S.C.C. File No. 38585

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

ATTORNEY GENERAL OF ONTARIO

Appellant

- and -

G.

Respondent

- and -

ATTORNEY GENERAL OF CANADA, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN CIVIL LIBERTIES ASSOCIATION, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, EMPOWERMENT COUNCIL and CANADIAN MENTAL HEALTH ASSOCIATION, ONTARIO

Interveners

FACTUM OF THE INTERVENER,
CANADIAN MENTAL HEALTH ASSOCIATION, ONTARIO DIVISION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I—OVERVIEW

1. This appeal presents a particular type of "adverse effect" discrimination claim under s. 15(1) of the *Charter of Rights and Freedoms*. Like in most "adverse effect" cases, the impugned law does not itself create a distinction on the basis of an enumerated ground but nonetheless impacts the claimant differentially. Yet, unlike in most "adverse effect" cases, the impugned law does not affect the claimant differentially simply by virtue of his membership in an enumerated group. *Christopher's Law* does not impact the Respondent differentially because he has experienced a mental illness, *per se*. Rather, the impugned law has a differential impact on him because, like many individuals who have experienced a mental illness, other laws govern the Respondent's life on the basis of an enumerated ground: mental disability. The courts below each analyzed this aspect of the Respondent's s. 15(1) claim differently. This Court should now clarify how they ought to have done so.

2. The Canadian Mental Health Association, Ontario Division (the "**CMHA**") intervenes on this question. It proposes a framework for approaching "combined effect" discrimination claims like the Respondent's. In a "combined effect" claim, a claimant challenges the constitutionality of a law that does not on its face create a distinction on the basis of an enumerated or analogous ground, but that, in conjunction with one or more other laws, has the combined effect of doing so. The CMHA submits that, in deciding this appeal, the Court should recognize that "combined effect" discrimination claims are different from other "adverse effect" discrimination claims. In this way, the Court can ensure that individuals who, like the Respondent, are broadly subject to government regulation on the basis of an enumerated or analogous ground do not bear an undue burden in litigation under s. 15(1) of the *Charter*, and therefore benefit from its full protection.

3. The CMHA makes three submissions in this regard.

4. First, where a claimant alleges that a law draws a distinction based on an enumerated or analogous ground owing to its interaction with another law that, on its face, creates such a distinction, the claimant should not "have more work to do at the first step"[1] of the s. 15(1) analysis.

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[1] *Withler v. Canada (Attorney General)*, 2011 SCC 12 [***Withler***], at para. 64. **See also:** *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181, at para. 53; *Fraser v. Canada (Attorney General)*, 2017 FC 557, at para. 100; *R v. T.M.B.*, 2013 ONSC 4019, at para. 30, *Carter v. Canada*

Nor should the claimant be required to establish at this stage that the impugned law has "a disproportionately negative impact".[2] Instead, for the purposes of this initial "'distinction' stage of the analysis",[3] the court should read the relevant statutes together and simply consider whether their combined effect is to create a distinction on the basis of an enumerated or analogous ground.

5. Second, in such "combined effect" cases, the court should again read the relevant statutes together to determine whether they operate to "impose[] burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating … disadvantage"[4] at the second stage of analysis. By considering the combined legislative scheme in assessing the "discriminatory *impact* of the distinction",[5] the reviewing court can properly recognize that, in "combined effect" cases, the law that creates the distinction on its face may not itself perpetuate an "arbitrary — or discriminatory — disadvantage",[6] but may cause the impugned law to "widen[] the gap between the historically disadvantaged group and the rest of society rather than narrowing it".[7]

6. Third, whether the laws' combined effect of discrimination is reasonably and demonstrably justified — because, for example, the discrimination reflects "an empirical fact" rather than "a stereotypical assumption about persons" in the enumerated or analogous group[8] — is for the state to establish under s. 1 of the *Charter*, not for the claimant to establish under s. 15(1).

7. Individuals experiencing a mental illness in Canada are more likely than the members of other enumerated or analogous groups to experience discrimination contrary to s. 15(1) of the

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(Attorney General), 2012 BCSC 886, at para. 1038; *Yashcheshen v. Attorney General of Canada*, 2019 SKQB 29, at para. 23.

[2] *G v. Attorney General for Ontario et al.*, 2017 ONSC 6713 ["**S.C. reasons**"], at paras. 145, 147, and 148, quoting *Withler* (S.C.C., 2011), *supra* note 1, at para. 64. **See also:** *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [***Taypotat***], at para. 21.

[3] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [***Alliance***], at para. 26.

[4] *Taypotat* (S.C.C., 2015), *supra* note 2, at para. 20. *Alliance* (S.C.C., 2018), *supra* note 3, at para. 25.

[5] *Alliance* (S.C.C., 2018), *supra* note 3, at para. 28 (emphasis in original). **See also:** *Quebec (Attorney General) v. A*, 2013 SCC 5 **[*Quebec A.G.*]**, at paras. 327, 330, per Abella J.

[6] *Taypotat* (S.C.C., 2015), *supra* note 2, at para. 20.

[7] *Quebec A.G.* (S.C.C., 2013), *supra* note 5, at para. 332, per Abella J.

[8] Appellant's Factum, at para. 57.

Charter owing to the joint operation of one or more laws. This is because individuals experiencing a mental illness are subject to an exceptional degree of potential state involvement in their lives through a complex web of statutes and regulations.[9] As a consequence, such individuals are more likely than the members of other enumerated or analogous groups to advance "combined effect" cases (like this one) under s. 15(1). This Court should ensure that claimants who are subject to broad state regulation on the basis of an enumerated or analogous ground — here, mental disability — do not bear an inappropriately weighty burden when they advance s. 15(1) claims. Vulnerable individuals should not find it more difficult to vindicate constitutional rights that have been violated because of the very laws that seek to protect them.[10]

PART II—STATEMENT OF ARGUMENT

1. First step of the s. 15 analysis: Courts should consider the "combined effect" of legislation in determining whether the law creates a distinction

8. Persons found not criminally responsible on account of mental disorder ("**NCRMD**") in relation to offences they have committed are individuals with a "mental … disability", in the language of s. 15 of the *Charter*.[11] They are subject to a different statutory regime, set out in Part XX.1 of the *Criminal Code*, than persons who are found guilty.

9. Part XX.1 "rejects the notion that the only alternatives for mentally ill people charged with an offence are conviction or acquittal".[12] It creates an alternative scheme whereby a person found NCRMD may be detained in a hospital, conditionally discharged, or discharged absolutely.

10. Here, the impugned sex offender registry legislation (Ontario's *Christopher's Law* and, in the courts below, the federal *Sex Offender Information Registration Act*, or "***SOIRA***") does not

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[9] **See, e.g.:** *Mental Health Act*, R.S.O. 1990, c. M.7 and *General Regulation*, R.R.O. 1990, Reg 741; *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A; *Substitute Decisions Act*, 1992, S.O. 1992, c. 30.

[10] **See:** *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 [***Winko***], at paras. 41 and 81.

[11] *G. v. Ontario (Attorney General)*, 2019 ONCA 264 ["**C.A. reasons**"], at para. 115. **See also:** *Winko* (S.C.C., 1999), *supra* note 10 at paras. 77-79, *R. v. Demers*, 2004 SCC 46, at para. 92, per LeBel J.

[12] *Winko* (S.C.C., 1999), *supra* note 10, at para. 21.

"on its face … create[] a distinction based on" the enumerated ground of "mental disability".[13] *Christopher's Law* and *SOIRA* impose reporting obligations on persons either convicted of or found NCRMD in respect of certain designated offences.

11. The sex offender laws do not themselves treat persons found NCRMD in respect of designated offences differently than persons convicted of and sentenced for those offences. *Christopher's Law* mandates the registration of sex offenders, and "offender" is defined as a person who has been convicted of or found NCRMD in respect of a sex offence.[14] *SOIRA* applies to persons upon whom a sentence has been imposed for a designated offence, or persons found NCRMD in respect of such an offence.[15]

12. Still, despite the absence of express language creating a distinction, "the sex offender registry legislation has a harsher effect on persons found NCRMD who committed designated offences compared with persons who were found guilty of designated offences".[16] This is because of "the interaction of the sex offender legislation with s. 730 of the *Criminal Code* and s. 4 of the *Criminal Records Act*".[17]

13. Section 730 of the *Criminal Code* allows a court to discharge (rather than convict) an accused who is found guilty of a designated offence.[18] A discharge under s. 730 may be either absolute or conditional, and is distinct from the conditional and absolute discharges available under Part XX.1 of the *Criminal Code* to persons found NCRMD. Section 4 of the *Criminal Records Act* allows for an offender who has been convicted of a designated offence to apply for a record suspension.[19]

14. An individual who is granted an absolute or a conditional discharge pursuant to s. 730 of the *Criminal Code* never becomes subject to the requirements of *Christopher's Law* or *SOIRA* in

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[13] *Alliance* (S.C.C., 2018), *supra* note 3, at para. 25. **See also:** *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, **[*Centrale*]** at para. 22; *Taypotat*, *supra* note 2, at para. 19 (emphasis added); *Withler* (S.C.C., 2011), *supra* note 1, at para. 61.

[14] *Christopher's Law*, 2000, S.O. 2000, c. 1, s. 1(1) ("offender").

[15] *Criminal Code*, R.S.C. 1985, c. C-46, s. 490.012.

[16] C.A. reasons, *supra* note 11, at para. 104 (emphasis added).

[17] C.A. reasons, *supra* note 11, at para. 105.

[18] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 730(1) and (3).

[19] *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4.

the first place.[20] An individual who is convicted of an offence but receives a record suspension is automatically removed from the provincial registry and may immediately apply to be removed from the federal registry.[21]

15. A person found NCRMD in respect of an offence is neither found guilty of that offence (and thus cannot be discharged pursuant to s. 730 of the *Criminal Code*) nor convicted of that offence (and thus cannot apply for a record suspension pursuant to s. 4 of the *Criminal Records Act*).[22] As a result, neither of the "exit ramps" from registration under the impugned legislation that are available to a person found guilty of a designated offence is available to a person found NCRMD in respect of the same offence.[23] Individuals who, like the Respondent, have been found NCRMD in respect of a designated offence paradoxically cannot be removed from the registry of offenders because they were never found guilty of that designated offence.

16. Neither *Christopher's Law* nor *SOIRA* expressly provides for the differential treatment of persons found NCRMD, as noted above. For this reason, the application judge analyzed the Respondent's claim in this case as one of "indirect" discrimination, *i.e.*, "where the distinction is not immediately apparent" on the face of the impugned legislation.[24] The applicant did not argue otherwise in the Court of Appeal; there, it was common ground that the differential treatment of persons found NCRMD is not "expressly spelled out in the [sex offender registry] legislation, but rather … is an effect of the legislation".[25]

17. In a "combined effect" case like this one, this should be a distinction without a difference. Although the impugned legislation may not itself "create[] a distinction on the basis of an enumerated or analogous ground", it depends for its operation on a broader legislative framework that creates such a distinction — here, Part XX.1 of the *Criminal Code*. It must therefore be

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[20] *Sex Offender Information Registration Act*, S.C. 2004, c. 10, s. 3(1) ("sex offender"); *Criminal Code*, ss. 490.019 and 490.02(1); *Christopher's Law*, *supra* note 14. **See also:** C.A. reasons, *supra* note 11, at para. 106.

[21] *Christopher's Law*, ss. 1(1) ("pardon"), 7(4) and 9.1; *Criminal Code*, s. 490.026(4). **See also:** C.A. reasons, *supra* note 11, at para. 108.

[22] **See:** C.A. reasons, *supra* note 11, at paras. 107 and 109.

[23] C.A. reasons, *supra* note 11, at para. 110.

[24] S.C. reasons, *supra* note 2, at para. 145.

[25] C.A. reasons, *supra* note 11, at para. 104.

construed in the context of that broader statutory scheme. Put differently, in assessing "effect", the impugned legislation must be read as part of the broader legislative framework of which it is a part, in accordance with "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".[26]

18. Persons found NCRMD are treated differentially because of ss. 16(1), 672.34, and 672.35 of the *Criminal Code*.[27] As a result, any legislation that "create[s] a regulatory … scheme"[28] applicable to individuals whose acts or omissions have been the subject of proceedings under the *Criminal Code* — rather than only to those individuals found guilty and/or convicted of an offence — will therefore necessarily treat persons found NCRMD differentially on the basis of an enumerated ground: mental disability.[29]

19. Apart from the need to consider more than one statute in determining whether a distinction has been created on enumerated or analogous grounds, there is no substantive difference between "direct" (or "facial") or "indirect" (or "adverse effects") discrimination claims where the alleged discrimination lies in the combined effect of two or more statutory regimes. A claimant in a "combined effect" case, like this one, should not be required to do more than point to the statutory schemes themselves to establish that, "on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground",[30] for the purposes of the first step of the analysis

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[26] *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, at para. 54. **See also:** *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, at para. 37; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 27.

[27] These provisions provide that a person cannot be held criminally responsible, found guilty, or convicted of an offence "for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong": *Criminal Code*, s. 16(1). **See also:** *ibid.*, ss. 672.34 and 672.35.

[28] *R. v. Dyck*, 2008 ONCA 309, at para. 38.

[29] **See, e.g.:** *Police Record Checks Reform Act*, 2015, S.O. 2015, c. 30, s. 9 and Schedule. **Cf.:** *Health Professions Procedural Code*, s. 51(1)(a), Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18.

[30] *Taypotat* (S.C.C., 2015), *supra* note 2, at para. 19 (emphasis added); *Alliance* (S.C.C., 2018), *supra* note 3, at para. 25.

under s. 15(1) of the *Charter*. This 'distinction' stage "is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases" but rather is intended to "ensure that s. 15(1) … is accessible to those whom it was designed to protect"[31]. In keeping with this approach to the first step of the s. 15(1) analysis, claimants in "combined effect" discrimination cases should be able to rely on statutory interpretation to establish the requisite distinction.

20. Unfortunately, this Court's comments in *Withler* have been interpreted to the contrary — including at first instance in this case. Speaking for a unanimous Court in *Withler*, McLachlin C.J. and Abella J. stated that:

> In ["adverse effect"] 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…. 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.[32]

21. In a pure "adverse effect" case, a court may have to consider (and the claimant may need to introduce evidence of) "[h]istorical or sociological disadvantage" to determine whether a law has the effect of creating a distinction (a "disproportionate … impact") based on an enumerated or analogous ground. To establish as much at the first step of the s. 15(1) test, the claimant may well "have more work to do" than where the distinction is on the face of the impugned law.

22. But where, as here, the distinction is on the face of another law upon which the operation of the impugned law relies, the claimant's "work" should be no different than if the distinction were on the face of the impugned law. They should simply have to establish that they are "denied a benefit that others are granted or carr[y] a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)".[33] The Court should confirm as much in deciding this appeal.

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[31] *Alliance* (S.C.C., 2018), *supra* note 3, at para. 26.

[32] *Withler* (S.C.C., 2011), *supra* note 1, at para. 64 (emphasis added). **See:** S.C. reasons, *supra* note 2, at paras. 138, 147.

[33] *Withler* (S.C.C., 2011), *supra* note 1, at para. 62. **Cf.:** *Alliance* (S.C.C., 2018), *supra* note 3, at para. 26.

2. Second step of the s. 15 analysis: Courts should consider the "combined effect" of legislation in assessing discriminatory impact

23. The burden on the claimant at the second step of the s. 15(1) analysis is similarly not an onerous one. As McLachlin J. (as she then was) put it in *Miron*, "[f]aced with a denial of equal benefit based on an enumerated or analogous ground, one would be hard pressed to show that the distinction is not discriminatory".[34]

24. So it is in "combined effect" cases, too. As discussed above, the defining feature of a "combined effect" case is the interplay of multiple statutes that collectively create a distinction based on an enumerated or analogous ground. The impugned law is said to have a differential impact on the claimant because another law (which itself is not impugned) draws a distinction on its face.

25. The non-impugned law, on its own, may well have an ameliorative purpose or a non-discriminatory impact on the claimant. Where this is so, it should nonetheless be open to the claimant to establish that the impugned law has the requisite discriminatory impact to make out a limit on the s. 15(1) right. This will be so where the laws' combined effect has a discriminatory impact on the claimant based on an enumerated or analogous ground — even if neither law, standing alone, has such an effect.

26. So long as the combined effect of the impugned law and the non-impugned law is to "impose[] burdens or den[y] benefits in a way that reinforces, perpetuates, or exacerbates disadvantage",[35] the impugned law must be held to limit the s. 15(1) right. To hold otherwise would risk turning the s. 15(1) analysis into an elaborate shell game — one in which, unless the provisions creating a distinction are contained in the impugned law itself, the claimant will be out of luck; the state always wins.

27. To ensure that individuals experiencing a mental illness enjoy the full benefit of s. 15(1)'s protection, the ameliorative effect of a non-impugned law should not be permitted to obscure the discriminatory effect of an impugned law, even when the impugned law only creates a distinction

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[34] *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 132.

[35] *Centrale* (S.C.C., 2018), *supra* note 13, at para. 30, per Abella J. **See also:** *Taypotat* (S.C.C., 2015), *supra* note 2, at para. 20.

based on an enumerated or analogous ground in combination with the non-impugned law. For the members of an enumerated group that is often subject to overlapping statutory and regulatory regimes, it is important that this Court say so.

3. In "combined effect" cases, courts should take care not to conflate discrimination under s. 15(1) of the *Charter* with justification under s. 1

28. As a plurality of this Court recently re-emphasized in *Centrale des syndicats du Québec*:

> The fact that the [impugned legislation] was intended to help [the members of an enumerated group] does not attenuate the *fact* of the breach. Purpose and intention are part of the s. 1 justification analysis. Determining whether there is a breach focuses on the *impact* of, not motive for, the law.[36]

29. The court's assessment of whether a legislative scheme limits a claimant's s. 15 right is "analytically distinct" from the determination of whether that limit is justified: "[I]t is for the [claimant] to establish that his or her *Charter* right has been infringed and for the state to justify the infringement."[37] It follows that the ameliorative purpose of a legislative scheme cannot insulate it from a challenge under s. 15. Rather, once a claimant has demonstrated that the law(s) make a distinction on an enumerated or analogous ground, and that the impact of that distinction is to "reinforce[], perpetuate[], or exacerbate[] disadvantage", the burden shifts to the state to demonstrate that the limit on the s. 15 right is reasonable and demonstrably justifiable under s. 1.

30. Regrettably, s .1 considerations are frequently (and improperly) imported into the second stage of the s. 15(1) analysis. Here, for example, Ontario and Canada made submissions in the Court of Appeal concerning the interplay between *Christopher's Law*, *SOIRA*, and the NCRMD provisions of the *Criminal Code*. The Court of Appeal considered these submissions in the context of the second step of s. 15(1) test.[38]

31. They did not belong there. These submissions properly pertained (and still pertain[39]) to the government's burden of justification under s. 1.

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[36] *Centrale* (S.C.C., 2018), *supra* note 13, at para. 35 (emphasis in original), per Abella J. **See also:** *Taypotat* (S.C.C., 2015), *supra* note 2, at para. 156 per McLachlin C.J. (dissenting but not on this point).

[37] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 182.

[38] **See:** C.A. reasons, *supra* note 11, at para. 118.

[39] **See:** Appellant's Factum, at paras. 51, 53-54, and 57-59.

32. As the Court of Appeal summarized the governments' submissions on this point:

> The respondents [Ontario and Canada] correctly point out that some distinctions, even distinctions based on enumerated grounds, promote equality.... They submit that the distinctions between persons who were found NCRMD in respect of designated offences and persons who were found guilty of the same offences, insofar as those distinctions relate to compliance with the sex offender registries, are not discriminatory. Rather, they draw appropriate differences between the treatment of convicted persons and persons found NCRMD. Those differences are said by the respondents to ensure that persons found NCRMD are not treated as criminals, but are instead afforded the full protection and benefit of Part XX.1 of the *Criminal Code*. According to the respondents, the absence of the "exit ramps" from the sex offender registries described above is necessary to recognize the distinct status of persons found NCRMD within the criminal justice system, and thereby provide them with equality under the law.[40]

33. It is certainly open to the state to argue, under s. 1 of the *Charter*, that the discriminatory impact of an impugned law is "appropriate" and that it "ensure[s] that [the claimant and others like them] are ... afforded the full protection and benefit of" another, non-impugned law. But these arguments — drawing, as they do, on statutory frameworks that benefit the claimant — should not be put against the claimant under s. 15(1), when the claimant still has the burden of establishing a limit on the *Charter* right. If the laws' combined effect is to reinforce, perpetuate, or exacerbate the disadvantage to which the claimant is subject by virtue of membership in an enumerated or analogous group, then that is enough; the impugned law is discriminatory. The state can then seek to justify that discrimination.[41]

PART III—SUBMISSIONS CONCERNING COSTS

34. The CMHA requests that no costs be awarded either for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2020.

Adam Goldenberg / Ljiljana Stanić

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[40] C.A. reasons, *supra* note 11, at para. 118 (emphasis added; citation omitted).

[41] **See:** *Miron* (S.C.C., 1995), *supra* note 34, at para. 129 (emphasis added); *Alliance* (S.C.C., 2018), *supra* note 3, at para. 43; *Centrale* (S.C.C., 2018), *supra* note 13, at para. 42, per Abella J.

PART IV—TABLE OF AUTHORITIES

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