October 16, 2026

Grounds for (In)Equality: The Supreme Court of Canada Grapples with Intersectionality in *Kanyinda*

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented on: *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 (CanLII)

This is the first of a planned series of posts on the Supreme Court of Canada's most recent equality rights decision, *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 (CanLII), and its application to potential new grounds of discrimination. Our posts will focus on the Court's findings related to infringement of section 15(1) of the *Charter* and, more specifically, on grounds, intersectionality, claimants' context, and comparison. Given this focus, we will have the most to say about the majority judgment written by Justice Andromache Karakatsanis and the concurrence of Chief Justice Richard Wagner and their contrasting approaches to these issues.

In this first post, we provide the factual background and judicial history of the case and then describe the four sets of reasons at the Supreme Court of Canada. Our commentary includes application of the Court's analysis to Alberta's referendum questions related to immigration status. Subsequent posts will consider the possible application of the Court's approaches on grounds of discrimination to two different factual contexts: employment benefits available to survivors of intimate partner violence (IPV) under Alberta's *Employment Standards Code*, RSA 2000, c E-9; and the Alberta government's recent shift from one disability benefit scheme, the Alberta Income for the Severely Handicapped (AISH), to two, AISH and the new Alberta Disability Assistance Plan (ADAP).

Facts and Judicial History

Ms. Bijou Cibuaua Kanyinda and her three young children came to Canada from the Democratic Republic of the Congo in October 2018 and immediately applied for refugee protection. Her refugee status was eventually approved in January 2021. In the two-and-a-half-year interim, Ms. Kanyinda obtained a work permit but was refused access to subsidized daycare for her children. Section 3 of the *Reduced Contribution Regulation,* CQLR, c S-4.1.1, r 1 (*RCR*), made under the *Education Childcare Act*, CQLR, c S-4.1.1 (*ECA*), listed the categories of people eligible for subsidized daycare, including citizens as well as some noncitizens such as international students, those with temporary resident or certain types of work permits, and those with refugee status. Because Ms. Kanyinda was a refugee claimant and lacked refugee status, she was denied access to the subsidized daycare which would have allowed her to work.

The *ECA* had its origins in the 1979 *Act respecting child day care,* SQ 1979, c 85, s 2. The objectives of the 1979 Act were to enable women to exercise the right to work and provide quality services for children (at paras 28-29). The first version of the *RCR* was enacted following the release of a 1997 Quebec government White Paper entitled *Les enfants au cœur de nos choix*, which focused on providing equal opportunities for children, reconciling work and family life, and increasing support for low-income families. Subsequently, the *ECA* was enacted in 2005 with two aims: first, to enhance the quality of the educational services intended for children before their admission to school; and, second, to help reconcile parental and professional or student responsibilities.

Ms. Kanyinda began her *Charter* challenge to section 3 of the *RCR* in 2019. She claimed that her exclusion infringed her section 15(1) equality rights on the enumerated ground of sex and the previously recognized analogous ground of citizenship, as well as on a proposed new analogous ground of immigration status. The Superior Court of Quebec rejected her claims on all three grounds. The Quebec Court of Appeal reversed, finding that section 3 of the *RCR* created a sex-based distinction in its effects, and that the exclusion was discriminatory because it perpetuated the historical disadvantage of women refugee claimants in the workforce. The Court of Appeal's remedy was to read in refugee claimants with a work permit to the categories of eligible persons under section 3 (at paras 18-23).

Supreme Court of Canada Decision

At the Supreme Court of Canada, all members of the Court agreed on the current test for assessing violations of section 15(1) of the *Charter*:

> … a claimant must show the challenged law or state action: (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. (at para 48)

This test has been relatively settled since *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) and *R v Sharma*, 2022 SCC 39 (Can LII). Much of the disagreement amongst members of the Court in those decisions and *Kanyinda* relates to the finer points of the application of the test.

In *Kanyinda*, the majority decision of Karakatsanis J found an infringement of section 15(1) on the ground of sex and did not consider the other two claimed grounds. Justice Malcom Rowe concurred with the majority's conclusion regarding sex discrimination but disagreed on some key aspects of their application of section 15(1). The concurring decision of Wagner CJ would have found an infringement of section 15(1) based on the analogous ground of refugee claimant status. Justice Suzanne Côté's dissenting judgment rejected discrimination based on sex and citizenship and did not recognize refugee status as an analogous ground.

Majority Judgment of Karakatsanis J

With Justices Sheilah Martin, Nicholas Kasirer, Mahmud Jamal, Michelle O'Bonsawin, and Mary Moreau concurring, Karakatsanis J began her reasons by noting the history of women's inequality at work and at home and the consequent importance of government policies such as subsidized childcare (at paras 1-3). She thus framed the case from the outset as being primarily about adverse effects discrimination based on sex. Because she ultimately found that section 3 of the *RCR* resulted in sex discrimination, Karakatsanis J found it unnecessary to consider citizenship and immigration status as relevant grounds under section 15(1) of the *Charter*. She did, however, note her agreement with the Chief Justice that "refugee claimants face stereotypes, historical disadvantage, and distinct vulnerabilities in Canadian society" (at para 26). For the majority, the "unique circumstances" of women refugee claimants were "integral to the sex-based analysis in this case" (at para 25).

Karakatsanis J foregrounded the substantive equality underpinnings of section 15, referencing the key principle that "substantive equality looks past neutral text to look at the actual impact of the law on disadvantaged groups" (at para 7). Another foundational point established in previous cases that she endorsed was that "discrimination will not be felt by all members of a disadvantaged group in the same way" (at para 39). Karakatsanis J tied this point to the concept of intersectionality and the idea that people in the same group may have different or unique experiences based on their "intersecting identities and realities" (at para 39). Women, for example, may face differing impacts of the law based on their "race, religion, ethnic background, sex, age, disability, sexual orientation, parental status, socioeconomic status, immigration status, or language abilities" (at para 39).

For the majority, an intersectional approach was supported by previous Supreme Court of Canada equality rights cases (at para 40, citations omitted). Karakatsanis J also found that intersectionality is an appropriate consideration at both steps of the section 15(1) analysis. At step one, the focus is on whether the impugned law draws a distinction between a particular claimant group and others, either directly or indirectly. As Karakatsanis J explained, "adverse effects arise from the nexus between a distinction that <u>may not</u> be rooted in an enumerated characteristic and a subgroup that <u>must</u> share an enumerated ground" (at para 42, emphasis in original). The key is that the distinction for the purposes of step 1 must always be connected to a protected ground (at para 43). In this case, for example, Karakatsanis J stated that it was "only possible to identify a sex-based distinction after a contextual inquiry into the circumstances shared by … women refugee claimants" (at para 43). It is also possible that the law may draw distinctions based on multiple protected grounds, and if so, there is no mandated order for assessing such claims (e.g., enumerated before analogous grounds) (at para 44).

At step two, "intersecting identities and realities" are relevant to a contextual examination of whether the distinction found at step one reinforces, perpetuates or exacerbates the claimant group's disadvantage. As noted by Karakatsanis J, forms of disadvantage such as economic, social or political exclusion, financial precarity, physical or psychological harms, and other institutional barriers "can be intimately related to, if not rooted in, the specific identities and realities shared by a particular group" (at para 45; see also para 36).

Satisfied that the role of intersectionality was now clarified, Karakatsanis J moved on to the test for section 15(1). She stated that, in adverse effects cases, evidence of disproportionate impact may be relevant at both steps of the inquiry – the steps are not "watertight compartments" (at para 49). At step one, courts may also "reasonably infer" a distinction based on adverse effects in cases where the disproportionate impact on a claimant group is "apparent and immediate" (at para 55, citations omitted). Relatedly, a claimant need not identify a specific comparator group for the purposes of establishing a distinction on protected ground(s) (at para 56).

At step two, Karakatsanis J reinforced her earlier discussion of intersectionality by recognizing that "discrimination cannot be neatly packaged into a single ground, and a person will often live with other circumstances, realities, or identities that may enhance or exacerbate their disadvantage" (at para 63). Put another way in the intervener factum of the National Association of Women and the Law (NAWL) and the Asper Centre (at para 5, available here), "[p]eople experience discrimination as whole persons, not as an aggregate of separate characteristics" (quoted in *Kanyinda* at para 63). Intersecting identities may also intensify the experience of discrimination based on a protected ground (at para 63).

Applying these principles to the case at hand, Karakatsanis J accepted the claim that the exclusion in section 3 of the *RCR* had a disproportionate impact on women refugee claimants, rejecting the Attorney General of Quebec's formalistic argument that "ineligibility for subsidized daycare is equally a barrier for men and women refugee claimants" (at para 70). The majority relied on an important holding from *Fraser* – another case involving a claim of sex-based adverse effects discrimination – that "two types of evidence are particularly helpful in establishing a disproportionate impact: evidence about the claimant group's situation and evidence about the results of the law" (*Kanyinda* at para 73).

Considering the first type of evidence, Ms. Kanyinda submitted an expert report from Dr. Jill Hanley which established that lack of access to affordable childcare negatively impacts women's participation in the workforce (at para 74) – an impact recognized in previous Supreme Court case law as well (at para 75). The specific challenges faced by women refugee claimants were supported by the expert evidence, including lack of access to informal childcare though support networks (at para 76). Focusing on the second type of evidence related to the impacts of the law, the expert evidence included interviews and focus groups with women refugee claimants which showed that "it is overwhelmingly the mother who stays home to care for the children if childcare is unaffordable or unavailable" (at para 79). It followed that women refugee claimants experienced the exclusion from childcare subsidies disproportionately compared to men. Here again the majority rejected the government's argument that the claimant needed to show that "only women refugee claimants were harmed" by the law; that argument was a misreading of *Fraser*'s requirement to prove disproportionate impact (i.e., that it is predominantly women who are affected by the law (at para 81, emphasis in original)). The evidence therefore satisfied the first step of the test for section 15(1) – the law created a distinction based on sex through its effects.

Turning to step two, Karakatsanis J noted several ways in which lack of access to subsidized childcare reinforced, perpetuated, and worsened the economic disadvantage of women refugee claimants – a group that is "already socio-economically vulnerable" (at para 87). The expert evidence once again established several impacts of the law: loss of job skills, gaps in employment that led to pay inequity, reduction in savings and financial security, and foregone educational and

vocational opportunities (at para 86). In turn, these impacts could lead to dependence on social assistance, French language-learning limitations, and barriers to societal integration (at para 86). While the high cost of unsubsidized childcare could be offset somewhat by the tax credit for childcare expenses, it did not eliminate the extra costs entirely (at para 88). Beyond the economic impacts, the exclusion of refugee claimants from the *RCR* further marginalized this group from Quebec society, including by "reinforcing stereotypes that refugee claimants come to Canada solely to exploit its social welfare benefits" (at para 89). Although the *RCR* had an ameliorative purpose overall, it was no answer to the discriminatory impact of the exclusion on women refugee claimants to say that other women benefitted from the law (at para 91).

Finally, Karakatsanis J reiterated the intersectional aspects of the claim, noting that the unique circumstances faced by women refugee claimants support the importance of looking beyond a single dimension of discrimination in order to "capture the full complexity and vulnerability of a claimant group's experience" (at para 90). Section 3 of the *RCR* therefore violated section 15(1) of the *Charter* on the basis of sex (at para 93).

Nor could the government justify the exclusion of refugee claimants as a reasonable limit under section 1 of the *Charter*. As required by the first step of *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, the majority was prepared to assume that Quebec's stated objective – limiting daycare subsidies to people with a sufficient link to Quebec – was pressing and substantial. They did note the government's limited section 1 evidence in this regard, however (at paras 97-99). Karakatsanis J also reminded the government that "this Court has long been cautious about finding an objective to be pressing and substantial based solely on budgetary considerations" (at para 99). It was at the second, rational connection step that the government's case proved to be fatal, because the record refuted its claim that refugee claimants lacked sufficient links to Quebec. Their connection was supported by international legal recognition of refugee claimants' rights and their eligibility for other benefits in Quebec such as work and study permits, healthcare, and schooling for their children (at paras 102-103). Ms. Kanyinda was therefore entitled to a constitutional remedy.

This was an appropriate case for a "reading in" remedy to correct the discriminatory exclusion of refugee claimants from section 3 of the *RCR*. Importantly given the Quebec Court of Appeal's narrower remedy, the majority did not limit reading in to refugee claimants holding a work permit, nor to women refugee claimants. All refugee claimant parents residing in Quebec are now entitled to subsidized childcare benefits as a result of this decision (at paras 111-112).

Concurring Judgment of Rowe J

Rowe J concurred with the majority that the exclusion of refugee claimants under section 3 of the *RCR* constituted sex discrimination under section 15(1) of the *Charter*. He therefore found it unnecessary to consider whether the exclusion was also discriminatory based on citizenship, immigration status, or refugee claimant status. On the latter two grounds, he agreed with Côté J's approach to the (non)recognition of new analogous grounds rather than that of the Chief Justice (at paras 118-119). Those contrasting approaches are described below. We place Rowe J's reasons immediately after the majority's because he offered "four additional points of clarification" to their analysis of section 15(1) (at para 115). One of those points is relevant to our focus in this post and concerns the place of intersectionality in section 15(1) claims.

On this point, Rowe J accepted that it was appropriate to consider multiple grounds of disadvantage affecting women refugee claimants (at para 147). However, he would have confined consideration of intersectionality to step two of the test for discrimination. For Rowe J, the majority's consideration of "intersecting identities and realities" at step one risked taking the inquiry beyond whether there was a distinction based on enumerated and analogous grounds (at para 150). He eschewed the idea of what he called "new 'hybridized' grounds defined by the various combinations of multiple forms of disadvantage" (at para 150), which he saw as "a major innovation within our jurisprudence" (at para 153). Rowe J was also wary of an approach that would, in a "disguised way … find discrimination on the basis of previously unrecognized analogous grounds" without undertaking the proper test for new grounds (at para 150). Instead, he saw intersecting forms of disadvantage as relevant to the second step of section 15(1), namely to whether the law reinforced, perpetuated or exacerbated disadvantage. For example, it was at this stage that the differences between refugee claimant women and other women were most apt (at para 156).

According to Rowe J, intersecting forms of disadvantage could also be relevant under section 1 of the *Charter*, specifically under the fourth balancing step of the test from *Oakes*. It was at that fourth step that he found section 3 of the *RCR* failed the justification analysis. Consideration of intersecting disadvantage here helped show how the deleterious effects of the exclusion of refugee claimants from subsidized childcare outweighed any salutary effects of section 3 (at paras 200-201). Beyond this point, Rowe J's section 1 reasons are lengthy and contain what could be called "clarifications" similar to those he offered for section 15(1). These we leave for another day.

Concurring Judgment of Wagner CJ

Wagner CJ acknowledged that the claim could have been resolved on the basis of sex discrimination as held by the majority. However, he preferred to focus on the ground of refugee claimant status as the "main pathway" for resolution of the case (at para 208). Because section 3 of the *RCR*, on its face, created a distinction that excluded refugee claimants, it was an instance of direct discrimination and under-inclusiveness if the distinction was based on a protected ground, whether enumerated or analogous (at paras 213-214).

The Chief Justice concluded that refugee claimant status was an analogous ground for five reasons. First was the fact that being a refugee claimant is a status that is apt to give rise to stereotypical reasoning that violates the dignity and freedom of members of the group. On this point, Wagner CJ acknowledged the prejudice against people who enter Canada seeking refuge from persecution and the accusations of cheating, queue-jumping and fraudulent claims levelled against them and serving as a basis for unequal treatment. Distinctions based on stereotyping rather than the true worth or ability of an individual were, for him, the first indicator and unifying principle for identifying analogous grounds (at para 220, citing *Miron v Trudel*, 1995 CanLII 97 (SCC), [1995] 2 SCR 418 at para 149, per McLachlin J).

In elaborating on his first reason, Wagner CJ stressed the similarities between the proposed analogous ground of refugee claimant status and the analogous ground of citizenship recognized in *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 as well as the grounds of race and national or ethnic origin enumerated in section 15(1) (at para 221). Discrimination based on non-citizenship was identified as the "companion of discrimination based

on race and national or ethnic origin" in *Andrews* (at 195, per LaForest J). Like discrimination based on non-citizenship, a distinction based on refugee claimant status could lead a person to have a sense of inferiority about their place in a community and deny their dignity and worth.

Second, Wagner CJ acknowledged the immutability of a group member's personal characteristics as another marker that identified analogous grounds (at para 222). This is the marker that a majority of the Court emphasized in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 (at paras 13-14, per McLachlin and Bastarache JJ). The Chief Justice found that refugee claimant status was an immutable characteristic because, like the status of citizenship, it was "not within the control of the individual" and "not alterable by conscious action" by the individual, as LaForest J put it in *Andrews* (at 195). He also relied on the reasons for the recognition of the analogous ground of marital status in *Miron*: that marital status "often lies beyond the individual's effective control" and the individual "exercises limited but not exclusive control over the designation" (at para 153 per McLachlin J). Like both citizenship and marital status, the exercise of state power is required to change an individual's refugee status; an individual cannot change those types of status by their own actions. Wagner CJ also pointed out that a decision to flee one's country of origin is not a "choice" and that, although refugee claimant status may be a temporary state, so too is the enumerated ground of age. As a final point on this second reason, he rejected the formalistic, immutability-focused approach of Côté J (and Rowe J who agreed with her on this point) in favour of a multifactor approach which better reflected the realities of refugee claimants (at para 223). This last point aligns the Chief Justice's reasons more closely with those of the concurring justices in *Corbiere* (at paras 59-62, per L'Heureux-Dubé J).

Wagner CJ's third point in favour of the recognition of this new analogous ground relied upon the fact that refugee claimants are a historically disadvantaged group (at paras 8, 11). Members of this group experience marginalization and stigmatization as well as stereotyping, they form a "distinct and insular minority," and, as a group that lacks political power, they are vulnerable to having their interests overlooked (at para 224). These factors identify ways in which refugee claimants are analogous to other groups identified by enumerated grounds, and why those other groups were enumerated in section 15(1).

Fourth, Wanger CJ recognized refugee claimants as a vulnerable and marginalized group. The varied causes for their barriers to integration in Canadian society include their situations of poverty or economic precarity, mental and physical health issues arising from exile, integration difficulties, uncertainty, language barriers, isolation and lack of social networks, and difficulties accessing both labour markets and social services (at para 225).

The Chief Justice's fifth and final reason for recognizing refugee claimant status was the existence of relevant protections in international instruments (at paras 226-227). While instruments such as the *International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20, July 2, 2009 (applying to non-nationals such as refugees and asylum seekers) and the *International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations Treaty Series 660: 195 (stating that "differential treatment based on citizenship or immigration status will constitute discrimination") are not binding in themselves, they support recognizing refugee claimant status as an analogous ground.

Similar to the majority's focus on a sub-group of women, Wagner CJ also addressed the fact that the challenged law did not affect all refugee claimants, noting that it was not necessary that it do so to be discriminatory (at para 215). It was enough that the distinction affected a part of the group, i.e., refugee claimants who were parents with children of childcare age.

Wagner CJ did not explicitly reference intersectionality as raised in the other judgments. As noted above, however, he did compare refugee claimant status, race, and citizenship as protected grounds (at para 221), noting the connections between these categories. He also recognized the particular impacts of section 3 of the *RCR* on refugee women, implicitly acknowledging intersectionality of sex and refugee claimant status (at para 208). As for his comparative analysis, the Chief Justice compared refugee claimants and those included in section 3 of the *RCR* in a straight-forward identification of the benefit denied to refugee claimants by section 3 that was available to other members of Quebec society (at para 214).

In applying the second step of the section 15(1) analysis, Wagner CJ had little difficulty finding that the distinction created by section 3 of the *RCR* denied refugee claimants the benefit and financial relief of subsidized daycare. That denial had an adverse impact because the cost of unsubsidized daycare was more than four times as much as the cost of subsidized daycare and had to be paid in advance of receiving the service (at para 236). Similar to the majority, Wagner CJ noted that the availability of a tax credit for childcare expenses did not counterbalance the adverse impact because it did not cover the entire cost difference; he also noted that it was not available at the time when the parent paid for the childcare (at para 236).

The distinction in section 3 of the *RCR* therefore had the effect of reinforcing, perpetuating or exacerbating the marginalization of refugee claimants (at para 242). Their exclusion "widens the gap between the historically disadvantage group and the rest of society rather than narrowing it" (at para 243, quoting *Quebec v A*, 2013 SCC 5 (Can LII) at para 332, per Abella J) and sent the message that refugee claimants and their children "[are] inferior and less deserving of benefits" (at para 244, quoting *Egan v Canada*, [1995] 2 SCR 51, 1995 CanLII 98 (SCC) at para 161, per Cory and Iacobucci JJ, dissenting). The second step of the section 15(1) test was therefore satisfied (at para 246).

Like the majority, Wagner CJ did not spend much time on the question of whether section 1 of the *Charter* justified the infringement of section 15(1). He agreed with Rowe J that the Quebec government failed the last step of the *Oakes* test because the deleterious effects of section 3 of the *RCR* outweighed its salutary effects (at para 250).

On the question of the remedy for the rights violation, Wagner CJ agreed with the majority that reading in was appropriate, with no need to limit this remedy to refugee claimants holding work permits (at para 255-256).

Dissenting Judgment of Côté J.

Although Côté's J's judgment in *Kanyinda* was the longest of the four, it did not tell us anything about grounds, intersectionality, context, or comparison that she had not already said in *Fraser*,

where she wrote her own dissenting reasons, and *Sharma,* where she concurred in the majority judgment written by Brown and Rowe JJ.

In *Kanyinda*, Côté J maintained the distinction in section 3 of the *RCR* was based on refugee claimant status and not sex because the cause of the adverse impact on Ms. Kayinda was her status; it was what differentiated her from other women (at paras 271, 296, 302). One of her main points was that because the Quebec government had acted to ameliorate the systemic and adverse impacts of parental responsibilities on women and were entitled to do so incrementally (at 285-287), excluding women with refugee claimant status was not discriminatory because that status was not a protected ground (at paras 290-91). Côté J accepted the government's point that their exclusion ensured the fiscal sustainability of subsidized daycare for everyone else (at para 335).

Although Côté J identified refugee claimant status as the cause of the adverse impact on Ms. Kanyinda, she insisted that it could not be recognized as an analogous ground. Her reason was simple: "it is not an immutable characteristic" (at para 346), engaging neither "actual" immutability or "constructive" or "attenuated" immutability (at paras 348, 358). For her, recognizing any new analogous ground is "fraught with consequences … as a 'constant marker of potential legislative discrimination'" (at para 352) and recognizing refugee claimant status would be contrary to the immutability cornerstone established in *Corbiere* (at para 353); any other indicators of analogous grounds must flow from immutability (at para 354). She stated that a group's vulnerability and marginalization are unrelated to immutability, even if their vulnerability and marginalization do overlap with being a discrete and insular minority and historically disadvantaged, both of which she conceded do overlap with immutability (at paras 356, 363). Instead, refugee claimant status is "inherently temporary" (at para 371) and changing that status "has little impact on an individual's personal identity" (at para 373).

Since there was no distinction based on sex, and refugee claimant status was not a protected ground, Côté J would have found no violation of section 15(1) – the sole judge to reach this conclusion.

Commentary

Justice Karakatsanis' Majority Judgment

It was somewhat surprising to see the majority state that "[t]his is not a case of direct discrimination" (at para 69). They could have approached this case as one of direct discrimination if they had focused on refugee claimant status, as the Chief Justice did. The majority's conclusion is also framed in terms of sex discrimination and not sex discrimination as it intersects with refugee claimant status (at para 93). Rather than being an inevitable approach, to treat this case as one of adverse effects discrimination was a choice. And it was an unusual choice because adverse effects claims have typically been more difficult to prove than direct discrimination claims (see e.g. Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19 Rev Const Stud 191). Perhaps for the majority, the challenges of an adverse effects claim were less daunting than the challenges of finding a new analogous ground, especially given the disagreement over the appropriate test for the latter inquiry. Perhaps as well the majority wanted to buttress the Court's

adverse effects sex discrimination analysis in *Fraser*, which suffered a setback in *Sharma*. Whatever the reason, the framing of the claim as being about sex, even with a consideration of the intersecting inequalities experienced by refugee claimant women, meant that the majority did not engage with aspects of refugee claimant status such as the systemic racism raised by some interveners (see e.g., the factum of the Canadian Association of Black Lawyers and Black Legal Action Centre (available here) at paras 18, 24). The only hint of engagement in the majority judgment came when they discussed the stereotyping of some refugee claimants as welfare cheats.

The majority's focus on sex means that the proper test for recognition of new analogous grounds, and the application of that test to refugee claimants and other migrants with precarious status, awaits another day.

On the other hand, the majority's reasons helpfully move the Court's jurisprudence on intersectionality forward. What they call "intersecting identities and realities" could have been termed "oppressions" to move the focus from personal characteristics onto the broader systemic forces that explain the lived experiences of refugee claimant women. We could also quibble with their suggestion that the point that not all members of the group need to be treated the same way for discrimination to be made out is an aspect of intersectionality (connections between grounds) rather than anti-essentialism (diversity within a group). And we have concerns with their statement that "adverse effects arise from the nexus between a distinction that may not be rooted in an enumerated characteristic and a subgroup that must share an enumerated ground" (at para 42, emphasis in original) if they truly meant to restrict this point to enumerated grounds rather than protected grounds (i.e., those that are enumerated or analogous). But the fact remains that this is the first decision where the Court really grapples with an intersectional analysis and endeavours to envelop it in both steps of the section 15(1) framework. Their approach means that grounds which are not currently recognized, such as poverty, can be brought into the equality rights analysis as long as they are connected to discrimination based on an enumerated or analogous ground. This framework should prove very useful for equality rights litigants framing future claims, and we look forward to further refinement of the framework from the Court.

Chief Justice Wagner's Concurrence

The Chief Justice's concurring judgment is notable for moving beyond the narrow immutability framework in *Corbiere*, which has been in place since 1999 despite growing calls to revisit the test for analogous grounds (see e.g. Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013), 10 J L & Equality 37; Jessica Eisen, "Grounding equality in social relations: suspect classification, analogous grounds and relational theory" (2016) 42 Queen's LJ 41). The other factors considered by the *Corbiere* minority included whether the characteristic was important to identity, personhood, or belonging; whether it aligned with a lack of political power, disadvantage, or vulnerability to disadvantage; and whether it was included in human rights legislation (*Corbiere* at para 60). In *Kayinda*, Wagner CJ added the need for an approach that recognized contemporary forms of discrimination (at para 218); the similarity of refugee claimant status to the recognized grounds of non-citizenship, race, and national or ethnic origin (at para 221); and the relevance of international instruments (at para 226). The combination of reasons in favour of recognizing refugee claimant status as a new analogous ground was overwhelming.

Justice Côté's Dissent

Two points about Côté J's judgment illustrate some of our concerns with the majority's decision to leave aside the question of analogous grounds. Côté J feared acceptance of refugee claimant status "would throw open the door to the recognition of most other immigration statuses" (at para 385) – a clear example of a "floodgates" argument. In a similar vein, she condemned using an intersectional approach by considering non-citizenship, race, and national origin alongside refugee claimant status, as the Chief Justice did. For Côté J, this would set too low a threshold (at paras 386, 389) – a slippery slope argument claiming that one seemingly harmless acceptance of a new analogous ground would set off a chain reaction of unintended, catastrophic consequences. We see similar catastrophizing in the Alberta referendum questions which we reference below.

Côté J also made a great deal of the tax credit available to refugee claimants for the non-subsidized childcare that they paid for before they received either the services or the tax credit. For example, she wrote that the tax credit meant the difference between subsidized and non-subsidized childcare was "minimal" and any distinction would "therefore not be discriminatory" (at para 276). She even did the math – twice – stating the evidence showed that in 2020 the net cost of a subsidized childcare space to a single-parent family with one child and an income of $27,500 was only $8.35 per day and, while the non-subsidized gross cost was $38 per day, the net cost after the tax credit was only $9.66 per day (at paras 328, 394). But consider this: if a refugee claimant needed childcare for five days a week, 50 weeks of the year, she would have to pay $9,500 per year ($38/day x 250 workdays per year) from her $27,500 annual gross income — just over one-third. That would leave her and her one child a gross monthly income of $1,500 to live on. Côté J's judgment, as a whole, is abstract and formalistic, but when she asserted, after doing the math, that refugee claimants have "affordable options for access to a daycare facility" (at para 394), nothing better shows how distant her judgment is from the lived experience of Ms. Bijou Cibuabua Kanyinda.

Concluding Thoughts

The failure to consider refugee claimant status as a protected ground under section 15(1) of the *Charter* by a majority in *Kanyinda* is an unfortunate outcome for Alberta. We are facing several questions on the October 19 referendum ballots that pertain to the place of those with precarious immigration status in our society. These questions include those asking us to consider whether Alberta should:

- Take "increased control over immigration for the purposes of decreasing immigration to more sustainable levels, prioritizing economic migration and giving Albertans first priority on new employment opportunities"
- Mandate that "only Canadian citizens, permanent residents and individuals with an Alberta approved immigration status will be eligible for provincially-funded programs, such as health care, education and other social services"
- Require "all individuals with a non-permanent legal immigration status to reside in Alberta for at least 12 months before qualifying for any provincially-funded social support programs"

- Charge "a reasonable fee or premium to individuals with a non-permanent immigration status living in Alberta for their and their family's use of the healthcare and education systems"

As many commentators have noted (see e.g., Parkland Institute, "Referendum questions blame minorities for Alberta's challenges;" Canadian Civil Liberties Association, "Alberta's Referendum: Civil Liberties, Democracy and the Questions Receiving Less Attention;" "The Muttart Foundation's Response to the Immigration Questions Included as part of the October 19th 2026, Provincial Referendum"), these questions are either dog whistles for systemic racism or omit essential information on current immigration trends and practices (and for some of that information, see Paula Simons, "'Defeat These Questions': A Senator's Fiery Rebuke to the UCP Referendum"). They seek to garner support for denying benefits to those awaiting more permanent immigration status and more broadly to scapegoat immigrants and refugees for things like Alberta's unemployment rate and health care delays.

In responding to these questions, it would have been helpful to have more clear doctrinal support for the proposition that the measures discussed, if implemented, would amount to discrimination based on immigration status. Even the Chief Justice's judgment, confined to refugee claimant status, does not deal with other precarious forms of status. However, his multifactor analysis points to the conclusion that these forms of status should also be recognized as analogous grounds, and that the kinds of measures discussed in these referendum questions would appear to be discriminatory on those grounds.

It is also regrettable that the judgments in *Kanyinda* did not deal more directly with the institutional and systemic racism underlying these types of policies (Quebec's childcare policy included). As noted by Canadian Association of Black Lawyers and Black Legal Action Centre, "policies restricting access to social services for asylum seekers [are] not only punitive but designed to deter migration from 'undesirable countries', thereby reinforcing racialized perceptions;" and also "reinforcing systemic barriers for racialized migrants" (at para 23). In our view, Alberta should refrain from going down this path regardless of the outcome of the referendum if it wants to avoid a section 15(1) *Charter* claim.

One of the authors, Koshan, participated in the intervention of NAWL and the Asper Centre in Kanyinda*. Both authors thank Laura Noble for her research assistance for our broader project on* Kanyinda*.*

This post may be cited as: Jennifer Koshan and Jonnette Watson Hamilton, "Grounds for (In)Equality: The Supreme Court of Canada Grapples with Intersectionality in *Kanyinda*" (16 October 2026), online: ABlawg, http://ablawg.ca/wp-content/uploads/2026/10/Blog_JK_Kanyinda_Intersectionality.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg

THE UNIVERSITY OF CALGARY FACULTY OF LAW BLOG

cc BY NC ND