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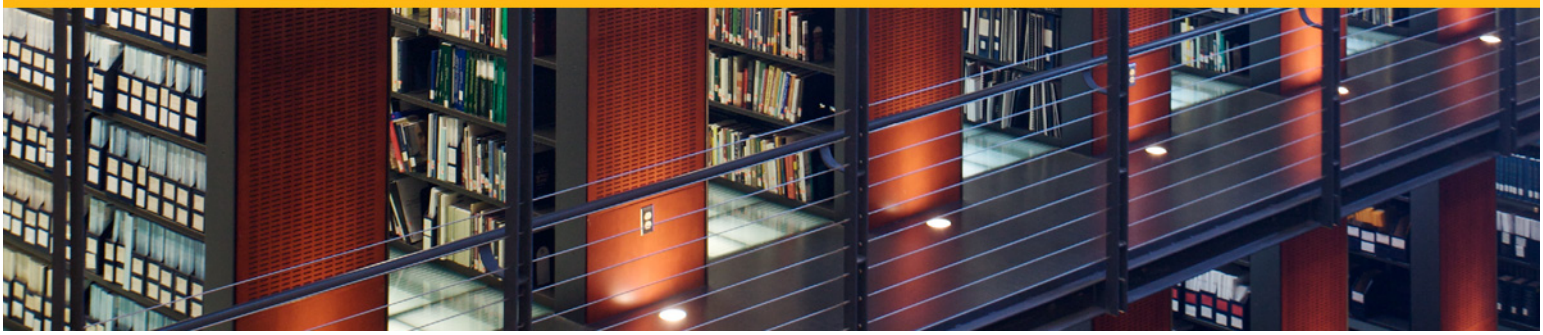

Section 15 of the *Canadian Charter of Rights and Freedoms*: The Development of the Supreme Court of Canada's Approach to Equality Rights Under the Charter

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Section 15 of the Canadian Charter of Rights and Freedoms*: The Development of the Supreme Court of Canada's Approach to Equality Rights under the Charter*
(Background Paper)

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CONTENTS

SECTION 15 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS:* THE DEVELOPMENT OF THE SUPREME COURT OF CANADA'S APPROACH TO EQUALITY RIGHTS UNDER THE CHARTER

1 INTRODUCTION

Section 15 of the *Canadian Charter of Rights and Freedoms* (the Charter)[1] guarantees the equal protection and equal benefit of the law to all. It 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Several groups seeking to advance their rights in Canadian society have relied on the equality provisions set out in section 15(1) of the Charter,[2] but the Supreme Court of Canada's formulation of the section 15 test – the analytical framework against which courts evaluate section 15 claims – has undergone significant revision since the Court's first such decision in 1989. This paper will focus on the current section 15 test, which was articulated by the Court in 2008 in its decision on a fishing rights case, *R. v. Kapp*.[3] To understand the current formulation of the test, it is helpful to review the Court's previous thinking, particularly with respect to the section 15 decisions in *Andrews v. Law Society of British Columbia* [*Andrews*][4] and in *Law v. Canada (Minister of Employment and Immigration)* [*Law*].[5]

In its decision in *Kapp*, and in some subsequent cases, the Supreme Court identified flaws in the section 15 test it had established earlier in *Law*, and the Court argued for a return to the principles it had originally set out in *Andrews*. This paper reviews the principles the Supreme Court had initially laid out in those cases, and then proceeds to the current section 15 test set out in *Kapp* and in subsequent section 15 decisions.

2 A BRIEF HISTORY OF SECTION 15 DECISIONS

Although the Charter became law in 1982, section 15 did not come into effect until 1985. This delay was intended to give Parliament and provincial and territorial governments enough time to bring their legislation into conformity with the Charter's equality provisions.[6] The Supreme Court rendered its first section 15 decision in 1989 in *Andrews*. Ten years later, in *Law v. Canada*, the Court created a multi-step analytical framework by which it sought to formalize the section 15 test. The *Law* test garnered a great deal of criticism from the legal academic community over the decade during which it was applied. In its 2008 decision in *Kapp*, the Court revisited the test and took a different approach, setting aside the rigid structure of the *Law* test.

2.1 *ANDREWS*: THE REJECTION OF FORMAL EQUALITY

2.1.1 DEFINING EQUALITY

In *Andrews*, the Supreme Court heard the claim of a British lawyer who sought to practise law in British Columbia but was barred from doing so because he was not a Canadian citizen. The Court faced the dual challenge of defining the rights set out in section 15(1), including the contents of an equality guarantee, and of guiding courts on how to identify discrimination. The decision is known for the Court's rejection of "formal equality" in favour of what would come to be known as "substantive equality."

The contrasting principles of formal and substantive equality have been used at different times to understand guarantees of equality under the Charter and other legislation. Under the formal equality principle, laws are applied in a similar manner to all those who are "similarly situated." This approach had characterized earlier equality jurisprudence under the *Canadian Bill of Rights*.

Although a formal equality analysis may, at first glance, seem like a fair approach, it can result in inequality. In his interpretation of section 15(1) in the *Andrews* decision, Justice McIntyre used the example of the Supreme Court's 1979 decision in *Bliss v. Attorney General of Canada* to illustrate how this inequality can come about.[7] In *Bliss*, which was decided under the *Canadian Bill of Rights*, the claimant argued that she was discriminated against on the basis of sex because her pregnancy disentitled her to unemployment benefits. The Court dismissed her claim, holding that because all pregnant persons were treated alike under the impugned law there was no discrimination.

Justice McIntyre unequivocally rejected formal equality as a "seriously deficient" conceptualization. He charged that the principle of treating likes alike could have been used to justify Adolph Hitler's Nuremburg laws, or the 1896 U.S. racial segregation decision in *Plessy v. Fergusson*, which condoned a "separate but equal" treatment of marginalized groups.[8]

Justice McIntyre proceeded to describe what he viewed as a preferable approach to equality analysis:

> [T]he purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.

Although Justice McIntyre did not use the term in *Andrews*, and neither did the Supreme Court until 1997,[9] this view of equality – in which it is understood that differential treatment may be necessary in order for certain groups to achieve equal status in a society – became known as "substantive equality." The principle of substantive equality would eventually become a major focus of the Court's understanding of section 15.

2.1.2 Defining Discrimination

Beyond defining equality, in his exploration of "the right to the equal protection and equal benefit of the law without discrimination" Justice McIntyre provided a definition of discrimination. Drawing upon his review of human rights case law, he held that discrimination is

> a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[10]

Justice McIntyre focused on the effects of discrimination. He specifically rejected an analysis that would have required discriminatory intent, emphasizing instead the "impact of the discriminatory act or provision upon the person affected."[11]

2.1.3 Section 1

A further element of the *Andrews* decision that provides useful background to a discussion of the *Law* test related to the application of section 1 of the Charter to section 15 claims. Section 1 stipulates that the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In Charter litigation, claimants must establish that the law or the government policy or decision they are challenging constitutes a breach of a particular section of the Charter. The government must then demonstrate that this breach is justified because it is a reasonable limit on the rights and freedoms of the claimant. In *Andrews*, Justice McIntyre anticipated that courts would have difficulty determining whether an infringement of section 15 had taken place without considering whether the alleged discrimination was justified. He emphasized, however, that it is essential for courts to keep their reasoning on sections 15 and 1 distinct:

> It is … important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement.[12]

2.1.4 Unresolved Issues

As will be seen in the following discussion, the Supreme Court has continued to struggle with this analytical distinction. It has also revisited the definition of discrimination several times. Although *Andrews* set the precedent for deciding section 15 claims, rejecting the formal equality analysis that had been the standard in much of the previous equality case law, the decision did not provide an explicit test for courts to apply. Ten years after *Andrews* was decided, the Court created such a test in its decision in *Law*.

2.2 *LAW*: THE FORMALIZATION OF THE SECTION 15 TEST

Between *Andrews* and *Law*, the Supreme Court released at least 30 decisions that had some bearing on section 15,[13] but as Justice Iacobucci noted in his introduction to the *Law* decision, the Supreme Court had struggled with its conception of section 15. Writing for a unanimous Court, he described section 15 as "perhaps the Charter's most conceptually difficult provision"[14] and made reference to the divisions within the Court with respect to the proper interpretation of the Charter's equality provisions.

The matter before the Court in this case was a challenge by a young widow, Nancy Law, of two provisions of the *Canada Pension Plan*. The provisions allow for spouses to receive survivor benefits if, at the time of their spouse's death, they are over the age of 35, or disabled, or have dependent children. Ms. Law was 30, able-bodied and childless, and so was denied a survivor's benefit. She alleged that the provisions were discriminatory on the basis of age.

Although Ms. Law's claim was unsuccessful, the Court used her case to set out a framework that could guide lower courts in their evaluation of section 15 claims. Justice Iacobucci stated that he intended to create a flexible framework, following in the tradition of *Andrews*:

> In accordance with McIntyre J.'s caution in *Andrews* … I think it is sensible to articulate the basic principles under s. 15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the *Charter* must be purposive and contextual. The guidelines which I review below are just that – points of reference which are designed to assist a court in identifying the relevant contextual factors in a particular discrimination claim, and in evaluating the effect of those factors in light of the purpose of s. 15(1).[15]

Despite Justice Iacobucci's intention to create flexible guidelines, the effect of the *Law* decision was the opposite: the creation of a rigid and complex test. The *Law* test has been summarized as follows:

> - The challenged law *imposes* (directly or indirectly) on the claimant *a disadvantage* (in the form of a burden or withheld benefit) in comparison to other *comparable persons*;
> - The disadvantage is based on a ground listed in or analogous to a ground listed in s. 15; and
> - The disadvantage also constitutes an *impairment of the human dignity* of the claimant.[16] [italics added]

The claimant was required to prove these three components on a balance of probabilities, meaning that a court would need to find that it is more likely than not that a proposition the claimant advances is true. This summary of the test is somewhat deceptive, however. Although it may appear that there are only three parts to the test, each component includes subparts, all of which the claimant had to prove. These will be discussed in turn.

2.2.1 Imposing a Disadvantage in Comparison with Other Comparable Groups

Although formulated as a single step, the first component of the *Law* test in fact had two parts. Claimants had to prove, first, that the law or policy they were challenging imposed a disadvantage, and, second, that this disadvantage existed in comparison with the situation of other, comparable, persons.

a) Imposing a Disadvantage

In its attempts to define discrimination, one of the features the Supreme Court has emphasized since *Andrews* is the notion that a distinction exists between the claimant and others that imposes a disadvantage on the claimant, which results in direct or indirect discrimination.

- A claim of direct discrimination was made in *Law* with respect to a surviving spouse being denied survivor benefits because of her age.
- A claim of indirect discrimination was made in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union*, also known as *Meiorin*.[17] In this case a female firefighter argued that the provincial law that set out aerobic standards for firefighters was discriminatory. Although the law did not directly discriminate by explicitly excluding female firefighters, its effect was to indirectly discriminate by excluding the vast majority of women by means of physical criteria held by the Court to be beyond the standard necessary for the safe and efficient performance of the job.

b) Comparable Groups

Under the *Law* test, claimants had to demonstrate that a distinction was made between them and persons with whom they share relevant characteristics except the one that forms the basis of the distinction. This group of persons is referred to as the "comparator group." On the facts in *Law*, the claimant could compare her treatment, specifically the denial of a survivor benefit, to that of survivors aged 35 or older, as they shared relevant personal characteristics other than age.

2.2.2 Listed or Analogous Grounds

Section 15(1) of the Charter lists seven prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. These are known as the listed or "enumerated" grounds. The Supreme Court has not interpreted this list as exhaustive, however. The use of the words "in particular" before this enumeration suggests that it was intended to be an open list. In *Andrews*, the Court recognized the first analogous ground: that of citizenship.

Analogous grounds are personal characteristics that, like the enumerated grounds, are "immutable, difficult to change, or changeable only at unacceptable personal cost."[18] Once an analogous ground is established in case law, it functions in the same way as any of the enumerated grounds and can form the basis of future equality claims.

Claimants have to establish that the distinction made between them and others is based on an enumerated or analogous ground. Alternatively, they can argue for the establishment of a new analogous ground. Thus far, citizenship, sexual orientation, marital status and "Aboriginality-residence" have been recognized as analogous grounds.[19] The latter means that the Charter now prohibits discrimination against First Nations people on the basis that they live off-reserve.

2.2.3 Impairment of Human Dignity

The final component in the *Law* test was the requirement that claimants establish that their human dignity was impaired by the imposed burden or withheld benefit. The Court set out four contextual factors to consider in determining whether, in this regard, the distinction amounts to discrimination. It would appear that the Supreme Court has since abandoned the human dignity component of the *Law* test (as will be discussed later), and so these factors need not be discussed in detail. However, because the burden on claimants was central to the Court's reasoning in subsequent formulations of the test, the four contextual factors are listed here to give a complete view of what the *Law* test required claimants to establish:

- pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group
- the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity or circumstances of the claimant or others
- the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society
- the nature and scope of the interest affected by the impugned law

2.2.4 Critiques of *Law*

Although some commentators applauded the Supreme Court's attempt in *Law* to provide structure to section 15(1) analysis,[20] the *Law* decision, and the subsequent section 15(1) jurisprudence it generated, received a significant amount of criticism. Much of this focused on the human dignity test, comparator groups and, more generally, on returning to a formal equality perspective rather than applying the substantive equality standard used in *Andrews*. These will be discussed below.

3 *R. V. KAPP*: THE BEGINNING OF THE END OF THE *LAW* TEST

The Supreme Court continued to apply the *Law* test to its analysis of section 15 claims from 1999 until 2008, when it rendered its decision in *R. v. Kapp*. This case involved a section 15 claim brought by a group of mostly non-Aboriginal commercial fishers who challenged certain licences issued under the federal Aboriginal Fisheries Strategy. They argued that the Strategy, which granted additional fishing rights to three First Nations, discriminated against the commercial fishers on the basis of race.

Kapp was the first decision in which the Supreme Court signalled some dissatisfaction with the *Law* test. It is significant for three reasons. First, the Court reaffirmed its commitment to employing a substantive equality analysis in evaluating section 15 claims. Second, the Court distanced itself from the human dignity component of the *Law* test. Third, the Court established a much more prominent role for section 15(2), which protects ameliorative programs from claims of discrimination.[21]

3.1 REAFFIRMING SUBSTANTIVE EQUALITY

Chief Justice McLachlin and Justice Abella wrote the majority decision in *Kapp*.[22] They began their analysis with a review of the *Andrews* principles, quoting Justice McIntyre's endorsement of substantive over formal equality. Many critics in the legal academic field had argued that the focus of the analysis in the *Law* test had resulted in a return to formal equality over substantive equality:

> Criticism has … accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.[23]

While it acknowledged these criticisms, the Court held that *Law* in fact accorded with Justice McIntyre's vision of substantive equality, although it never again employed the *Law* test.

3.2 RETHINKING HUMAN DIGNITY

The other major criticism Chief Justice McLachlin and Justice Abella addressed on behalf of the Court was the effect of the human dignity test. They praised the *Law* decision for "unifying what had become, since *Andrews*, a division in [the] Court's approach to s. 15," but noted that the human dignity test has been widely criticized for placing an additional burden on equality claimants.

Although they emphasized that "human dignity is an essential value underlying the s. 15 equality guarantee," Chief Justice McLachlin and Justice Abella held that "several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*" [emphasis in original].[24] This appeared to be their explanation of why the *Law* test had not been the "philosophical enhancement it was intended to be."[25]

3.3 A NEW ROLE FOR SECTION 15(2)

Section 15(2) has not yet been addressed in this paper, reflecting the fact that the section was essentially ignored by the Supreme Court for most of the Charter's history. In 2000, when the Court had an opportunity to consider the substance of section 15(2), it held that the section was an "interpretive aid" that merely provided a more fulsome explanation of section 15(1).[26]

The Court changed its view on section 15(2) in *Kapp*. It held that the section "seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups."[27] The Court held that section 15(2) "tells us, in simple

clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15."[28] Essentially, section 15(2) protects ameliorative programs against charges of what is often called "reverse discrimination."[29]

Drawing upon this substantive role for section 15(2), Chief Justice McLachlin and Justice Abella created a test whereby if the government can prove that an impugned law or program is ameliorative in nature, a section 15(1) inquiry is not even necessary:

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[30]

Some commentators have raised concerns about this test; these are discussed in the next section.

3.4 MOVING FORWARD FROM *KAPP*

In view of the criticisms of *Law* discussed above, the Court in *Kapp* reconfirmed its commitment to employing a substantive equality analysis to section 15. It also addressed criticism it had received about the human dignity component of the *Law* test and determined that the test was acting as a barrier to claimants.

Although *Kapp* was understood as rejecting certain aspects of the *Law* test, it was not immediately clear that the *Kapp* decision set out a different section 15(1) test. Because the case was decided on the basis of section 15(2), the decision did not provide an application of the section 15(1) test, whereas Supreme Court cases establishing a new legal test generally do provide an application. Following *Kapp*, then, some uncertainty remained, and lower courts, including courts of appeal, continued to look to the human dignity factors in their section 15(1) analyses.[31] Further, although the Court seemed somewhat critical of the *Law* test in *Kapp*, it did not explicitly reject the *Law* test, but instead stated that *Law* "[did] not impose a new and distinctive test for discrimination, but rather affirm[ed] the approach to substantive equality under s. 15 set out in *Andrews*."[32]

Despite the Supreme Court's reluctance to openly reverse *Law*, it never again applied the *Law* test in its section 15 decisions, and instead would refer to a passage from *Kapp* when evaluating section 15(1) claims. In what might initially have appeared to be merely a summary of earlier case law, Chief Justice McLachlin and Justice Abella referred to a section 15(1) "template" from *Andrews*:

> (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[33]

The five subsequent Supreme Court cases dealing with section 15 all quoted this passage from *Kapp* and applied it as a legal test.

4 THE FIRST APPLICATIONS OF *KAPP*

In 2009, the year following the *Kapp* decision, the Supreme Court rendered three decisions with some application of section 15(1): *Ermineskin Indian Band and Nation v. Canada*, *A.C. v. Manitoba (Director of Child and Family Services)* and *Alberta v. Hutterian Brethren of Wilson Colony*.[34] The Court did not deal with section 15 in great depth in any of these cases and essentially decided the cases on other grounds. These first few cases showed a Court that seemed unified on the application of section 15 but that did not actively engage in section 15 analyses. Although the Court's discussion of any case will necessarily be specific to the facts brought before it, these three cases raised seemingly valid equality issues affecting historically marginalized groups – namely, First Nations people, Jehovah's Witness children, and religious minorities. Nevertheless, the section 15 analysis for each amounted to a few paragraphs at most. Some commentators have described the Court's section 15 analysis in these cases as "perfunctory" and "without sufficient elaboration,"[35] or "conclusory" and "without real explanation."[36]

5 *WITHLER*: CONFIRMING THE TEST

The facts of *Withler v. Canada (Attorney General)*[37] were similar to that in *Law* in that it involved an age discrimination claim relating to the quantum of death benefits available to surviving spouses, but this time under the *Public Service Superannuation Act*. The unanimous decision was drafted by Chief Justice McLachlin and Justice Abella. The Court again explicitly rejected formal equality in favour of substantive equality:

> Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. …
>
> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.[38]

5.1 THE END OF COMPARATOR GROUPS?

Much of the Court's discussion in *Withler* on substantive equality was with reference to comparator groups. A major critique of *Law* was that the comparator group requirement had become a barrier for equality claims, and had even become a means of rejecting claims. According to some commentators, courts (including the Supreme Court of Canada) have rejected equality claims because claimants did not choose the correct comparator group, and therefore did not adduce sufficient

evidence to support their claim with reference to what the court considered to be an appropriate comparator group.[39]

As discussed, the first step of the *Law* test required a demonstration that the claimant experienced a burden or was denied a benefit in comparison with a comparator group. Academics had begun to question the utility of comparator groups in a substantive equality analysis, and the Court in *Withler* appears to have responded to these concerns. The Court cited a decision of Justice Binnie's in which he noted that "a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis" and that the choice of comparator group had been the "Achilles heel" of many equality claims.[40]

In some cases, a comparator group is relatively easy to identify, as it was in *Law*, where the claimant could compare herself to surviving spouses over the age of 35. In situations where it is more difficult to identify a comparator group, however, claimants may have to invest significant time and money preparing social science data, which could then become irrelevant if a court held that the proposed comparator was not the appropriate one.[41]

This rejection of a proposed comparator group could happen even at the Supreme Court, after a case has been litigated at trial and on appeal. For example, *Auton (Guardian* ad litem *of) v. British Columbia (Attorney General)*,[42] which has been noted for "epitomiz[ing] [the] defects of formalist comparator analysis,"[43] involved a claim on behalf of autistic children who were denied access to funding for an intensive behavioural therapy to treat their disorder. In *Auton*, the claimants proposed "non-disabled children and their parents" or "adult persons with mental illness" as the comparator groups. The Court substituted its own comparator group, which was significantly more complex, and on which it would have been very difficult to adduce evidence:

> a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.[44]

As the Court in *Withler* noted, this "incorrect" choice of comparator group resulted in the claimants' failure even to establish that a distinction had been made, as required by the first step of the *Law* test. Further, the comparator group approach appears to require that claimants compare themselves to similarly situated individuals. This was the core of the formal equality analysis the Supreme Court claimed to have abandoned. In *Withler*, the Court acknowledged that this element of the *Law* test had the potential to invite a formal equality analysis:

> [A] mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify – and, indeed, thwart the identification of – the discrimination at which s. 15 is aimed.[45]

Although the Court recognized that comparator groups may not facilitate substantive equality analyses, it held that "[c]omparison plays a role throughout the [section 15(1)] analysis."[46] However, "[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination."[47] Since *Withler*, then, it would appear that a specific identification of a comparator group is no longer required.

5.2 ELABORATING ON THE SECTION 15(1) TEST

Although the *Withler* decision did not change the *Kapp* test, the Court did provide some additional explanation of the concepts behind the test, and *Withler* was the first case in which the Court provided an in-depth application of the section 15(1) *Kapp* test to the facts of a case.

The Court noted that the purpose of the "distinction" component of the test is to establish that the claimant has been treated differently from others in that "he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic" that qualifies as an enumerated or analogous ground.[48] The Court also noted that, for those claiming indirect discrimination, this task will be more challenging. Although the Court did not elaborate on this point, it would appear that the additional "work to do at the first step" would be to adduce social science data to prove the effect the law or policy has on the claimant.[49]

With respect to the second component of the test, the Court sought to elaborate on the creation of disadvantage and the perpetuation of prejudice and stereotyping. Again moving away from the approach taken in *Law*, the Court held that the four factors that formed the basis of the human dignity test need not be explicitly canvassed in every case. The four factors might be useful indicators as to whether substantive inequality is at play, but other factors may be relevant as well. The Court concluded that "all factors that are relevant to the analysis should be considered,"[50] although it did not provide additional guidance for determining which factors are relevant in a given case.

6 *CUNNINGHAM*: APPLYING THE 15(2) TEST

In *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, the Supreme Court heard a claim brought by Métis people who were removed from the Peavine Métis Settlement's membership list when they registered for status under the *Indian Act*.[51] The Chief Justice, writing for a unanimous Court, held that there was no discrimination.

Cunningham was the first decision in which the Supreme Court applied its new section 15(2) test. The Court also took the opportunity to discuss the purpose of section 15(2) in greater detail than it had in *Kapp*:

> The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. … Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people … equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.[52]

The Court used fairly categorical terms in holding that section 15(2) can insulate a wide array of ameliorative programs from Charter scrutiny. The Court held that if the conditions in the *Kapp* section 15(2) test are met, namely that the program is genuinely ameliorative and that there is a correlation between the program and the disadvantage suffered by the target group, then section 15(2) "protects all distinctions drawn on enumerated or analogous grounds that 'serve and are necessary to' the ameliorative purpose."[53]

Commentators have noted that this approach, first adopted in *Kapp* and continued in *Cunningham*, could be detrimental to the most disadvantaged members of society.[54] Specifically, they argue that if an ameliorative program were under-inclusive, meaning that certain groups were overlooked and should have access or that subgroups within the target population are unable to access the program, these excluded individuals might be unable to make a successful equality claim. Some have suggested that an alternative would be to use the section 15(2) approach from *Kapp* only where more advantaged individuals are challenging an ameliorative program (as was the case in *Kapp*, where mostly non-Aboriginal fishers challenged a program that benefitted three First Nations communities), and to engage in a full section 15(1) analysis where disadvantaged individuals claim that a program is underinclusive.[55]

7 *QUEBEC V. A*: THE END OF CONSENSUS?

Although there were multiple judgments in several of the decisions since *Kapp*, the members of the bench did not express any disagreement on the application of section 15 until 2013. Another feature of the section 15 cases heard between *Kapp* and *Cunningham* is that none of the claimants succeeded in convincing the Supreme Court that they had suffered discrimination. In all of the cases decided on the basis of section 15(1), the claimants successfully argued that there was a distinction drawn between them and others, but none was able to demonstrate that this distinction created a disadvantage by perpetuating prejudice or stereotyping. In the two section 15(2) cases, the Court found that the challenged program was ameliorative, and so no section 15(1) analysis was performed. This also means that the Supreme Court had not performed a section 1 analysis (under which the government must demonstrate that the discrimination the claimant suffered was justified) since before it introduced the *Kapp* test.

The first section 15 decision after *Kapp* in which the Court found discrimination was rendered in January 2013 in the case of *Quebec (Attorney General) v. A*.[56] This case involved an equality claim made within the context of family law, with particular

reference to distinctions under Quebec law of the rights of married versus unmarried couples (called de facto spouses in Quebec) upon the dissolution of their relationships.

After the breakdown of a relationship, some provinces allow only previously married couples to access a share of family property, such as equity in the family home, vehicles, or other valuables. However, all provinces except Quebec allow former partners to claim spousal support regardless of their marital status. In *Quebec v. A*, a woman unsuccessfully challenged the laws that prohibited her from seeking a share of family property or spousal support from her former partner. The result was a lengthy decision with four separate judgments dissenting and concurring with portions of other judgments.

7.1 JUSTICE LEBEL ON SECTION 15(1)

Although the case deals with a complex support and property regime under Quebec's *Civil Code*, section 15(1) is, as Justice Lebel asserts, "at the heart of this case."[57] Justice Lebel wrote for the majority in the result, but Justice Abella's judgment was the majority decision on the section 15(1) analysis.

Justice Lebel provided a lengthy history of the development of section 15(1) from *Andrews* and *Law* through to *Kapp* and *Withler*. His analysis turned on "the broad range of values embraced by s. 15," a phrase he borrowed from *Andrews*.[58] The main value he emphasized was human dignity, which in his view appeared to depend largely upon personal autonomy, self-determination and personal choice. Further, he asserted that:

> substantive equality is not denied solely because a disadvantage is imposed. Rather, it is denied by the imposition of a disadvantage that is unfair or objectionable, which is most often the case if the disadvantage perpetuates prejudice or stereotypes.[59]

Justice Lebel also emphasized that the two parts of the second component of the *Kapp* test, addressing the imposition of a disadvantage either by perpetuating prejudice or by stereotyping the claimant, are critical elements of the test; he held that claimants must prove either prejudice or stereotyping. He concluded that excluding de facto spouses was not discriminatory because it protected their choice to be excluded from the property and support regimes by virtue of their choice not to marry.

7.2 JUSTICE ABELLA ON SECTION 15(1)

Justice Abella, writing for the plurality on section 15(1), began her review of the facts of the case by noting that A had asked her partner to get married at least twice, but he refused. Her focus was on whether excluding an "economically vulnerable" spouse from "mandatory support and property division regimes simply because he or she was not in a formally created union"[60] is a violation of section 15(1). She noted the "disproportionate number of women who experienced poverty when they separated."[61]

In her section 15(1) analysis, she differed from Justice Lebel's application of the *Kapp* test by stating that claimants are not obligated to specifically prove either prejudice or stereotyping; rather, these are two of the indicators that may help to determine whether a law violates the norm of substantive equality under section 15(1):

> We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*.[62] [Emphasis in original]

One criticism of *Kapp* in the academic literature was that its apparent reliance on prejudice and stereotyping in identifying discrimination risked overlooking other significant harms, which could include "marginalization, oppression, and deprivation of significant benefits."[63] Unlike Justice Lebel, who would have maintained prejudice and stereotyping as necessary elements of the test, Justice Abella argued that the emphasis in the analysis should be on the impact of a law on the claimant, not on whether the claimant can prove the attitudes or motives of others. As she noted above, this is more in keeping with Justice McIntyre's definition of discrimination in *Andrews*.

Another issue Justice Abella raised, harkening back to *Andrews*, was the need to maintain an analytical distinction between section 15 and section 1 of the Charter. Justice McIntyre argued in *Andrews* that this distinction was appropriate given the evidentiary burdens: claimants should not be expected to prove government intent. Justice Abella noted another potential danger with collapsing the section 1 and 15 analyses, however. Specifically, she argued that if courts consider government intent at this stage, where it may be easy to dismiss a policy decision to exclude a group from a statutory benefit as "reasonable," section 15(1) would become merely "a prohibition on intentional discrimination based on irrational stereotyping" rather than a tool to promote substantive equality.[64]

Finally, Justice Abella addressed another issue that academics have raised as contrary to the principles of substantive equality: that of choice. She cited examples of the Supreme Court rejecting arguments that one's choice to belong in a particular group could justify government action that might otherwise appear discriminatory. Marital status might not be considered a true choice, she noted, since societal factors can remove that choice from certain individuals; for instance, the claimant A had in fact wanted to marry her partner. Another example to which Justice Abella referred was discrimination against pregnant women who are deemed to have chosen to become pregnant. In both cases, the choice may not have been as free as an outsider might assume; in neither case, she argued, should this choice have any bearing on a substantive equality analysis.

In applying the *Kapp* test, Justice Abella held that the *Civil Code* provisions created a distinction, and that this distinction was discriminatory. She focused on the historical disadvantage that unmarried couples have faced, and their vulnerability in comparison with the situation of married spouses. She held that this discrimination

was not justified under section 1 of the Charter, but the majority of the Court upheld the *Civil Code* provisions, either finding no discrimination, as Justice Lebel did, or finding that the discrimination could be justified under section 1. The claimant was unsuccessful.

7.3 SECTION 15(1) GOING FORWARD

As mentioned, Justice Abella's interpretation of section 15(1) in this case forms the majority, which means that her approach will be binding on future cases. Essentially, she relied on the *Kapp* test, but held that the second component of the test, in which courts must determine whether a distinction amounted to discrimination, is to be applied in a flexible manner. How lower courts will apply this flexible approach remains to be seen.

8 CONCLUSION

The Supreme Court's interpretation of both section 15(1) and section 15(2) of the *Canadian Charter of Rights and Freedoms* has undergone significant changes since its first decision in *Andrews*. A common thread appears to be a commitment to substantive equality, although some academics have charged that this commitment waned in *Law* and in some of the case law that developed in its wake.

The Court began with a rather fluid approach to section 15(1) in the *Andrews* decision, which emphasized the effects of a law on the claimant. In 1999, the Court formalized the section 15(1) test. In *Kapp* and several subsequent cases, the Court moved away from the rigid structure of the *Law* test, apparently influenced at least in part by scholarly arguments that the *Law* test had been acting as an impediment to equality claimants.[65] *Kapp*, *Withler* and *Quebec v. A* all show a Court acknowledging critiques from legal scholars, and in some cases responding by changing the law.

Given the novelty of this trend in section 15 case law, it is difficult to say how the *Kapp* test might affect future cases and analysis. Thus far, however, the changes initiated in *Kapp* have yet to result in a single successful outcome for an equality claimant at the Supreme Court.

NOTES

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2. For example, gay and lesbian communities have made significant strides in achieving equality since the advent of the Charter in the decisions in *Egan v. Canada*, [1995] 2 S.C.R. 513, in which sexual orientation was recognized as an analogous ground, and in *M. v. H.*, [1999] 2 S.C.R. 3, in which the Court held that same-sex couples should be read into the definition of common-law spouses under Ontario family law legislation. Certain Aboriginal communities have also used section 15 to achieve gains in equality; see for example *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, in which off-reserve First Nations residents challenged the *Indian Act* provisions that prevented them from voting in band elections.
3. *R. v. Kapp*, 2008 SCC 41.
4. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
5. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
6. Peter W. Hogg, *Constitutional Law of Canada,* 5th edition (loose-leaf), Carswell, Toronto, 2010, Chapter 55, p. 10.
7. *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.
8. Ibid. Note that *Plessy v. Fergusson* upheld the Louisiana *Separate Car Act*, which required separate rail cars for black and white passengers.
9. The first description of the *Andrews* approach as "substantive, and not merely formal equality" was in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 61.
10. *Andrews*, p. 174.
11. Ibid., p. 173.
12. Ibid., p. 178.
13. For a review of Supreme Court case law on section 15 from *Andrews* to *Canada (Attorney General) v. Hislop*, 2007 SCC 10, see Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, Publication no. BP-402E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, March 2007.
14. *Law*, para. 2.
15. Ibid., para. 6.
16. Hogg (2010), chapter 55, p. 19.
17. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.
18. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 60.
19. Citizenship was recognized in *Andrews*, sexual orientation in *Egan*, and marital status in *Miron v. Trudel* [1995] 2 S.C.R. 418. "Aboriginality-residence," relating to discrimination against First Nations people on the basis that they live off-reserve, was recognized in *Corbiere*.
20. See for example Ian Peach, "Section 15 of the *Canadian Charter of Rights and Freedoms* and the Future of Federal Regulation of Indian Status," *University of British Columbia Law Review*, Vol. 45, No. 1, 2012.
21. Ameliorative programs are those intended to improve the condition of a disadvantaged group. The marginal note for section 15(2) refers to such programs as "affirmative action programs."

22. Although there was a dissent, it was on another ground, meaning that the Court was unanimous in its application of section 15.

23. *Kapp*, para. 22. In making this statement, the Supreme Court referred to eight legal articles and texts that criticized the Court's apparent return to a formal equality analysis.

24. Ibid., paras. 20–21.

25. *Kapp*, para. 22. The Court referred to twelve examples of legal articles and texts that advanced this argument.

26. *Lovelace v. Ontario*, 2000 SCC 37.

27. *Kapp*, para. 33.

28. Ibid., para. 38.

29. This was the explanation the Supreme Court provided in its next section 15(2) decision in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, discussed later in this paper.

30. *Kapp*, para. 41.

31. See for example Barbara Billingsley, "Taking Measure of the Charter's Equality Guarantee: A Comment on the Court of Appeal's Ruling in *Morrow v. Zhang*," *Alberta Law Review*, Vol. 47, No. 1, 2009, p. 229.

32. Kapp., para. 24.

33. Ibid., para. 17.

34. These cases were *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30; and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37. Before *Withler v. Canada (Attorney General)*, discussed in the next section, the Supreme Court rendered one additional case with a brief reference to section 15(1): *Ontario (Attorney General) v. Fraser*, 2011 SCC 20. The majority dismissed the section 15(1) claim in a single paragraph, and the dissents did not deal with section 15(1), other than one dissent that briefly discussed analogous grounds.

35. Jonnette Watson Hamilton and Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp," *Alberta Law Review*, Vol. 47, No. 4, 2010, p. 953.

36. Margot E. Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15," in Sanda Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*, Lexis Nexis, Markham, Ontario, 2010, p. 217.

37. *Withler v. Canada (Attorney General)*, 2011 SCC 12.

38. Ibid., paras. 31 and 39.

39. The Court reviewed critiques from legal academics in *Withler* at para. 59.

40. Ibid. at para. 48, citing *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65.

41. The Supreme Court alludes to this possibility in *Withler*, para. 59.

42. *Auton (Guardian* ad litem *of) v. British Columbia (Attorney General)*, 2004 SCC 78.

43. Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s," in Rodgers and McIntyre (2010), p. 164.

44. *Auton*, para. 55.

45. *Withler*, para. 60.

46. Ibid., para. 61.
47. Ibid., para. 63.
48. Ibid., para. 62.
49. Ibid., para. 64.
50. Ibid., para. 66.
51. *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37.
52. Ibid., para. 41.
53. Ibid., para. 45.
54. See for example Peach (2012), p. 122, and Sophia Moreau, "*R. v. Kapp*: New Directions for Section 15," *Ottawa Law Review*, Vol. 40, 2008–2009, p. 295.
55. Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter," *New Brunswick Law Review* (2013) (Forthcoming).
56. *Quebec (Attorney General) v. A*, 2013 SCC 5.
57. *Quebec v. A*, para. 134.
58. Ibid., para. 135.
59. Ibid., para. 180.
60. Ibid., para. 291.
61. Ibid., para. 300.
62. Ibid., para. 327.
63. Jennifer Koshan, "Redressing The Harms of Government (In)Action: A Section 7 Versus Section 15 Charter Showdown," *Constitutional Forum*, Vol. 22, No. 1, 2013, p. 32.
64. *Quebec v. A*, para. 333, quoting Sheila McIntyre, "Deference and Dominance: Equality Without Substance," in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, Lexis Nexis Canada, Markham, Ontario, 2006, p. 104.
65. This dialogue with the academic community appears to be a rather recent trend. In deciding *Law*, the Court did not rely on a single secondary source despite the fact that it was making what proved to be drastic changes in its section 15(1) analysis: McIntyre (2010), p. 158.