharma*, *supra* note 49 at [para 29](#); *Fraser*, *supra* note 8 at [para 34](#).

⁵¹ *Fraser*, *supra* note 8 at [paras 34, 42](#).

⁵² See e.g.: *Granovsky v Canada (Minister of Employment and Immigration)*, [2000 SCC 28](#) at para 43; *Jacob v Canada (Attorney General)*, [2024 ONCA 648](#) at [paras 71-73](#) (leave to appeal to SCC pending) [*Jacob*].

⁵³ *Sharma*, *supra* note 49 at [para 30](#); *Withler*, *supra* note 8 at [para 39](#).

⁵⁴ *Sharma*, *supra* note 49 at [paras 42, 47](#).

⁵⁵ *Sharma*, *supra* note 49 at [para 49](#); *Fraser*, *supra* note 8 at [paras 56-58](#); *Withler*, *supra* note 8 at [para 43](#). Note: in *Sharma*, the Court found that the claimant failed at the first step because she did not demonstrate that the *Criminal Code* provision making conditional offences unavailable for specific offences created or contributed to a disproportionate impact on Indigenous offenders. The Majority noted that expert evidence or statistical data showing Indigenous offenders are disproportionately represented among those imprisoned for these specific offences (i.e. those impacted by the law), relative to non-Indigenous offenders, “might establish that the removal of conditional sentences created or contributed to a disproportionate impact on Indigenous offenders” (at [para 76](#)).

⁵⁶ *Sharma*, *supra* note 49 at [para 49](#), citing *Fraser*, *supra* note 8 at [para 60](#).

⁵⁷ *Fraser*, *supra* note 8 at [paras 62-63](#).

proof that the former is disproportionately impacted.⁵⁸ Specifically, to establish a disproportionate impact based on the law’s outcomes, one must examine the pool of people denied a benefit due to a facially neutral criterion and determine whether members of a protected group are over-represented (i.e. denied a benefit more frequently) within this pool.⁵⁹

23. The claimants in *Fraser* demonstrated that legislated restrictions to the pension plan created or contributed to disproportionately reduced pensions for women.⁶⁰ Statistical evidence showed that RCMP members who job-shared were predominantly women with young children.⁶¹ The facially neutral law denying job-sharers access to pensionable benefits “plainly” had a disproportionate impact on women.⁶² This evidence about the law’s outcomes was bolstered by evidence about the broader situation of disadvantage “women face as a group in balancing professional and domestic work.”⁶³ Consequently, the Court concluded that excluding job-sharers from more favourable pension benefits disproportionately impacted women.⁶⁴

24. Recently, in *Jacob*, the Ontario Court of Appeal considered the case of workers deemed ineligible for the Canada Emergency Response (the “CERB”) because they failed to meet the facially neutral \$5,000 income threshold. The Court found a disproportionate impact, as workers with disabilities were significantly over-represented among those unable to meet the threshold.⁶⁵ The Court also noted that statistics showing the percentage of CERB recipients with a disability was similar to the national percentage of workers with a disability were unhelpful, as they failed to account for the group excluded for not meeting the income threshold.⁶⁶

25. Applying the s. 15(1) framework to the question at issue: the first step requires proof that the Impugned Provision created or contributed to the disproportionate denial of the CCB for racialized children of refugee claimants. The Trial Judge found that while the pool of those excluded from the CCB due to their parents’ refugee claimant status includes both racialized and

⁵⁸ *Fraser*, *ibid* at [para 58](#) [emphasis in the original].

⁵⁹ *Fraser*, *ibid* at [para 55](#).

⁶⁰ *Sharma*, *supra* note 49 at [para 47](#); *Fraser*, *ibid* at [para 106](#).

⁶¹ *Fraser*, *supra* note 8 at [para 97](#).

⁶² *Fraser*, *ibid* at [para 97](#).

⁶³ *Fraser*, *ibid* at [para 98](#).

⁶⁴ *Fraser*, *ibid* at [para 106](#); *Procureur général du Québec v Kanyinda*, [2024 QCCA 144](#) at [paras 94-95, 100](#) (leave to the SCC granted): Based on statistical and expert evidence on the impact of the law on affected refugee claimants, the Court found that excluding refugee claimants from Quebec’s subsidized childcare program disproportionately affected women.

⁶⁵ *Jacob*, *supra* note 52 at [paras 81-84](#).

⁶⁶ *Jacob*, *ibid* at [paras 81-82](#).

non-racialized children, they are predominantly racialized.⁶⁷ These unchallenged findings, supported by expert evidence, suggest that children of refugee claimants are disproportionately impacted by the Impugned Provision on the basis of race.⁶⁸

ii. Step Two: Whether the Exclusion of Refugee Claimants' Children from the CCB Reinforces, Exacerbates, or Perpetuates their Disadvantage

26. To determine whether the impugned law has the effect of reinforcing, exacerbating, or perpetuating disadvantage, courts must examine the effect of the harm caused to the affected group.⁶⁹ This harm may include economic exclusion or disadvantage, social marginalization, psychological harms, or physical harms and must be considered in the context of pre-existing systemic or historical disadvantages faced by the group.⁷⁰ The Court in *Fraser* applied this framework to find that the statutory scheme denied benefits in a manner that perpetuated a long-standing disadvantage to women: gender bias within pension plans.⁷¹

27. Similarly, children constitute a historically disadvantaged group.⁷² Canadian law has long recognized the inherent vulnerability of children, rooted in their relative immaturity, lack of sophistication, and dependence on adults.⁷³ To address these realities, courts and legislatures have consistently imposed special protections to ensure children can fully and equitably benefit from the law, meaningfully exercise their rights, and have their best interests taken into account as a primary consideration.⁷⁴

28. Beyond age-based vulnerability, the children of refugee claimants live with the accumulated effects of poverty, racial discrimination, and precarious immigration status.⁷⁵ Genuine

⁶⁷ Reasons for Judgment, *supra* note 1 at paras 100(d), 192, 198; PAB Vol. 1, Tab 3, pp 49, 74, 76-77; see also: Expert evidence summarized in the Appellant's Written Submissions (Section 7 and 15 Arguments) dated 5 August 2022 at paras 143-147, pp 49-50.

⁶⁸ Note: While the Appellant argues that disproportionate impact is established because the law results in partial discrimination against a subset of racialized people (i.e. refugee claimants and their children), the Intervener submits that disproportionate impact, based on evidence about the outcomes of the law, must be assessed by focusing on the excluded group (i.e. the children of refugee claimants).

⁶⁹ *Sharma*, *supra* note 49 at [paras 51-52](#); *Fraser*, *supra* note 8 at [para 76](#).

⁷⁰ *Sharma*, *supra* note 49 at [para 52](#); *Fraser*, *supra* note 8 at [para 76](#).

⁷¹ *Fraser*, *supra* note 8 at [para 108](#).

⁷² *JFCY*, *supra* note 15 at [para 225](#); *Canada (Attorney General) v Campbell*, [2005 FCA 420](#) at [para 34](#) [*Campbell*].

⁷³ *AB v Bragg Communications Inc*, [2012 SCC 46](#) at [para 17](#), *Sharpe*, *supra* note 13 at [para 170](#); *R v Friesen*, [2020 SCC 9](#) at [para 1](#); *DB*, *supra* note 15 at [paras 61-65](#); *R v LTH*, [2008 SCC 49](#) at [paras 3, 95](#); *Campbell*, *supra* note 73 at [para 34](#).

⁷⁴ *Sharpe*, *supra* note 13 at [paras 170-173](#); *DB*, *supra* note 15 at [paras 76, 84](#); *CP*, *supra* note 5 at [paras 77, 81, 83-85](#); *supra* notes 29 and 30; *YCJA*, *supra* note 12 at [s \(3\)\(1\)\(b\)\(iii\)](#).

⁷⁵ See factual findings and expert evidence summarized at para 17 (above).

substantive equality recognizes that these intersecting challenges compound pre-existing disadvantage, making exclusion from a financial lifeline particularly harmful for these children compared to other children in Canada.

29. The Trial Judge recognized these challenges, finding that “[d]enying refugee claimants the CCB also exacerbates and perpetuates the disadvantages faced by their minor children, who are racialized children living in poverty.”⁷⁶ Specifically, the Judge found that the Impugned Provision prevents the children of refugee claimants from enjoying the “positive impact” of the CCB’s direct cash transfers, which can make a “measurable difference” in alleviating child poverty.⁷⁷ This exclusion, based solely on their parents’ refugee claimant status, deepens and perpetuates their disadvantage relative to other Canadian children.⁷⁸

30. By denying the children of refugee claimants a consistent monthly payment, the law creates economic exclusion and disadvantage.⁷⁹ This harm has the effect of reinforcing, perpetuating, and exacerbating the historical and systemic disadvantages these children already face.

PART III – CONCLUSION AND ORDER SOUGHT

31. This Court’s decision will have a profound impact on the children of refugee claimants, who are predominantly racialized and living in deep poverty. For these children, access to the CCB could mean the difference between deprivation and having their basic developmental needs met. The Court’s interpretation and application of their equality rights must be contextual and informed by Canada’s international legal obligations, the principle of the best interests of the child, and the intersecting vulnerabilities and disadvantages faced by children of refugee claimants. While JFCY takes no position on the outcome of this appeal, the Court should examine whether excluding this group of children from an income security program designed to alleviate child poverty – solely because their parents are seeking asylum in Canada – is consistent with substantive equality, the animating norm of section 15.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 24th day of January, 2025.

⁷⁶ Reasons for Judgment, *supra* note 1 at para 216: PAB Vol. 1, Tab 3, pp 80-81.

⁷⁷ Reasons for Judgment, *supra* note 1 at paras 100(h) and 208: PAB Vol. 1, Tab 3, pp 49 and 79; see also: Roos Transcript, *supra* note 43 at pp 59-60, 98-99: PAB Vol. 1, Tab 20, pp 848-849, 887-888.

⁷⁸ Reasons for Judgment, *supra* note 1 at paras 206 and 209: PAB Vol. 1, Tab 3, pp 78-79.

⁷⁹ *Sharma*, *supra* note 49 at [para 52](#); *Fraser*, *supra* note 8 at [para 76](#); *Withler*, *supra* note 8 at [para 37](#).



Justice for Children and Youth

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<i>Canadian Charter of Rights and Freedoms</i> , Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11	15
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<i>Citizenship Act</i> , RSC, 1985, c C-29	5.1(1)(a), 10(3.1)(a)
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Respondent

and

JUSTICE FOR CHILDREN AND YOUTH
Intervener

FEDERAL COURT OF APPEAL
PROCEEDING COMMENCED AT TORONTO

**MEMORANDUM OF FACT AND LAW OF THE
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