

Schedule "C" - Draft Factum

Docket: COA-26-CV-0836

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**THE REGIONAL MUNICIPALITY OF WATERLOO and ATTORNEY
GENERAL FOR ONTARIO**

Applicants (Appellants)

-and-

NAMED RESPONDENTS AND PERSONS UNKNOWN

Respondents
(Respondents)

**DRAFT FACTUM OF THE ATTORNEY GENERAL OF
ALBERTA, INTERVENER**

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PART I – OVERVIEW

1. The Attorney General of Alberta (Alberta) intervenes in this appeal to clarify the applicable jurisprudential principles for identifying analogous grounds under section 15 of the *Charter*, and specifically whether “homelessness” is analogous to the enumerated grounds.

2. This appeal may be the first time an appellate court determines whether homelessness is an analogous ground under section 15 of the *Charter*. This Court’s decision may have wide-ranging implications for all provinces in Canada, including Alberta, as homelessness has not been recognized as an analogous ground by any appellate court in the country.

3. The analogous grounds inquiry asks whether a proposed ground is immutable – a personal characteristic that either cannot be changed, or that is “constructively immutable”. The constructive immutability inquiry must focus on whether the proposed ground is connected to a core aspect of an individual’s personal identity, like religion or citizenship.

4. Homelessness is not analogous to the enumerated grounds in section 15 of the *Charter* as it is neither truly immutable nor an integral aspect of personal identity. Homelessness is not a personal characteristic that is an important and desired part of a person’s sense of identity like religion or citizenship. Rather, homelessness is a temporary circumstance that most people would prefer to change.

PART II – FACTS AND STATUTORY SCHEME

5. Alberta takes no position on the facts or the outcome of this appeal.

PART III – ISSUES

6. Alberta's submissions focus on the proper jurisprudential approach to recognizing analogous grounds under section 15 of the *Charter* and whether homelessness is analogous to the enumerated grounds in section 15.
7. Alberta makes no submissions on any of the other issues in this appeal.

PART IV – LAW AND ARGUMENT

A. Section 15 protects against discrimination based on immutable traits

8. The *Canadian Charter of Rights and Freedoms* was enacted in 1982. Section 15 came into effect three years later in 1985, and states:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹

9. The general purpose of section 15 is “to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration”.²

10. Section 15 “reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups”.³ To prove a *prima facie* violation of section 15(1) a claimant must demonstrate that the impugned law or state action:

- i) On its face or in its impact, creates a distinction based on

¹ [Canadian Charter of Rights and Freedoms](#), Schedule B to the *Canada Act 1982*, s [15](#).

² [Corbiere v Canada \(Minister of Indian and Northern Affairs\)](#), [1999] 2 SCR 203 at para [5](#).

³ [Fraser v Canada \(Attorney General\)](#), 2020 SCC 28 at para [27](#); [Kahkewistahaw First Nation v Taypotat](#), 2015 SCC 30 at paras [19-20](#).

enumerated or analogous grounds; and

- ii) Imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.⁴

11. Section 15 recognizes that certain groups have historically suffered negative and demeaning effects. Such affronts to human dignity should be prohibited in order to promote a society where all persons are considered worthy of respect, and nobody is arbitrarily disadvantaged due to their innate personal characteristics.⁵

B. Analogous grounds must be immutable or constructively immutable

12. The enumerated grounds set out in section 15 are not exhaustive. Section 15(1) also prohibits discrimination on grounds analogous to those explicitly enumerated. Analogous grounds were first identified in *Andrews*,⁶ and the leading case on the recognition of new analogous grounds is *Corbiere*.⁷

13. Enumerated and analogous grounds serve to screen out those claims “having nothing to do with substantive equality and hel[p] keep the focus on equality for groups that are disadvantaged within the larger social and economic context”.⁸

14. The common ground shared by all enumerated and analogous grounds in section 15 is the “immutability” of personal characteristics, including those that are “constructively immutable”.⁹ Such grounds either cannot be changed, like race, or

⁴ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27; *R v Sharma*, 2022 SCC 39 at para 28; *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para 48.

⁵ See e.g. *Vriend v Alberta*, [1998] 1 SCR 493 at para 67.

⁶ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

⁷ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 193.

⁸ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 193; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19.

⁹ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 193; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13.

are “changeable only at unacceptable cost to personal identity”, like religion or citizenship.¹⁰ Analogous grounds are those that “the government has no legitimate interest in expecting us to change to receive equal treatment under the law”.¹¹

15. The enumerated grounds are “legislative markers of suspect grounds associated with stereotypical, discriminatory decision making”.¹² They are a legal expression of a general characteristic, not a contextual fact-based conclusion about whether discrimination exists in a given case. The grounds “conceptually identify the sorts of claims” that fall under section 15.¹³

16. Distinctions on enumerated or analogous grounds may or may not be discriminatory in a given circumstance, but the grounds “stand as constant markers” of potential discrimination.¹⁴ Once a distinction on an enumerated or analogous ground is established, the contextual and fact-specific inquiry proceeds to determine whether the distinction is discriminatory in that case.¹⁵

C. Constructive immutability is tied to personal identity

17. The recognition of analogous grounds is rare. As the Supreme Court of Canada noted in *Dickson*, “new analogous grounds are not lightly identified”.¹⁶

18. The first criteria in identifying an analogous ground is looking for grounds that are similar to the grounds enumerated in section 15 – race, national or ethnic

¹⁰ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 193; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13.

¹¹ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 193; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13.

¹² *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 7.

¹³ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 11.

¹⁴ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 8-10.

¹⁵ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 11.

¹⁶ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 195.

origin, colour, religion, sex, age, or mental or physical disability.¹⁷ These grounds often serve as the basis for stereotypical decisions made not on the basis of merit.¹⁸

19. The “thrust of identification of analogous grounds” is “to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment”.¹⁹

20. The principled approach for recognizing constructively immutable analogous grounds was summarized and outlined in *Corbiere*, and has been regularly reaffirmed by the Supreme Court of Canada as the governing test for recognizing new analogous grounds.²⁰

21. As the Supreme Court of Canada explained in *Corbiere*, constructively immutable grounds are “personal characteristic[s] that [are] changeable only at unacceptable cost to personal identity”.²¹ Other factors identified in the cases, such as the fact that a decision adversely impacts on a discrete and insular minority or group historically discriminated against, “flow from the central concept of immutable or constructively immutable personal characteristics”.²² In other words, the central focus of a constructive immutability inquiry is whether a proposed ground is a core aspect of one’s personal identity.

22. Both the majority and concurring opinions in *Corbiere* recognized

¹⁷ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para [13](#).

¹⁸ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para [13](#).

¹⁹ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para [13](#).

²⁰ See e.g. *Withler v Canada (Attorney General)*, 2011 SCC 12 at para [33](#); *Quebec (Attorney General) v A*, 2013 SCC 5 at paras [190](#), [194](#), [334-335](#), and [416](#); *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para [193](#).

²¹ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para [13](#) [emphasis added].

²² *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para [13](#) [emphasis added].

Aboriginality-residence as an analogous ground because “the distinction goes to a personal characteristic essential to a band member’s personal identity, which is no less constructively immutable than religion or citizenship”.²³

23. As Justice L’Heureux-Dubé elaborated, a band member’s decision to live on- or off-reserve is “an important one to their identity and personhood, and is therefore fundamental”.²⁴

24. The focus on personal identity predates *Corbiere*. In recognizing sexual orientation as an analogous ground, the Supreme Court of Canada noted that sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”.²⁵

25. This test for constructively immutable analogous grounds, and its focus on personal identity, continues to be re-affirmed in recent Supreme Court of Canada decisions. In *Dickson*, the majority confirmed that grounds which are “changeable only at unacceptable cost to personal identity” are constructively immutable.²⁶

26. In *Kanyinda*, all three justices that engaged in the analogous grounds inquiry accepted that “constructively immutable” means “changeable only at unacceptable cost to personal identity”.²⁷ Both Côté and Rowe JJ re-affirmed that analogous

²³ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 14 (McLachlin and Bastarache JJ, agreeing with L’Heureux Dubé J’s analysis) [emphasis added].

²⁴ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 62 (L’Heureux Dubé J, concurring) [emphasis added].

²⁵ *Egan v Canada*, [1995] 2 SCR 513 at 528 [emphasis added]; See similarly *M v H*, [1999] 2 SCR 3 at para 64; *Vriend v Alberta*, [1998] 1 SCR 493 at para 90.

²⁶ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 193 [emphasis added]; See similarly para 350 (Martin and O’Bonsawin JJ, dissenting).

²⁷ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para 119 (Rowe J, dissenting, adopting Côté J’s analysis), para 217 (Wagner J, concurring), para 348 (Côté J, dissenting).

ground recognition must remain grounded in the “central concept” of immutability.²⁸

D. The *Kanyinda* decision did not change the analogous grounds analysis

27. In *Kanyinda*, the Supreme Court of Canada was asked to recognize a new analogous ground of “refugee claimant status”. The six-member majority left “the issue of whether to recognize such an analogous ground for another day”.²⁹

28. Since the majority declined to address the issue or comment on the test for analogous grounds, *Kanyinda* did not change the law on analogous grounds in any way. Further, the majority (Côté J and Rowe J) of the three justices who addressed the issue of whether refugee claimant status should be recognized as an analogous ground decided that it should not.³⁰

29. Further, even though Wagner CJ’s concurring opinion did not focus on connection to personal identity as the central aim for a constructive immutability analysis, he nonetheless acknowledged that “the ‘immutable’ nature of an individual’s personal characteristics, including those that are ‘constructively immutable’, that is changeable only at an unacceptable cost to personal identity, such as religion or citizenship is generally a common denominator for all analogous grounds”.³¹

30. Wagner CJ’s approach of moving away from the “central criterion” of immutability towards “a more flexible and progressive approach” to section 15,³² was

²⁸ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para [119](#) (Rowe J, dissenting, adopting Côté J’s analysis), para [348](#) (Côté J, dissenting).

²⁹ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para [26](#).

³⁰ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para [119](#) (Rowe J, dissenting, adopting Côté J’s analysis), para [383](#) (Côté J, dissenting).

³¹ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para [217](#) (Wagner J, concurring) [emphasis added].

³² *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para [218](#) (Wagner J, concurring).

not accepted by any of the other eight justices in *Kanyinda*, nor is it consistent with Supreme Court of Canada jurisprudence on analogous grounds, outlined above.

31. As Côté J (Rowe J concurring) pointed out, a “multifactorial approach” is contrary to the *Corbiere* framework because it treats immutability “just like any other factor taken into consideration”, rather than the “central concept”.³³

32. Returning to the key focus of “personal identity”, Côté J noted that refugee status has little impact on personal identity, and “certainly does not define individuals in terms of personal identity as strongly as other ... grounds, such as religion or citizenship”.³⁴

33. It differs from citizenship which “serves a highly important symbolic function as a badge identifying people as members of the Canadian polity”³⁵ or religion, which involves “freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment”.³⁶ As Côté J noted, “[s]uch a grounding in identity does not accompany refugee claimant status”.³⁷ The same considerations apply to homelessness.

E. Homelessness is not an analogous ground

34. The *Corbiere* test must be applied when considering whether homelessness is an analogous ground. The court must consider whether homelessness is a personal characteristic that is truly immutable, like race, or a personal characteristic

³³ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at paras [353-354](#) (Côté J, dissenting).

³⁴ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at para [373](#) (Côté J, dissenting).

³⁵ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 196.

³⁶ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para [39](#).

³⁷ *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 at paras [373-374](#) (Côté J, dissenting) [emphasis added].

essential to one's personal identity, like citizenship or religion.

35. Homelessness is not truly immutable. It is the transitory state of being without shelter – a temporary situation which individuals and governments actively seek to change and improve. Nor is homelessness a personal characteristic that reflects a key component of who someone is as a person.

36. Courts have noted that traits like poverty or homeless are vague and difficult to define, and that impecunious persons are an amorphous group who are not united by a single shared personal characteristic.³⁸ As the Ontario Supreme Court noted in *Tanudjaja*, “[b]eing without adequate housing is not a personal characteristic”,³⁹ and being unable to afford adequate housing is “not a basis for distinguishing an analogous group”.⁴⁰

37. Poverty and homelessness are neither immutable or constructively immutable, because an individual's socioeconomic situation can change, and the conditions of poverty or homelessness are not personal characteristics akin to race, religion, or other personal traits.⁴¹ In contrast to being an important and desired part of a person's sense of identity like religion or citizenship, homelessness or poverty are circumstances most people would prefer to change.

³⁸ *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at paras 129-134, aff'd *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, leave to appeal refused, [2015 CanLII 36780](#) (SCC); *R v Banks*, 2007 ONCA 19 at paras 99-104; *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17 at paras 42-43.

³⁹ *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at para 130; See similarly *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 at para 126; *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at para 231.

⁴⁰ *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at para 131.

⁴¹ *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at paras 129-130; *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17 at paras 42-43.

38. Far from a characteristic which “the government has no legitimate interest in expecting us to change”, homelessness is a temporary hardship which governments and individuals actively seek to ameliorate.⁴² As the Nova Scotia Court of Appeal noted, “the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances ... but to eradicate that mutable characteristic of poverty itself”.⁴³ The same logic applies to homelessness. Homelessness “is not an adopted emblem of identity, like religion ... that the individual observes peacefully free of government mending”.⁴⁴

39. Homelessness is a social condition resulting from poverty or a lack of access to resources. It is not a core aspect of one’s personal identity. It does not meet the *Corbiere* test for an analogous ground.

PART V – ORDER SOUGHT

40. Alberta takes no position on the order to be granted in the appeal.

41. Alberta does not seek costs and asks that no order as to costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 20th day of October 2026.

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⁴² See e.g. <https://www.alberta.ca/homelessness-response>

⁴³ *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17 at para 42.

⁴⁴ *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17 at para 42.

Schedule “A” – Authorities Cited

	Jurisprudence
1.	<i>Abbotsford (City) v Shantz</i> , 2015 BCSC 1909
2.	<i>Andrews v Law Society of British Columbia</i> , [1989] 1 SCR 143
3.	<i>Boulter v Nova Scotia Power Incorporation</i> , 2009 NSCA 17
4.	<i>Corbiere v Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 SCR 203
5.	<i>Dickson v Vuntut Gwitchin First Nation</i> , 2024 SCC 10
6.	<i>Egan v Canada</i> , [1995] 2 SCR 513
7.	<i>Fraser v Canada (Attorney General)</i> , 2020 SCC 28
8.	<i>Kahkewistahaw First Nation v Taypotat</i> , 2015 SCC 30
9.	<i>M v H</i> , [1999] 2 SCR 3
10.	<i>Quebec (Attorney General) v Kanyinda</i> , 2026 SCC 7
11.	<i>Quebec (Attorney General) v A</i> , 2013 SCC 5
12.	<i>R v Banks</i> , 2007 ONCA 19
13.	<i>R v Sharma</i> , 2022 SCC 39
14.	<i>Syndicat Northcrest v Amselem</i> , 2004 SCC 47
15.	<i>Tanudjaja v Attorney General (Canada)</i> , 2013 ONSC 5410
16.	<i>Tanudjaja v Canada (Attorney General)</i> , 2014 ONCA 852
17.	<i>Tanudjaja, et al. v. Attorney General of Canada, et al.</i> , 2015 CanLII 36780
18.	<i>The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained</i> , 2023 ONSC 670
19.	<i>Vriend v Alberta</i> , [1998] 1 SCR 493
20.	<i>Withler v Canada (Attorney General)</i> , 2011 SCC 12

Schedule “B” – Statutes Cited

	Statutes	Sections
1.	<i>Canadian Charter of Rights and Freedoms</i> , Schedule B to the <i>Canada Act 1982</i> .	s 15

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