THE CONTINUAL REINVENTION OF SECTION 15 OF THE CHARTER

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I. INTRODUCTION

The Supreme Court of Canada has taken three different approaches to section 15 of the *Canadian Charter of Rights and Freedoms*[1] as exemplified in the 1989 decision in *Andrews v Law Society of British Columbia,*[2] *Law v Canada (Minister of Employment and Immigration)*[3] decided ten years later, and *R v Kapp,*[4] handed down in 2008. Essentially, each decade the Court has tried a new approach to equality claims. In our view, these are not slightly different analytical frameworks; each includes new formulas with new focuses requiring new types of evidence. This continual reinvention justifies Justice McIntyre's claim in *Andrews* that equality is "an elusive concept,"[5] and illustrates the Court's admission in *Law* that section 15 "is perhaps the *Charter*'s most conceptually difficult provision."[6]

In this paper,[7] we reflect upon these reinventions and conceptual and analytical difficulties. We began writing together about section 15 as a result of the

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*, cited to SCR].

[3] [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law*, cited to SCR].

[4] 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

[5] *Andrews, supra* note 2 at 164.

[6] *Law, supra* note 3 at para 2.

[7] This essay is based on the authors' oral presentation to a non-specialist legal audience at a University of Calgary Faculty of Law *Assentio Mentium* (Meeting of the Minds) event in Calgary, Alberta on October 18, 2012. We have retained much of the informal nature of the oral presentation, while adding references to sources we relied upon.

Kapp decision and have now jointly authored four articles[8] and a number of blogs[9] about developments since 2008. Our writing is informed by our volunteer work with the Women's Legal Education Action Fund (LEAF), where we have both been members of LEAF litigation committees.[10] We have found that it is useful to write about section 15 together because the case law is copious, rather technical and complex, and there is a great deal of secondary literature.

In our opinion, the continual reinvention of section 15 has led to a marked lack of success for equality-seeking individuals and groups before the Supreme Court,[11] despite its periodic recognition of some of the problems with its previous approaches.[12] Subject to a small number of important exceptions, we believe that the

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[8] Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp" (2010) 47 Alta L Rev 927 ["Courting Confusion"]; Jennifer Koshan & Jonnette Watson Hamilton, "'Terrorism or Whatever': The Implications of *Alberta v Hutterian Brethren of Wilson Colony* for Women's Equality and Social Justice," in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ont: LexisNexisCanada, 2010) 221 ["Terrorism or Whatever"]; Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16 Rev Const Stud 31 ["Meaningless Mantra"]; and Jonnette Watson Hamilton & Jennifer Koshan, "The Supreme Court, Ameliorative Programs, and Disability: Not Getting It" (2013) CJWL 56 ["Not Getting It"]. See also Jennifer Koshan, "Redressing The Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown" (2013) Constitutional Forum (forthcoming) ["*Charter* Showdown"], which we also draw upon in this article.

[9] See, for example, Jonnette Watson Hamilton & Jennifer Koshan, "The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges", online: ABlawg <http://ablawg.ca/2009/02/20/the-end-of-law-a-new-framework-for-analyzing-section-151-charter-challenges/>; Jennifer Koshan, "Differential Treatment of Equality Law post-*Kapp*", online: ABlawg <http://ablawg.ca/2010/05/25/differential-treatment-of-equality-law-post-kapp/>; Jonnette Watson Hamilton, "Interpreting Section 15(2) of the Charter: LEAF's Intervention in *Alberta (Minister of Aboriginal Affairs and Northern Development) v. Cunningham",* online: ABlawg <http://ablawg.ca/2010/12/16/interpreting-section-152-of-the-charter-leaf's-intervention-in-alberta-minister-of-aboriginal-affairs-and-northern-development-v-cunningham/>; Jonnette Watson Hamilton & Jennifer Koshan, "Non-Fatal Exclusion: The Fatal Accidents Act, Stepchildren, and Equality Rights", online: ABlawg <http://ablawg.ca/2012/07/03/non-fatal-exclusion-the-fatal-accidents-act-stepchildren-and-equality-rights/>.

[10] Jennifer worked as the Legal Director of the British Columbia branch of the LEAF in the mid-1990s and also served on LEAF's National Legal Committee for several years in the 2000s. She served on the LEAF / DAWN subcommittees in *Eldridge v British Columbia (AG),* [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]; *Auton (Guardian ad litem of) v British Columbia (AG),* 2004 SCC 78, [2004] 3 SCR 657 [*Auton*], and on the LEAF subcommittee in *Jean v Minister of Indian and Northern Affairs*, [2009] FCA 377 [*Jean*]. Jennifer is also a founding member of the Women's Court of Canada, and the author of an alternative equality rights judgment (Jennifer Koshan, "*Newfoundland (Treasury Board) v N.A.P.E.*" (2006) 18 CJWL 321) in the Newfoundland pay equity case, *Newfoundland (Treasury Board) v Newfoundland and Labrador Assn of Public and Private Employees*, 2004 SCC 66, [2004] 3 SCR 381 [*NAPE*]. Jonnette was a member of the LEAF subcommittees in two cases about s 15(2) heard after the *Kapp* decision: *Jean, ibid*, and *Cunningham, supra* note 15.

[11] See Bruce Ryder, Cidalia C Faria, & Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 Sup Ct L Rev 103 ["What's Law Good For?"]; Bruce Ryder & Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 Sup Ct L Rev 505["Managing Equality Rights"].

[12] *Kapp, supra* note 4 at para 22; *Withler, infra* note 14 at paras 55-60.

Court's reinvention in *Kapp* (and *Kapp*'s companion cases) is its worst, and is the least likely to achieve substantive equality and remedy the oppression of disadvantaged groups in Canada.[13] We will support our claim through a brief review of the case law from *Andrews* to *Kapp*, and then focus on *Kapp* and the Court's subsequent decisions in *Withler v Canada (Attorney General)*[14] and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham.*[15] We will also review a number of other recent cases where *Kapp* was applied and section 15 was given short shrift. Through this case review, we will identify a number of ongoing problems with the Supreme Court's approach to section 15, including its narrow definition of discrimination, its difficulties with fully recognizing adverse effects discrimination, its refusal to recognize any positive duty to remedy inequality, its importation of section 1 considerations such as arbitrariness and government policy into section 15, its factoring in of the cost of benefits outside the context of remedies, and its deference to governments in cases involving benefits and targeted programs. These problems indicate that although the Court continually describes its goal as one of substantive equality, it has yet to develop an approach that truly embraces that notion.

We also include some consideration of the most recent decision of the Supreme Court on section 15, *Quebec (Attorney General) v A*,[16] a decision rendered while this paper was under review. We will address the implications of that case for our arguments in the conclusion.[17] Our initial response to the question posed by this issue, "The Promise of Equality – Are We There Yet?", was a definite "no." Our answer is still "no", as we will explain.

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[13] This is not just our opinion. Other advocates and academics have explored alternatives to s 15 such as s 7 of the *Charter* and Human Rights Codes. See, for example, ARCH Disability Law Centre, *The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities*, Research Paper (Law Commission of Ontario, 2010) at 31, online: ARCH Disability Law Centre <http://www.archdisabilitylaw.ca/?q=shield-becomes-sword-expansion-ameliorative-program-defence-programs-support-persons-disabilities>; Kerri Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2010-12) 42 Ottawa L Rev 411; Radha Jhappan, "The Equality Pit or the Rehabilitation of Justice" (1998) 10 CJWL 60; Marie-Ève Sylvestre, "The Redistributive Potential of Section 7 of the *Charter*: Incorporating Socio-economic Context in Criminal Law and in the Adjudication of Rights" (2010-11) 42 Ottawa L Rev 389.

[14] 2011 SCC 12, [2011] 1 SCR 396 [*Withler*].

[15] 2011 SCC 37, [2011] 2 SCR 670 [*Cunningham*].

[16] 2013 SCC 5 [*Quebec v A*].

[17] We also include some comments on *Quebec v A*, *supra* note 16, in the footnotes.

II. THE PROMISE OF SECTION 15 ITSELF

The wording of section 15 was broader than any comparable constitutional guarantee of equality in other jurisdictions, largely because of the advocacy of women and other equality-seeking groups during the drafting of the *Charter*.[18] For example, the first part of section 15(1) speaks of what *Andrews* described as four basic rights:[19] equality before the law, equality under the law, the right to the equal protection of the law, and the right to equal benefit of the law. The use of the phrase "under the law" was protection against decisions made under the *Canadian Bill of Rights*,[20] in which the courts had held that discriminatory exclusions from entitlements to benefits were not covered by the guarantee of equality "before the law."[21] The more expansive wording of section 15 was seen at the time as having altered the entire orientation of the guarantee of equality from a negatively oriented guarantee of non-discrimination to a positively oriented right to equality.[22] As another example of early promise, this time involving the second part of section 15(1) which lists the enumerated grounds of discrimination, we note that Canada was the first democracy to give constitutional status to the equality rights of persons with mental and physical disabilities.[23] And section 15(2) was included in the *Charter* to silence debate about the constitutionality of affirmative action programs and to protect those programs from charges of reverse discrimination.[24]

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[18] See generally Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23 Windsor YB Access Just 145.

[19] *Andrews, supra* note 2 at 170. Section 15(1) provides:

> 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.

[20] *Canadian Bill of Rights*, RSC 1970, App III, s 1(*b*).

[21] See *Attorney General of Canada v Lavell*, [1974] SCR 1349 (upholding s. 12(1)(b) of the *Indian Act*, RSC 1970, c I-6, which deprived women, but not men, of their membership in Indian Bands if they married non-Indians because it did not violate a guarantee of equality *before* the law); *Bliss v Attorney General of Canada*, [1979] 1 SCR 183 (holding that the denial of unemployment insurance benefits to women because they were pregnant did not violate the guarantee of equality before the law because any inequality was "not created by legislation but by nature": *ibid* at 190.)

[22] Porter, *supra* note 18 at 150-56. See also Lynn Smith, "A New Paradigm for Equality Rights", in Lynn Smith, ed, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 353 at 368. See also Anne Bayefsky, "Defining Equality Rights" in Anne Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 24.

[23] M. David Lepofsky, "The Charter's Guarantee of Equality to People with Disabilities – How Well Is It Working?" (1998) 16 Windsor YB Access Just 155 at 161.

[24] *Lovelace v Ontario* (1997), 33 OR (3d) 735, 148 DLR (4th) 126, (CA) cited with approval in *Cunningham*, *supra* note 15 at para 50. Section 15(2) provides:

> 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

Section 15 was thus seen as full of promise in 1982, when it was entrenched in the Constitution, and in 1985, when it finally came into effect. That promise seemed to be fulfilled in the first few cases before the Supreme Court.

III. *ANDREWS* / *TURPIN* (1989)

The Supreme Court's first opportunity to interpret section 15 arose in two 1989 cases: *Andrews* and *R v Turpin*.[25] *Andrews* involved a successful challenge to the Law Society of British Columbia's requirement that lawyers be Canadian citizens.[26] At the time, the proposed answers to the question of how to analyze claims under section 15(1) lay at two extremes.[27] On the one hand, constitutional law scholar Peter Hogg was of the view that every distinction drawn in law counted as discrimination and the question of whether that discrimination was justifiable or not should be resolved under section 1.[28] The equality guarantee had little work to do under his approach. On the other hand, in her judgment in the British Columbia Court of Appeal decision in *Andrews*,[29] Justice Beverley McLachlin, as she then was, took the view that only unreasonable or unfair legislative distinctions were prohibited, as assessed within section 15. Her approach left no role for section 1.

It appears to us that, over the years, Chief Justice McLachlin has brought the Supreme Court's jurisprudence around to her point of view,[30] but her approach was not adopted in *Andrews*. Justice McIntyre, writing for the majority on the issue of whether there was a violation of section 15(1), rejected both Peter Hogg's and Justice McLachlin's approaches and chose a middle ground: only discrimination based on grounds, both listed and analogous, is prohibited, and questions of justification are left for section 1.[31]

> those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[25] [1989] 1 SCR 1296 [*Turpin*].

[26] *Barristers and Solicitors Act*, RSBC 1979, c 26, s 42.

[27] Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990-1991) 4 CJWL 407 at 411-12.

[28] Peter W Hogg, *Constitutional Law of Canada*, 2d ed (Toronto: Carswells, 1985) at 800-801, cited in *Andrews, supra* note 2 at 178-79.

[29] (1986), 2 BCLR 305, 27 DLR (4th) 600 at 610, [1986] 4 WWR 474 [*Andrews BCCA*].

[30] See *infra* text accompanying note 82 and text accompanying note 99.

[31] *Andrews, supra* note 2 at 178-82.

In *Andrews*, Justice McIntyre organized his analysis around three questions: 1) Has there been a denial of one of the four basic equality rights? 2) Is there discrimination? 3) Is the discrimination based on enumerated or analogous grounds?[32] The focus on the four equality rights in the first step dissipated in subsequent cases. For the second step, *Andrews* relied on the concept of discrimination set out by the Court in its interpretation of human rights legislation to define "discrimination":[33]

> I would say then that discrimination may be described as 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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

The third step ensured that the claim fit within the overall purpose of the equality guarantee, which was said to be "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."[34]

In addition to setting out the enumerated and analogous grounds approach that has prevailed, a three-part analysis and an oft-quoted definition of discrimination, *Andrews* established a number of important principles. Formal equality — referred to as the "similarly situated test" — was rejected and a commitment to substantive equality was made.[35] Formal equality requires that "likes" be treated alike and "unlikes" be treated differently.[36] Substantive equality is

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[32] Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can Bar Rev 299 at 310.

[33] *Andrews, supra* note 2 at 174-75, relying on *Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd*., [1985] 2 SCR 536 at 551 [*O'Malley*]; *Canadian National Railway Co. v Canada (Canadian Human Rights Commission*), [1987] 1 SCR 1114 at 1138-39.

[34] [1991] 1 SCR 933 at para 80 [*Swain*].

[35] *Andrews, supra* note 2 at 163-71. As we note below, however, the Court did not adopt the language of "substantive equality" until later; see note 70 and accompanying text.

[36] Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58 Sup Ct L Rev (2d) 245 at 246-47 (differentiating formal equality, substantive equality, equity and diversity). See also Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 38.

concerned with ensuring that laws or policies do not impose subordinating treatment on groups already suffering social, political or economic disadvantage in Canadian society, and recognizes that some groups may need to be treated differently to achieve equality of results.[37] For example, in the debate about whether the opposite-sex requirement in the legal definition of marriage violated section 15, a formal equality approach focused on whether same sex couples were similarly situated to opposite sex couples in relation to the objectives of the legal definition of marriage, whereas a substantive equality approach focused on whether the exclusion from marriage had the effect of further subordinating gays and lesbians in Canadian society.[38]

Commentators have noted that the Court's understanding of substantive equality in *Andrews* amounted to little more than that of contextualized formal equality.[39] Only the narrowest "similarly-situated" analysis was rejected in *Andrews*; that is, the Court merely rejected an analysis that would have accepted Canadian citizens and non-citizens as different without looking at any context before making that assessment.[40]

On a more positive note, *Andrews* also determined that the main consideration in any section 15 analysis must be the impact or effect of the law on the individual or group concerned; discriminatory intent is not required to prove a violation of section 15.[41] As a result, both direct discrimination and adverse effects discrimination were recognized.

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[37] Hughes, *supra* note 36*;* Sheppard, *supra* note 36.

[38] This example also shows how formal and substantive equality may merge in particular outcomes such as the protection of same sex marriage, and how formal equality may sometimes be sufficient to achieve progressive goals. See Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" in Sheila McIntyre & Sanda Rodgers, eds*, Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis Butterworths, 2006) ["*Diminishing Returns*"] 291 at 292; Ryder, Faira & Lawrence, "What's Law Good For?", *supra* note 11at 107.

[39] Majury, *supra* note 27 at 425; Sheila McIntyre & Sanda Rodgers, "Introduction: High Expectations, Diminishing Returns – Section 15 at Twenty", in McIntyre & Rodgers, *Diminishing Returns, supra* note 38, 1 at 8; Martha A McCarthy & Joanna L Radbord, "Foundations for 15(1): Equality Rights in Canada" (1999) 6 Mich J Gender & L 261 at 267; Beverley Baines, "*Law v. Canada*: Formatting Equality" (2000) 11 Constitutional Forum 65 at 69; Margot Young, "Unequal to the Task: "Kapp"ing the Substantive Potential of Section 15" in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ont: LexisNexisCanada, 2010) 183 at 186, 198-9 [Young, "Unequal to the Task"].

[40] *Andrews*, *supra* note 2 at 166-67.

[41] *Ibid* at 174.

Justice McIntyre also decided that equality is a comparative concept, with inequality discernible through comparison with others.[42] However, not every individual within the relevant equality-seeking group must suffer from discrimination before it is found to exist.

A final broad principle recognized in the *Andrews* approach to section 15 was that the equality guarantee and section 1 are distinct and must be analyzed separately — if only because the party bearing the burden of proof differs.[43]

The Court's decision in *Turpin* reinforced the *Andrews* criterion of disadvantage which had figured in Justice McIntyre's definition of discrimination.[44] Justice Wilson, writing for a unanimous Court, emphasized that in order to ascertain if legislation is discriminatory one must consider the group in question and its place in the broader "social, political and legal context."[45] In doing so she raised a question about the role of historic disadvantage that lingered unresolved in the section 15 jurisprudence until recently.[46] In the circumstances of *Turpin*, persons accused of homicide offences in certain provinces, who were required to be tried by judge and jury, were not considered by the Court to belong to a "discrete and insular minority", and their claim of discrimination was dismissed.[47]

There were a number of other early highlights in the Court's interpretation of section 15. For example, the Court affirmed in *Schachter v Canada* that the right to equality is a "hybrid" of negative and positive rights.[48] A father had challenged a provision of the *Unemployment Insurance Act, 1971* which discriminated between natural parents and adoptive parents with respect to parental leave. The section 15 violation was subsequently conceded by the federal government and the issue before the Court was the appropriate remedy for an underinclusive benefit. It accepted that in some cases courts should extend benefits to groups that have previously been denied them rather than imposing "equality with a vengeance" by striking down the

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[42] *Ibid* at 162.

[43] *Ibid* at 177. The reasons for this analytical separation are clearly articulated by Justice McLachlin, as she then was, in *Miron v Trudel*, [1995] 2 SCR 418 at 485-86 [*Miron*].

[44] See also *supra* note 33 and accompanying text..

[45] *Turpin, supra* note 25 at 1331.

[46] See *infra* note 134 and accompanying text.

[47] *Turpin, supra* note 25 at 1332-33.

[48] [1992] 2 SCR 679 at 721 [*Schachter*]. For critiques of the distinction between positive and negative conceptions of rights, see e.g. Sylvestre, *supra* note 13 at 403; Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights under the *Charter*: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev L Soc Issues 37; Young, "Unequal to the Task" *supra* note 39 at 197.

benefit scheme altogether.[49] *Schachter* has been cited frequently since for the proposition that governments do not have positive obligations to introduce particular benefit schemes under the *Charter*, but once such schemes have been created, they cannot be discriminatory about who is included.[50]

Despite this generally positive start to the interpretation and application of section 15, controversy soon overtook the Court.

IV. THE EQUALITY TRILOGY

By the mid-1990s, the Court was badly fractured into three camps, with the divisive issue being the role that "irrelevant personal characteristics" should play with respect to the distinctions drawn by the challenged law or policy. Relevance requires a consideration of whether distinctions between groups are sufficiently related to the purpose of the law in question. It thus requires the importation into section 15 of factors focused on government objectives, that is, matters properly left to section 1. The so-called "equality trilogy" of the mid-1990s made this problem abundantly clear.

In *Egan v Canada*,[51] *Miron v Trudel*,[52] and *Thibaudeau v Canada*[53] the Court was fundamentally divided as to the meaning of equality and the test for ascertaining a violation.[54] Four judges — McLachlin, Cory, Iacobucci, and Sopinka — retained the analysis most resembling that developed in *Andrews*. For them, the question was whether there was a distinction based on a prohibited ground and resulting discrimination; if there was, section 1 analysis was required. They emphasized the importance of relieving historical disadvantage.[55] But this group was not entirely consistent with *Andrews*. For example, in *Miron* Justice McLachlin, as she then was, restated the overarching purpose of section 15 as being "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or

[49] The term "equality with a vengeance" was used by LEAF, one of the interveners in the case, and adopted by the Court: *Schachter*, *supra* note 48 at 702.

[50] *Ibid* at 721-22.

[51] [1995] 2 SCR 513 [*Egan*] (denial of spousal allowance based on opposite-sex definition of "spouse" violated s 15 but upheld under s 1).

[52] *Miron, supra* note 43 (denial of accident benefits to common law spouses under provincial legislation-based automobile insurance policy violated s 15 and not justified under s 1).

[53] [1995] 2 SCR 627 [*Thibaudeau*] (provision requiring custodial parent to include child support payments in income did not violate s 15).

[54] See e.g. Marie-Adrienne Irvine, "A New Trend in Equality Jurisprudence?" (1999) 5 Appeal 54 at 58.

[55] Martin, *supra* note 32 at 315-16.

burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance."[56] She elevated stereotyping to be the critical marker of discrimination.[57]

The test formulated by a second group of four judges — La Forest, Gonthier, Lamer and Major — required more than a distinction based on a ground and a resulting disadvantage. This group also asked whether that distinction was based on an irrelevant personal characteristic which was either enumerated or analogous.[58] If a personal characteristic was relevant to the functional values underlying the challenged law, it in effect negated any possibility of finding discrimination. This approach was criticized almost immediately on the basis that it was a formal equality approach, and it brought section 1 considerations about the rationality of the law's means in relation to its purpose into section 15, thus placing a burden on claimants to adduce evidence of the law's purpose.[59] But despite these early critiques and the rejection of the addition of relevance by a majority of the Court, relevance has kept re-surfacing as a factor in equality jurisprudence.

Justice L'Heureux-Dubé rejected *Andrews* and its grounds approach in the trilogy. She proposed a new test focused on the impact of the law on the group involved and the nature of the interest affected by the distinction.[60] This formulation was not supported by the other members of the Court at the time of the trilogy or later, although Justice L'Heureux-Dubé's focus on the nature of the interest affected was picked up in the *Law* decision.[61]

The equality trilogy reflected the inconsistency and uncertainty of the Court with respect to the scope and application of section 15. But an empirical analysis of all of the decisions rendered in the decade after *Andrews* revealed even bigger problems.[62] In the Supreme Court, the claimant success rate for section 15 claims

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[56] *Miron, supra* note 43 at para 54.

[57] Martin, *supra* note 32 at 331-32 (noting that, before *Law*, *supra* note 3, *dicta* in other cases placed an increasing emphasis on the need to establish a form of stereotyping before there would be a finding of discrimination and that too great a reliance on stereotyping would force litigants to formulate complaints only in these terms, an approach that would be counter to both a purposive and contextual approach to s. 15).

[58] *Miron*, *supra* note 43 at paras 23-30 (per Gonthier J).

[59] Laura Fraser, "Rights Without Meaning: Failing to Give Effect to the Purpose of Section 15(1)" (1997) 6 Dal J Leg Stud 347 at 356; Irvine, *supra* note 54 at 58-59. See also Martin, *supra* note 32 at 327-8; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in McIntyre & Rodgers, *Diminishing Returns, supra* note 38, 95 at 100.

[60] *Egan, supra* note 51 at 553-54.

[61] See *infra* note 76 and accompanying text.

[62] Ryder, Faira & Lawrence, "What's Law Good For?", *supra* note 11.

was only seven out of twenty-seven cases, or 25.9 percent, consistently lower than that of other *Charter* claims which hovered around a thirty-four percent claimant success rate.[63] Six of the nine grounds of discrimination listed in section 15 — race, national origin, ethnic origin, colour, religion, and mental disability — had not given rise to a single successful claim in the first decade of Supreme Court decisions.[64] The theoretical promise of substantive equality to ameliorate historical disadvantage had not been fulfilled by the Courts' practices up to that point.

V. POST-TRILOGY

In the later 1990s, following the equality trilogy, a number of cases were much more generous in their interpretation of section 15. The split in the Court was papered over. We were treated to an expansive definition of discrimination, a renewed emphasis on the importance of examining the broader context in which the rights claim took place, and vigorous effects-based analysis.[65]

During this period, the cases of *Eldridge v British Columbia (Attorney General)*[66] and *Vriend v Alberta*[67] brought in a short-lived period of hope for substantive equality analysis focused on ameliorating disadvantage. These were the first cases challenging the government's failure to act to remedy disadvantage. The hope was that the Court would order the disadvantage remedied, and not just because it was necessary to ensure equal treatment, but because the failure to remedy disadvantage was, in itself, a violation of the government's obligation to promote equality.[68] *Eldridge* and *Vriend* were the first Supreme Court decisions in which the obligation to promote equality — as opposed to simply preventing discrimination — was given some real effect. In *Eldridge*, the Court recognized that the hearing-impaired had an equal right to access medical services which required the government to provide funded sign language interpretation, and in *Vriend* the Court read sexual orientation into Alberta's human rights legislation as a protected ground of discrimination. The judgments provided *dicta* that moved somewhat in the

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[63] *Ibid* at 112.

[64] *Ibid* at 115.

[65] Irvine, *supra* note 54 at 55.

[66] *Eldridge*, *supra* note 10.

[67] [1998] 1 SCR 493 [*Vriend*].

[68] Margaret Denike & Kate Stephenson, "Twenty Years of Equality Rights: The Eternal Return of the 'Same'", Report Commissioned by the Court Challenges Program of Canada for a National Consultation on Equality Law (Ottawa, October 2004) at 74.

direction of recognizing that courts could impose positive obligations on governments without undermining the legitimacy of democracy.[69]

Eldridge and *Vriend* were also the first time that the term "substantive equality" was used and affirmed by the Court itself.[70] But their promise was short-lived. *Eldridge* and *Vriend* were followed soon after, in 1999, by *Law*, a case which came to be widely criticized for its approach to section 15.

VI. *LAW V CANADA*

The claimant in this case, Nancy Law, was 30 years old when her husband died. She was precluded from receiving survivor's benefits under the Canada Pension Plan until she reached the age of 65 because she was under the age of 35 at the time of her husband's death, she was not disabled, and she did not have any dependent children. The Supreme Court surprised observers with a unanimous decision with a new interpretation of section 15.[71] And, oddly enough for a case with such substantive revisions, there were no public interest interveners in *Law* — unlike almost every other major section 15 case.

In the decade following *Law*, that unanimous decision, penned by Justice Iacobucci, dictated the governing approach under section 15. *Law* established a three step test for claims of discrimination:

1) Whether the purpose or effect of the law or government action imposed differential treatment between the claimant and others, either in purpose or effect;
2) Whether the differential treatment was based on one or more enumerated or analogous grounds; and
3) Whether the law's purpose or effect was discriminatory.[72]

The question of discrimination, step three and the key issue, focused on whether the claimant could show a violation of their human dignity. Four contextual factors were relevant to this inquiry:

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[69] See e.g. *Eldridge, supra* note 10 at paras 73, 77-78 (the government obligation to provide sign language interpretation services in accessing health care was affirmed). The estimated cost of fulfilling the government's obligation was only $150,000 per year, relatively little in the context of a health care budget: see Hester A. Lessard, "Dollars Versus [Equality] Rights': Money and the Limits on Distributive Justice" (2012) 58 Sup Ct L Rev (2d) 299 at 309.

[70] Young, "Unequal to the Task", *supra* note 39 at 183; *Eldridge, supra* note 10 at para 61; *Vriend, supra* note 67 at paras 82, 83.

[71] June Ross, "A Flawed Synthesis of the Law" (2000) 11 Constitutional Forum 74 at 74-77.

[72] *Law*, *supra* note 3 at paras 39, 88.

1) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the claimant(s);[73]
2) The correspondence or lack of correspondence between the ground(s) on which the claim was based and the actual need, capacity, or circumstances of the claimant(s);[74]
3) The ameliorative purpose or effects of the law upon a more disadvantaged person or group;[75] and
4) The nature and scope of the interest affected by the law.[76]

It was thought remarkable by some commentators that the four contextual factors in *Law* did not resolve the main question that plagued the equality trilogy, namely, the role that legislative "purpose," or the "relevance" of a distinction to that purpose, should or should not play in the analysis of section 15 claims.[77] However, the second contextual factor — in spite of the Court's original intention that it would allow for differential treatment that promoted substantive equality — came to replicate the relevance consideration from the trilogy in some cases.[78]

Law provided a mechanical, formalistic approach to section 15. Justice Iacobucci had gone to some lengths to insist that *Law* was not to be applied as a "rigid test,"[79] but the Court's own mechanical application of *Law* in subsequent cases watered down this admonition somewhat. Its three-plus-four step test was eagerly seized on by law students, lawyers and lower courts as a formula to be marched through. It was embraced so eagerly that when *Kapp* was decided in 2008, lower courts were very reluctant to abandon the *Law* test.[80]

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[73] This factor is a reference to *Turpin, supra* note 25 at 1333: "A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case".

[74] This is a reference to *Eaton v Brant Co. Board of Education*, [1997] 1 SCR 241 at para 66 [*Eaton*], holding that "the avoidance of discrimination will frequently require that distinctions be made to take into account the actual personal characteristics of groups such as disabled persons".

[75] The source of this factor is also *Eaton, ibid*: "the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society".

[76] This factor echoed *Egan, supra* note 51 at 556 (per L'Heureux-Dubé J, dissenting): "the more severe and localized the . . . consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter".

[77] See e.g. Ross, *supra* note 71 at 77, 82.

[78] See Martin, *supra* note 32 at 328; McIntyre, *supra* note 59 at 102-05; Baines, *supra* note 39 at 72.

[79] *Law, supra* note 3 at paras 6, 88.

[80] All of the lower courts which dealt with challenges under s 15 in the first seven months following the *Kapp* decision, *supra* note 4, used the two-part test set out in *Andrews*, *supra* note 2, as restated in *Kapp*.

Law imported some section 1 considerations into section 15, particularly through the second contextual factor of correspondence which, in the following years, proved to be the most important of the four factors. Attention to "correspondence" between the grounds at issue and the claimant's actual situation inevitably involved attention to the objective of the challenged law or policy, and a consideration of whether the differential treatment on a prohibited ground was relevant to the achievement of that objective. For example, in *Lovelace v Ontario*, the Court found that a gaming program that was targeted at First Nations bands registered under the *Indian Ac*t did not discriminate in excluding non-status Indians or Métis because, although their needs corresponded to the aims of the program, their capacities did not: they had "very different relations with respect to land, government, and gaming from those anticipated by the casino program."[81] But if section 15 is restricted to unreasonable, unfair or arbitrary distinctions — Justice McLachlin's approach from the Court of Appeal decision in *Andrews* — it confuses the relationship between section 15 and section 1. The burden is on the claimant rather than government as it is under section 1, reducing the government's *Oakes* obligations.[82]

The abstract, subjective and malleable nature of human dignity was another problem. *Law* rendered dignity the touchstone of equality, and the violation of dignity the measure of discrimination.[83] The promise of *Andrews* was that disadvantage — a matter of structural and social relations — would guide equality analysis, but in focusing on dignity, defined as feeling "self-respect and self-worth,"[84] the effect of *Law* was to shift the focus from social disadvantage to personal feelings. This approach effectively individualized and de-contextualized the "experience" of discrimination, and rendered equality a matter of a personal psychological experience or emotion, rather than a matter of social and systemic disadvantage and exclusion.[85] The concept was so malleable that it also made outcomes unpredictable.[86] These criticisms of *Law* were acknowledged by the

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See *Hartling v Nova Scotia (AG)*, 2009 NSSC 2 at para 17; *C.C.-W. (Litigation guardian of) v Ontario (Health Insurance Plan, General Manager)*, [2009] OJ No 140 (SCJ) at para 104; *Withler v Canada (AG)*, 2008 BCCA 539 at para 155; *Confédération des syndicats nationaux c Québec (PG)*, 2008 QCCS 5076 at paras 326-27; and *Downey v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 65. However, three of the four — all but *C.C.-W* — also used the concept of human dignity and *Law*'s, *supra* note 2, four contextual factors to determine a violation of human dignity in the second step.

[81] 2000 SCC 37, [2000] 1 SCR 950, [*Lovelace*] at para 75. See also Martin, *supra* note 32 at 328.

[82] *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

[83] Denike & Stephenson, *supra* note 68 at 91; Martin, *supra* note 32 at 328-330.

[84] *Law, supra* note 3 at para 53.

[85] Denike & Stephenson, *supra* note 68 at 95; Martin, *supra* note 32 at 329-30.

[86] Debra M McAllister "Section 15(1) – The Unpredictability of the Law Test" (2003-04) 15 NJCL35; Diane Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences", (2001) 13

Supreme Court in *Kapp* in 2008,[87] but in the post-*Law* era human dignity — and comparator groups — played major roles.

VII. POST-*LAW*

It is impossible to read the post-*Law* cases without being struck by the fact that human dignity is within the eye of the beholder.[88] Whether a violation of dignity was made out in a given case seemed to depend upon the extent to which the factual context was taken into account, the significance that was assigned to the purpose of the law in question, and how that purpose was defined. *Gosselin v Quebec (Attorney-General),*[89] *Nova Scotia (Attorney General) v Walsh*,[90] and *Trociuk v British Columbia (Attorney General)*[91] each illustrate how the *Law* test not only failed to fulfill its promise of greater predictability (suggested by the unanimity of the court in *Law* and the lower courts' embrace of the three-plus-four step test), but also moved further away from substantive equality.

Gosselin involved a challenge by a young unemployed woman to Quebec social assistance laws that provided those who were single, unemployed, and under 30 years old with $170 per month in social assistance, only a third of the regular benefits. The case was framed as an age discrimination claim, and gave rise to a split in the Court that was as deep and as fundamental as the one evident in the equality trilogy. All of the judges applied the *Law* test but the Court split 5:4 on the results of its application to the facts, with the majority finding no discrimination.[92] As in *Law* itself, the majority's analysis of age discrimination was sorely lacking in context, with little attention paid to the conditions of poverty in which the claimant and others

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CJWL 37 at 56; Christopher Bredt & Adam Dodek, "Breaking the Law's Grip on Equality: A New Paradigm for Section 15" (2003) 20 Sup Ct L Rev (2d) 33 at 47.

[87] *Kapp, supra* note 4 at paras 21-22 (citations omitted).

[88] See Denise Réaume, "Discrimination and Dignity" (2003) 63 La L Rev 645; Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's LJ 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6 Rev Const Stud 290; Diana Majury, "The Charter, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall LJ 297.

[89] 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].

[90] 2002 SCC 83, [2002] 4 SCR 325 [*Walsh*].

[91] 2003 SCC 34, [2003] 1 SCR 835 [*Trociuk*].

[92] *Gosselin, supra* note 89 (per McLachlin, CJ for the majority and L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ for the dissent on s 15). A majority of the Court also rejected Gosselin's s 7 claim (L'Heureux-Dubé and Arbour JJ. dissenting).

in the class that she represented actually lived, despite their youth and theoretical employability.[93]

In *Walsh*, the Court reversed the Nova Scotia Court of Appeal, which had struck down a matrimonial property law confined to married couples. Writing for the majority, Bastarache J characterized the central question as whether a reasonable unmarried member of a heterosexual couple would find that their exclusion from the division of property regime "has the effect of demeaning his or her dignity."[94] The Court held that such a person would not feel demeaned; on the contrary, he or she would feel approbated by the fact that the legislature recognized their "choice" not to marry.[95]

Trociuk was a unanimous decision that legislation excluding the particulars of some fathers from their children's birth registration and the resulting denial of participation in the choice of the children's surnames was discriminatory on the basis of sex. Justice Deschamps wrote that the absence of historical disadvantage need not necessarily preclude a finding of discrimination.[96] She also underscored the point that "neither the presence nor absence of any of the [*Law*] contextual factors is dispositive of a section 15(1) claim" or "determines the outcome of the dignity analysis."[97] *Trociuk* is one of a very few sex discrimination cases that have been successful — and it was a formal equality case where the claimant was a man.[98]

The analysis in each of these three cases is distilled into a test about the feelings of the reasonable person: would a reasonable person in the circumstances of the claimant, apprised of the relevant circumstances, legitimately feel that their

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[93] *Gosselin supra* note 89 and *Law supra* note 3 suggest that age-based discrimination claims will be very difficult to prove. See Gwen Brodsky, Rachel Cox, Shelagh Day & Kate Stephenson, "*Gosselin v. Quebec (Attorney General)* (Women's Court of Canada) (2006) 18 CJWL 193 at 200-04 (analyzing the claim as one of age in intersection with reliance on social assistance); see also Hughes, *supra* note 36 at 262 (noting that age-based discrimination claims are given less scrutiny by the Court).

[94] *Walsh, supra* note 90 at para 38 (per Bastarache J).

[95] *Walsh, Ibid* at paras 43, 55-58, 62 (L'Heureux Dubé, J dissenting). For critiques of the Court's choice-based reasoning, see Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 209; Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in McIntyre & Rodgers, *Diminishing Returns, supra* note 38, 115. See also *Quebec v A*, *supra* note 16 (where a majority of the Court focused on choice as the reason for upholding Quebec's exclusion of *de facto* spouses from a number of income- and property-sharing provisions in the *Civil Code*).

[96] *Trociuk, supra* note 91 at para 20.

[97] *Ibid*.

[98] For critiques, see Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v British Columbia (Attorney General)*" (2001) 16 CJWL 165; Ryder, Faira & Lawrence, "What's Law Good For", *supra* note 11 at 122-23.

dignity is infringed? The focus on feelings in this test is problematic because it does not account for the social relations and larger systemic factors at issue. This test is similar to that advocated by Justice McLachlin in the British Columbia Court of Appeal in *Andrews*. Her question was "whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair."[99]

Other problematic post-*Law* cases focused on the need for a comparative approach. In *Granovsky v Canada (Minister of Employment and Immigration),*[100] where the Canada Pension Plan distinction between permanent and temporary disabilities was challenged, the Court emphasized that "identification of the group in relation to which [an] appellant can properly claim 'unequal treatment' is crucial,"[101] and substituted a different comparator group for the group identified by the claimant.

Hodge v Canada (Minister of Human Resources Development)[102] reaffirmed the judiciary's role in scrutinizing the claimant's choice of comparator. The Court asserted what came to be known as the "mirror comparator" approach:[103]

> The appropriate comparator group is the one which mirrors the characteristics of the claimant . . . relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter.

Only one comparator, a mirror of the claimant in all but one respect, was allowed.[104]

In *Auton (Guardian ad litem of) v British Columbia (Attorney General),*[105] a case involving a claim for funded autism services, the Court came up with a comparator that was so narrow and complex that the claimants had no way of

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[99] *Andrews BCCA, supra* note 29 at 609-10.

[100] 2000 SCC 28, [2000] 1 SCR 703 [*Granovsky*].

[101] *Ibid* at para 45.

[102] 2004 SCC 65, [2004] 3 SCR 357 [*Hodge*].

[103] *Ibid* at para 23.

[104] For critiques of *Hodge*, *supra* note 102, see e.g. Margot Young, "Blissed Out: Section 15 at Twenty", in MacIntyre & Rodgers, *Diminishing Returns*, *supra* note 38 at 45; Daphne Gilbert and Diana Majury. "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111.

[105] *Auton, supra* note 10.

showing differential treatment based on the evidence they had led at trial. The mirror comparator in *Auton* was a "non-disabled person, or a person suffering a disability other than a mental disability, who seeks or receives funding for a non-core therapy that is important for his or her present and future health, is emergent and has only recently began to be recognized as medically required."[106] The claim was also dismissed on the basis that unlike *Eldridge*, there was no benefit that was being unequally provided by the law.[107]

There were some victories for equality-seeking groups in the post-*Law* period.[108] For example, in *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*,[109] the Court held that the complete denial of benefits for chronic pain under Nova Scotia's workers' compensation scheme constituted discrimination on the basis of physical disability contrary to section 15. However, even that victory was short-lived. The Nova Scotia government responded by providing benefits for chronic pain ranging from three per cent to a maximum of six per cent, or 75 per cent of pre-accident gross weekly earnings. In *Downey v Nova Scotia (Workers' Compensation Appeals Tribunal)*,[110] Cromwell J (as he then was), writing for a unanimous Court of Appeal, upheld the six per cent cap on the basis that it did not demean the dignity of workers suffering from chronic pain.

Corbiere is another important case in the period between *Law* and *Kapp*, where the Court first considered its approach to analogous grounds in depth.[111] The case challenged the exclusion of off-reserve Indian band members from voting in band elections. The Court was unanimous in finding that this exclusion amounted to discrimination based on the analogous ground of Aboriginality-residence. Writing for the majority, Justices McLachlin and Bastarache stated that analogous grounds were those that "often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or

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[106] *Ibid* at para 55.

[107] For critiques, see e.g. Ravi Malhotra, "Has the Charter Made a Difference for People with Disabilities? Reflections and Strategies for the 21st Century" (2012) 58 Sup Ct L Rev (2d) 273 at note 83; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror on the Wall, What's the Fairest of Them All?" in MacIntyre & Rodgers, *Diminishing Returns, supra* note 38 135 at 146-48; Martha Jackman, "Health Care and Equality: Is There a Cure?" (2007) 15 Health LJ 87.

[108] Some of these victories could be considered formal equality wins. See e.g. *M. v. H.*, [1999] 2 SCR 3; *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur,* [2003] 2 SCR 504 [*Martin*]. See also Ryder, Faira & Lawrence, "What's Law Good For", *supra* note 11 at 123-24 (discussing *Martin* as a formal equality case).

[109] *Martin*, *ibid*.

[110] 2008 NSCA 65.

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

changeable only at unacceptable cost to personal identity."[112] While the majority emphasized stereotyping and personal characteristics that were actually or constructively immutable in *Corbiere*, Justice L'Heureux Dubé, in a concurring judgment, approached analogous grounds more contextually. She concentrated on characteristics that were fundamental to "identity, personhood, or belonging", as well as those that spoke to a lack of political power, disadvantage, or vulnerability.[113] The majority's approach to grounds has prevailed in the small number of cases raising issues of analogous grounds since *Corbiere*.[114]

To summarize the post-*Law* period, sixteen equality cases were heard by the Supreme Court under the *Law* approach and in only five — 31.2 percent of the cases — did the equality-seeking claimant(s) win.[115] In at least one of these cases, the win did not promote substantive equality,[116] so the success rate is arguably lower still. The majority of claims failed at the third step, the discrimination / human dignity stage. [117] Of particular concern is the fact that cases in which the recognition of rights is inexpensive have been successful and cases in which rights recognition is expensive have failed.[118]

At the end of the *Law* era, in *Kapp* the Supreme Court conceded that human dignity had indeed turned out to be an additional barrier to equality-seekers, adding another hurdle to what they had to prove.[119] *Kapp* marked the end of the use of human dignity in section 15 cases (although lower courts and lawyers were slow to appreciate that abandonment).

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[112] *Ibid* at para 13. The focus on stereotyping here echoes Justice McLachlin's elevation of stereotyping to be the critical marker of discrimination in *Miron*, and foreshadows its role as the Court's major focus in the *Kapp* era.

[113] *Ibid* at para 60.

[114] See e.g. *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989 (professional / employment status not an analogous ground); but see Justice L'Heureux Dubé's concurring judgment, finding that it could be in the appropriate context; see also her judgment in *Dunmore v Ontario (AG),* 2001 SCC 94, [2001] 3 SCR 1016 (finding status as an agricultural worker to be an analogous ground). Three members of the Court dismissed the argument that status as an agricultural worker is an analogous ground in *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]. For discussions of grounds see Hughes, *supra* note 36 at 262-63; Joshua Sealy-Harrington, "Mutable Immutability: Clarifying and Criticizing the Role and Significance of Immutability in Equality Rights under the Charter" (2013) J L & Equality (forthcoming).

[115] Ryder, Faira & Lawrence, "What's Law Good For?", *supra* note 11.

[116] See *Trociuk, supra* note 91.

[117] See however *NAPE, supra* note 10, where the failure to deliver on pay equity obligations was found to violate the equality guarantee but was held to be justified under s. 1 due to a budget crisis.

[118] Lessard, *supra* note 69.

[119] *Kapp, supra* note 4 at paras 21-22.

VIII. *KAPP* AND SECTION 15(1)

Kapp was a challenge to the federal government's Aboriginal Fishing Strategy, which included a 24-hour priority licence to fishers from three First Nations on the Fraser River. A group of mostly non-Aboriginal commercial fishers argued that this priority violated their equality rights under section 15 of the *Charter*. *Kapp* is mainly thought to be significant for its approach to section 15(2), which we will discuss shortly, but it also made some important changes to section 15(1).[120]

First, Chief Justice McLachlin and Justice Abella, for a unanimous Court on the approach to section 15, simplified the test for discrimination somewhat by consolidating *Law*'s three steps into two: "(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?"[121] They then confusingly noted the continued relevance of *Law*'s four contextual factors, despite the elimination of the need to show a violation of human dignity to prove discrimination. The Court suggested that the contextual factors of pre-existing disadvantage and the nature of the interest affected were relevant to the perpetuation of disadvantage and prejudice, and noted that the correspondence factor pertained to stereotyping.[122] As for *Law*'s ameliorative purpose or effect factor, it was now to be considered under section 15(2), although the Court left open the possibility that it might also be pertinent to whether the law or program perpetuated disadvantage.[123]

Kapp said it was a reaffirmation of *Andrews*[124] and worked *Law*'s four contextual factors into its new approach, but it was more than a consolidation of previous case law on section 15(1) – it was, in our view, another reinvention. As already mentioned, the focus of the final stage of analysis — whether there is discrimination — is no longer on human dignity. Given the problems with human dignity outlined earlier, we see this move away from dignity as the first of three positive aspects of the *Kapp* approach.[125] But the Court did not replace dignity in a positive way in *Kapp;* the definition of discrimination was narrowed through its new

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[120] In *Quebec v A, supra* note 16 at paras 162, 170, 217, LeBel J characterizes the changes made by *Kapp*, *supra* note 4, as a reworked analytical framework for s 15(1).

[121] *Kapp, supra* note 4 at para 17. Justice Bastarache's concurring judgment focused on section 25 of the *Charter*.

[122] *Ibid* at para 23.

[123] *Ibid*.

[124] *Ibid* at paras 14, 17.

[125] *Withler*'s approach to comparator groups is the second exception; see text accompanying note 146. *Kapp*'s protection of ameliorative programs targeting disadvantaged groups from claims of "reverse discrimination" is the third exception; see text following note 179.

focus on stereotyping and prejudice. The groundwork for this focus may have been laid in *Miron* and *Corbiere*, but *Kapp* does not mark a return to *Andrews*, which emphasized disadvantage. *Kapp*'s narrow definition of discrimination leaves out other harms, such as marginalization, oppression, and deprivation of benefits significant to well-being that may be relevant to individuals and groups claiming section 15's protection.[126] This may be particularly problematic for adverse effects cases, where the harms of discrimination typically go beyond prejudice and stereotyping. *Kapp* also provided little guidance to lower courts on how its new approach to section 15(1) should be applied, likely because section 15(1) was not fully applied to the facts of the case.[127]

IX. POST-*KAPP*: SECTION 15(1) AND *WITHLER*

The Court's next major section 15(1) case was *Withler* in 2011, which can be seen as a companion case to *Kapp*. Surviving spouses of federal civil servants and Canadian Forces members challenged a reduction in the supplementary death benefits they received after their spouses died. The reduction was based on the age of the plan member at the time of death, with surviving spouses of older plan members receiving reduced benefits. This led to a claim of age-based discrimination.

Chief Justice McLachlin and Justice Abella, again writing for a unanimous Court, confirmed the *Kapp* test for discrimination: "(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?"[128] The Court also built on *Kapp* somewhat by explaining that a law will perpetuate disadvantage when it treats a historically disadvantaged group in ways that exacerbate their situation.[129] Further, it attempted to define discriminatory stereotyping by stating that it occurs where government action imposes a disadvantage "based on a stereotype that does not correspond to the actual circumstances and characteristics" of the claimant(s),[130] thereby aligning stereotyping even more closely with *Law*'s correspondence factor

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[126] Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 48-65. See also Hamilton & Koshan, "Courting Confusion", *supra* note 8 at 937; Sophia Moreau, "*R v Kapp*: New Directions for Section 15" (2008-09) 40 Ottawa L Rev 283 at 291-292; Young, "Unequal to the Task", *supra* note 39 at 209.

[127] This is because s 15(2) prevailed. See Hamilton & Koshan, "Courting Confusion", *supra* note 8 at 928-9.

[128] *Withler, supra* note 14 at para 30, quoting *Kapp, supra* note 4 at para 17.

[129] *Withler, ibid* at para 35.

[130] *Ibid* at para 36. For a critical commentary on these definitions, see Hamilton & Koshan, "Meaningless Mantra", *supra* note 8 at 48-49 (noting that the Court explains "perpetuation" rather than disadvantage, and that its explanation of "stereotyping" is essentially tautological). The Court provides more useful definitions of "prejudice" and "stereotyping" in *Quebec v A, supra* note 16. See *infra* note 201.

than had *Kapp*.[131] It noted that stereotyping may also perpetuate prejudice and disadvantage, but a group that is not historically disadvantaged may also be subjected to discriminatory stereotyping.[132] This clears up the debate that had persisted since *Turpin* about whether equality rights claimants need to show pre-existing disadvantage.[133] In cases of stereotyping, the answer appears to be no.[134]

Like *Kapp*, *Withler* confirmed the relevance of *Law*'s four contextual factors to the assessment of prejudice and stereotyping, and the Court added a fifth factor as well.[135] Where the impugned law is part of a larger benefit scheme, the ameliorative effect of the law on others and the interests it attempts to balance will also influence the discrimination analysis.[136] Showing a large degree of deference to the government, the Court indicated that "allocation of resources and particular policy goals that the legislature may be seeking to achieve" are relevant in the context of large benefit schemes.[137] This approach seriously waters down the third factor from *Law* – the focus is no longer on other disadvantaged groups, let alone more disadvantaged groups, but on "others" writ large.[138] It also imports section 1 considerations about balancing of interests and social policy goals into section 15.

Withler's approach to comparative analysis under section 15(1) is also significant. As noted earlier, the Court's analysis of comparators often created barriers to equality claims, especially when it took a mirror comparator approach.[139] In *Withler*, the Court referenced the academic criticism of this approach, and admitted that it may result in formal equality where the focus is on comparing treatment of those who are similarly situated. It also acknowledged that the mirror approach may make intersecting grounds of discrimination more difficult to claim,

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[131] *Kapp, supra* note 4 at para 23.

[132] *Withler, supra* note 14 at para 36.

[133] See *supra* note 46 and accompanying text.

[134] This point was confirmed in the opinion of Justice LeBel in *Quebec v A*, *supra* note 16 at para 182 (writing in dissent on s 15, but not on this point). Justice Abella's majority decision on s 15 in *Quebec v A* focuses more heavily on historic disadvantage (see e.g. paras 318, 332, 349, 356), but does not state that it is necessary for a successful s 15 claim.

[135] In *Quebec v A, ibid* at para 165, LeBel J categorizes the new factor introduced by *Withler*, *supra* note 14, as a second or alternative function attributed to the ameliorative contextual factor.

[136] *Withler, supra* note 14 at para 38.

[137] *Ibid* at para 67.

[138] The third factor from *Law*, *supra* note 4, had been relaxed in earlier cases such as *Lovelace, supra* note 81 at paras 84-86, to focus on "other" disadvantaged groups that benefit programs might have been targeted, rather than "more" disadvantaged groups.

[139] See *supra* note 103-10 and accompanying text.

and may unfairly burden claimants to find the perfect comparator and to mount sufficient evidence to show differential treatment based on this comparison.[140]

The Court adopted a new, more flexible approach to comparison in *Withler*. At the first stage of the *Kapp* test, if the claimant establishes a distinction based on one or more protected grounds, the claim should proceed to the second step of the analysis, and there is no need to identify a particular comparator group. However, the Court indicated that this would be more difficult for claims of indirect discrimination, where the law on its face treats everyone the same but has an adverse impact on a particular group. Claimants in these cases "will have more work to do", and may need to present evidence of historical or sociological disadvantage to show how the law imposes a burden or denies a benefit to them relative to others.[141] At the second stage of the *Kapp* test, the Court noted that comparison may be of assistance in analyzing whether the law or government action perpetuates disadvantage or stereotyping.[142]

Applying these principles to the facts in *Withler*, the Court found that the legislation drew a distinction based on age, and the first step of the *Kapp* test was satisfied without the need to identify a particular comparator group.[143] However, the Court held that this distinction did not amount to discrimination. The "central consideration" was said to be the overall purpose of the benefit scheme, the allocation of government resources, and legislative policy goals — in other words, the new fifth contextual factor.[144] Comparing the situation of the claimants to the beneficiaries of the broader benefit scheme, the Court found that the reduced death benefits were not discriminatory, as they did not fail to account for the claimants' actual needs and circumstances.[145]

In its approach to comparator groups, *Withler* presents the second exception to our argument that the current reinvention of section 15 is the most problematic. The Court's recognition of the problems with its mirror comparator approach is a positive step forward and has significant potential benefits for equality claimants.[146]

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[140] *Withler, supra* note 14 at paras 55-59 (citations omitted).

[141] *Ibid* at para 64.

[142] *Ibid* at paras 63-65.

[143] *Ibid* at para 69.

[144] *Ibid* at para 71.

[145] *Ibid* at paras 72-73.

[146] *Withler*'s (*supra* note 14) more flexible approach to comparators seems to have had a positive spillover effect in human rights cases. See *Moore v British Columbia (Education)*, 2012 SCC 61 (finding that the courts below had taken too strict an approach to comparators in the context of educational services for

It is somewhat ironic, however, that a mirror comparator approach might have actually exposed the discrimination inherent in the reduced supplementary death benefits for older widows.[147] The Court's statement that it will be more difficult to prove indirect or adverse effects discrimination claims, based on the need for comparative analysis in these cases, is another cause for concern. This may make it more challenging for groups such as persons with disabilities to make out section 15 claims, as many of the inequalities they face are based on laws that fail to take their particular needs and circumstances into account.[148]

We have already noted the difficulties with *Withler*'s addition of a fifth contextual factor in cases involving large benefit schemes. The importation of section 1 considerations into section 15 has been an issue since Justice McLachlin's approach in *Andrews* was rejected, and as noted above, it resurfaced in the trilogy and in *Law*. Although the problems with this approach were acknowledged in *Kapp* in 2008, we see the Court return to a balancing approach under section 15 only three years later in *Withler*. The Court's commitment to keep section 15 and section 1 considerations distinct, as first articulated in *Andrews*, was not kept in *Withler*.

A third concern with *Withler* is that even though the concepts are now defined with somewhat more detail, a continued focus on prejudice and stereotyping will make some section 15(1) claims difficult to mount, because only certain kinds of harm are recognized as discrimination.[149] The Court's decision that stereotyping may occur without proof of pre-existing disadvantage has the potential to promote substantive equality in some cases involving new forms of disadvantageous treatment — for example, in the case of those who are stereotyped because of their genetic makeup. But it might also detract from substantive equality if cases like *Trociuk,* where the male claimant was not a member of a historically disadvantaged group, could be successful under this understanding of discrimination. The Court's failure to consider the full context of the case in *Withler* — i.e. the vulnerability of the elderly widows[150] — also suggests that stereotyping is overtaking disadvantage as the predominant definition of discrimination. This replicates one of the problems with the *Law* test, where the second contextual factor came to overshadow considerations such as pre-existing disadvantage.[151]

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students with learning disabilities). *Withler*'s more flexible approach to comparators was also noted approvingly in *Quebec v A, supra* note 16 at paras 167-69, 189 by LeBel J, but not commented upon by Abella J.

[147] See Hamilton & Koshan, "Meaningless Mantra", *supra* note 8 at 52.

[148] But see Malhotra, *supra* note 107 at 282-3 (noting that disability discrimination may also involve stereotyping and direct discrimination such as harassment).

[149] Hamilton & Koshan, "Meaningless Mantra", *supra* note 8 at 48-49.

[150] *Ibid* at 56.

[151] McIntyre, *supra* note 59 at 103-4.

X. OTHER POST-*KAPP* SECTION 15(1) CASES

In other post-*Kapp* cases, section 15(1) claims have received minimal attention from the Court and have been dismissed in a few short paragraphs.[152] Equality rights were not the focus of the claimants in most of these cases, yet they still provide useful illustrations of some of the problems with the *Kapp* approach to section 15. These cases were also subsequently relied upon by the Court as authority for the basic principles of their latest approach.[153]

For example, in *Alberta v Hutterian Brethren of Wilson Colony*, the Court reviewed a claim that Alberta's mandatory photo requirement for drivers' licences was unconstitutional in light of the belief of Hutterites that having their photos taken violates the second commandment.[154] The main focus of the case was freedom of religion under section 2(a) of the *Charter*.[155] A majority of the Court found the section 2(a) violation to be justified under section 1 and went on to summarily review and dismiss the section 15 argument as follows:

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v Law Society of British Columbia*, … as explained in *Kapp*.[156]

Once again the Court's dismissal of equality rights seems to narrow the definition of discrimination to include only distinctions involving stereotyping. Moreover, its reference to a "neutral" policy choice ignored adverse effects

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[152] In addition to the cases discussed in this part, see also *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 [*Ermineskin*], where the Court dismissed a claim of discrimination in the context of First Nations' property held in trust by the Crown under the *Indian Act* without a contextual inquiry into the treatment of "Indians" under the *Indian Act*.

[153] See *Withler, supra* note 14 at paras 30, 31, 66, citing *Ermineskin*, *supra* note 152; at para 30 citing *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 [*AC*]; and at paras 30 and 66 citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*]. See also *Quebec v A, supra* note 16 at paras 172, 178 (per LeBel J.) citing *Ermineskin, supra* note 152; at paras 171, 173 (per Lebel J) citing *Hutterian Brethren, ibid*; and at para 173 (per LeBel J) citing *AC, ibid*.

[154] *Hutterian Brethren, ibid*.

[155] *Ibid* at para 105 (indicating that "the s. 15 claim was not considered at any length by the courts below and addressed only summarily by the parties in this Court.").

[156] *Ibid* at para 108 (per McLachlin CJ).

discrimination, and imported section 1 considerations about the rationality of government policy into section 15(1).[157]

In *A.C. v Manitoba*, the Court dismissed a section 15 claim of age discrimination in the context of a youth's competency to make medical decisions, focusing its judgment on sections 2(a) and 7 of the *Charter*.[158] A plurality of the Court in a judgment written by Justice Abella held that the competency of those under 16 to make such decisions was not based on any "disadvantaging prejudice or stereotype", and did not amount to age-based discrimination.[159] Justice Abella suggests that it will be very difficult to prove claims of age-based discrimination, citing the frequency with which the Court has dismissed such claims and quoting Chief Justice McLachlin's remark in *Gosselin* that "age-based distinctions are a common and necessary way of ordering our society."[160] In a concurring judgment, Chief Justice McLachlin and Justice Rothstein found that the distinction between those under and over 16 was not discriminatory because it was "ameliorative, not invidious."[161] They improperly looked at amelioration in relation to the claimant rather than other groups, sending the message that even if a law treats a person adversely, if it is for their own good it will not be discriminatory.[162]

In *Ontario (Attorney General) v Fraser*,[163] the Court reviewed the constitutionality of the *Agricultural Employees Protection Act, 2002,*[164] which created a specific labour relations regime for agricultural workers. The challenge centred on freedom of association under section 2(d) of the *Charter*, but also involved a claim that the regime involved discrimination based on status as an agricultural worker. The majority dismissed the section 15(1) claim, as they felt it had not been established that the regime "utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage."[165] In a concurring judgment, Justice

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[157] See Hamilton & Koshan, "Terrorism or Whatever", *supra* note 8 at 247-48.

[158] *AC, supra* note 153. A majority dismissed the claims under s 2(a) and s 7 as well. Writing in dissent, Justice Binnie found some support for the s 15(1) arguments, but ultimately found that "the real *gravamen* of A.C.'s complaint is … with the forced treatment of her body in violation of her religious convictions."(at para 231).

[159] *Ibid* at para 111.

[160] *Ibid* at para 110, quoting *Gosselin*, *supra* note 89 at para 31.

[161] *Ibid* at para 152.

[162] The Court also took this approach in earlier cases. See Dianne Pothier, "But It's for Your Own Good" in Margot Young, ed, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 40.

[163] *Fraser supra* note 114.

[164] SO 2002, c 16.

[165] *Fraser, supra* note 114 at para 116 (per McLachlin CJ and LeBel J). Justice Abella, who dissented on the s 2(d) decision, did not consider s 15 of the *Charter*.

Deschamps characterized the claim as one of "economic inequality", which she found to be beyond the scope of section 15 of the *Charter*.[166] Along with Justices Charron and Rothstein in a separate concurring judgment, she also found that employment status and the category of "agricultural worker" do not amount to analogous grounds protected under section 15.[167]

As noted, section 15(1) was not the major issue in these cases.[168] Nevertheless, they show how challenging equality rights claims can be under the *Kapp* approach. The losses in these cases arguably flow from the narrow formulation of discrimination in *Kapp* and the Court's failure to reconsider and reject the second contextual factor from *Law*, which continues to be the source of inappropriate section 1 considerations within section 15 analysis. The cases also suggest that some grounds are beyond the purview of section 15. As in *Kapp*, the cases fail to give guidance to claimants and lower courts about how to mount and assess equality claims because of their too brief analysis of those arguments.[169]

It is significant that no equality rights claims including or since *Kapp* have been successful at the Supreme Court.[170] Of these losses, only *Kapp* can be seen as a victory for substantive equality in its dismissal of the "reverse discrimination" claim. While it has only been five years since *Kapp* was decided, it does not seem too soon to say that although the Court has acknowledged its critics and attempted to modify its approach to section 15(1) accordingly, the application of this approach has not been positive for equality seeking groups.

XI. SECTION 15(2): AFFIRMATIVE ACTION

To this point our discussion of *Kapp* has related to its implications for section 15(1) of the *Charter*. *Kapp* is also significant for changing the Court's approach to section 15(2) from that of "interpretive aid" set out in *Lovelace*.[171] In that 1997 case, the Court held that under section 15(2), laws, policies and programs aimed at improving the conditions of disadvantaged individuals or groups would generally be consistent

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[166] *Ibid* at para 315.

[167] *Ibid* at paras 295, 315.

[168] We do not dispute that equality can be advanced by non-section 15 cases; see Hughes, *supra* note 36 at 268-70.

[169] See Hamilton & Koshan, "Courting Confusion", *supra* note 8 at 928-29.

[170] This was true even for dissenting judgments until *Quebec v A*, *supra* note 16, where five justices found a violation of section 15, but one of those five (Chief Justice McLachlin) found the violation to be justified under section 1.

[171] *Supra* note 81 at 105-08.

with the purpose of equality rights protections accorded by section 15, and could permissibly target certain groups for the provision of benefits. Ameliorative programs could not be underinclusive of the very people they were designed to assist, but exclusion from a targeted rather than a comprehensive program was less likely to be discriminatory.[172]

In *Kapp*, the Court departed from the interpretive aid approach, and decided that section 15(2) should have "independent force" in the section 15 analysis.[173] Once a claimant proves a distinction made on an enumerated or analogous ground under the first step of the section 15(1) test, the government has an opportunity to prove that the impugned law, program or activity is ameliorative; if so, it is not discriminatory. If the government fails to demonstrate that its program falls under section 15(2), the law or program must then receive full scrutiny under section 15(1) to determine whether it is discriminatory.[174]

As a result of its new approach, *Kapp* also set out a new test for section 15(2). The government must prove that the law or program at issue has an ameliorative or remedial purpose, as opposed to effect. The ameliorative purpose must be genuine, although it need not be the sole purpose of the law or program, and it must be "plausible that the program may indeed advance the stated goal of combatting disadvantage."[175] The law or program cannot be restrictive or punitive. It must be aimed at a specific disadvantaged group, since section 15(2) is intended to protect targeted government programs rather than "broad societal legislation."[176] The Court explicitly avoided the language of "saving," and noted that if the section 15(2) test is met, the program is by definition not discriminatory.[177]

On the facts of *Kapp*, the Court found that there was a distinction based on race under the first step of the section 15(1) test, as the claimant fishers did not have the same priority as the targeted First Nations fishers.[178] However, the communal

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[172] *Ibid* at para 85. On the facts of the case, however, *Law*'s (*supra* note 3) second, "correspondence" factor operated to deny the claim of discrimination. See *supra* note 81 and 82 and accompanying text.

[173] *Supra* note 4 at para 34.

[174] *Kapp*, *supra* note 4 at para 40.

[175] *Ibid* at paras 44-48, 51.

[176] *Ibid* at paras 54-55.

[177] *Ibid* at para 40.

[178] For a critique of the finding that this distinction was race-based, see e.g. June McCue, "*Kapp*'s Distinctions: Race-Based Fisheries, the Limits of Affirmative Action for Aboriginal Peoples and Skirting Aboriginal People's Unique Constitutional Status Once Again" (2008) 5 Directions 56.

licence issued to the bands in question was seen as an ameliorative program targeted at a disadvantaged group, so the claim of "reverse discrimination" was defeated.[179]

The defeat of the section 15(1) claim in *Kapp*, on the basis that section 15(2) protects ameliorative programs targeting disadvantaged groups from claims of "reverse discrimination," is the third exception to our general argument that the *Kapp* approach to equality rights is the Court's worst. *Kapp* promoted substantive equality by dismissing the claim of generally more advantaged fishers that the communal licence intended to ameliorate historic disadvantage should be struck. However, *Kapp* left open the question of how section 15(2) should be approached in cases where underinclusive benefit programs are at issue, i.e., where a disadvantaged group claims that it was excluded from an ameliorative program in a discriminatory way.

XII. *CUNNINGHAM* AND UNDERINCLUSIVITY UNDER SECTION 15(2)

The Court dealt with an underinclusiveness claim in *Cunningham* in 2011.[180] *Cunningham* involved Métis persons in Alberta who registered as status Indians to receive health benefits under the *Indian Act,*[181] and as a result lost their status as members of a Métis settlement under the *Metis Settlements Act*.[182] Their exclusion from the *MSA* resulted in a loss of benefits, including their ability to participate in their Métis community, their right to vote in Métis Council elections, and their right to continue to reside on or occupy Métis land.

In a unanimous decision written by Chief Justice McLachlin, the Court held that its approach to section 15(2) of the *Charter* under *Kapp* should also apply to underinclusive ameliorative programs. Noting that "it is unavoidable that ameliorative programs, in seeking to help one group, will necessarily exclude others,"[183] it decided that governments could target particular disadvantaged groups as a matter of priority, leaving other disadvantaged groups out — even those persons who "share a similar history of disadvantage and marginalization."[184] This aspect of the ruling is an extension of *Kapp*, which dealt with a more advantaged group seeking to eliminate benefits that the government had provided.

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[179] *Kapp, supra* note 4 at paras 58-61.

[180] *Cunningham, supra* note 15.

[181] *Indian Act,* RSC 1985, c I-5.

[182] *Metis Settlements Act*, RSA 2000, c M-14 [*MSA*].

[183] *Cunningham, supra* note 15 at para 40.

[184] *Ibid* at para 53.

Although the Court avoided the language of underinclusivity in *Cunningham*, it held that exclusions that might otherwise be discriminatory are permitted if they "serve and advance" the object of the ameliorative program.[185] This relaxes the burden on the government compared to that imposed in *Kapp*, which required that exclusions be "necessary" to advance the program's goals.[186] The Court also spoke of the "saving" effect of section 15(2) in *Cunningham*, further extending the impact of *Kapp*.[187]

Applying its test for section 15(2) to the facts of *Cunningham*, the Court found that the purpose of the *MSA* was "to enhance Métis identity, culture, and self-government through the establishment of a Métis land base," and that this was an ameliorative purpose within the meaning of section 15(2).[188] This framing of the purpose allowed the Court to conclude that the exclusion of status Indians from membership in Métis settlements did "serve and advance" the object of preserving distinctive Métis status. The exclusion was therefore seen as protected under section 15(2).[189] The Court did not get to the issue of whether the *MSA* had discriminatory effects on the claimants, including those that perpetuated gender-based inequalities.[190]

Cunningham will make it difficult for disadvantaged groups to claim that they are wrongfully excluded from benefit programs. For example, persons with particular disabilities excluded from legislation or programs that focus on differently constructed disabilities will have an uphill battle after *Cunningham*.[191] It is possible that *Cunningham* might be distinguished by other equality-seeking groups in future section 15 cases, as it dealt with what the Court called "a special type of ameliorative program … designed to enhance and preserve the identity, culture and self-governance of a *constitutionally recognized group*."[192] However, we are not hopeful,

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[185] *Ibid* at para 45.

[186] *Kapp, supra* note 4 at para 52; Hamilton & Koshan, "Not Getting It", *supra* note 8 at 65-69.

[187] *Cunningham, supra* note 15 at paras 41, 44; Hamilton & Koshan, "Not Getting It", *supra* note 8 at 65.

[188] *Cunningham*, *ibid* at para 60.

[189] *Ibid* at paras 72-83; Hamilton & Koshan, "Not Getting It", *supra* note 8 at 67.

[190] *Ibid* at 69 (citing Women's Legal Education and Action Fund, Intervener Factum in *Alberta (Minister of Aboriginal Affairs and Northern Development) v Cunningham*, online: LEAF <http://leaf.ca/wordpress/wp-content/uploads/2011/04/2010-Cunningham-Factum.pdf> at paras 19-21. In contrast, see the decision of the Alberta Court of Appeal in *Cunningham*, 2009 ABCA 239 at paras 28, 34-51.

[191] Hamilton & Koshan, "Not Getting It", *supra* note 8 at 69; Denise Réaume, "Equality Kapped: *Alberta v Cunningham"* (2011), on-line: Women's Court of Canada, <http://womenscourt.ca/2011/07/equality-kapped-alberta-v-cunningham/>.

[192] *Cunningham*, *supra* note 15 at para 54 [emphasis added].

in large part because extending coverage of a government benefit or program raises what Justice Binnie in *NAPE* called the "dollars versus rights controversy."[193]

XIII. CONCLUSION

There have been significant changes to the Supreme Court's approach to sections 15(1) and (2) recently. However, despite a nod to criticisms of its earlier equality rights cases, and despite being presented with strong arguments that alternative approaches would take equality more seriously,[194] the Court has made it very difficult for claimants to achieve success in cases where substantive equality principles warrant it. As Denise Réaume concluded, "[o]ne is tempted to conclude that the Supreme Court is bored with equality litigation, or finds it too difficult to actually work through the "elusive concept" of equality… and really doesn't want to see any more equality cases. It has certainly done its utmost to discourage claimants."[195] Part of the problem is that the Court does not always follow through on its stated commitment to the goal of substantive equality, nor the principles it sets forth, when it actually applies section 15 to the facts of particular claims (as in *Withler*).

There are some important equality rights challenges currently before the courts,[196] so equality-seeking claimants are not yet giving up. What sort of approach should be taken in these cases to ensure that substantive equality is more likely to be achieved?

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[193] *Supra* note 10 at para 65. See generally Lessard, *supra* note 69, looking at social benefit challenges under s 15 from 1989 to 2012 and finding that "[a]ll the cases that are successful are ones in which rights recognition is costless, is of comparatively low cost, or is characterizes by the Court as an inexpensive or even money-saving outcome . . . [whereas all] of the cases in which rights recognition is 'expensive' fail"(*ibid* at 304).

[194] In *Cunningham*, LEAF proposed an approach for cases of discriminatory underinclusion that would require full s 15(1) analysis. See LEAF Factum in *Cunningham, supra* note 190.

[195] Réaume, *supra* note 191 (quoting *Andrews*, *supra* note 2 at 164).

[196] See e.g. *Tanudjaja et al v Ontario and Canada*, Notice of Application (2010, ONSC) at 3, on-line: The Social Rights Advocacy Center: <http://www.socialrights.ca/litigation/homelessness/Notice%20of%20Application%20Amended.pdf> (challenging the failure of the federal and Ontario governments "to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing" under ss 7 and 15 of the *Charter*; *Carter v Canada (AG)* 2012 BCSC 886 (challenging the assisted suicide provisions of the *Criminal Code* for their impact on persons with disabilities); *Barbra Schlifer Commemorative Clinic v HMQ Canada*, 2012 ONSC 5271 (challenging the federal government's repeal of the long-gun registry on the basis of its violations of women's security of the person and equality rights).

Our suggestions for the next reinvention of section 15 are as follows. Under section 15(1), the Court must accept that equality requires recognition of more harms than merely those of stereotyping and prejudice, as suggested by *Kapp* and *Withler*. Section 15 engages harms that flow from membership in disadvantaged groups, harms that include the perpetuation of oppressive power relations, denial of access to basic goods, and diminishment of self-worth in addition to prejudice and stereotyping.[197] The harms of adverse effects discrimination must also be placed on an equal footing with those of direct discrimination. More burdensome evidentiary standards for adverse effects discrimination, as suggested in *Withler*, should not be required, and it must be recognized that a focus on stereotyping and prejudice may make it difficult to prove adverse effects discrimination.

The Court should continue to take a flexible approach to comparators, and must honour its commitment to undertake a contextual analysis of equality rights claims. It must also be open to accepting new and intersecting grounds of discrimination, including those related to economic disadvantage such as poverty and homelessness.[198] Claims of age-based discrimination must also be given their due, particularly where age intersects with other grounds, such as gender or poverty.

The Court's consideration of how other individuals and groups may benefit or be affected by particular laws or programs, as seen in *Withler*, should be removed from section 15(1) and confined to section 1, and so should questions about the relevance or rationality of differential treatment in light of government objectives (i.e. *Law*'s correspondence factor). There should be less deference to government overall within section 15. In benefits cases, the Court is obviously worried about the cost of extending programs, but cost should be seen as relevant only to remedy, and not as an internal limit on section 15.[199]

In the realm of ameliorative programs, the *Kapp* approach to section 15(2) should be restricted to rejecting challenges by advantaged individuals or groups to affirmative action programs that attempt to remedy historic disadvantage. Challenges by disadvantaged groups to underinclusive programs should go through a full section 15(1) analysis, to allow the effects of exclusion to be comprehensively considered. Governments should not be permitted to rely on targeted benefit programs as an end-run around their obligation to promote equality.

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[197] See Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54 UTLJ 291.

[198] Homelessness and poverty have not yet been recognized as analogous grounds under section 15. See e.g. *R v Banks*, 2007 ONCA 19 at paras 98-100, leave to appeal to SCC refused, [2007] SCCA No 139. But see *Falkiner v Ontario (Minister of Community and Social Services),* (2002) 59 OR (3d) 481 (CA), where receipt of social assistance was recognized as an analogous ground.

[199] *Schachter supra* note 48 at 721-22 (per Lamer CJ). Budgetary concerns are also not a pressing and substantial objective for the purposes of s 1 of the *Charter*, short of a fiscal crisis. See *Schachter*, *ibid*; *NAPE*, *supra* note 10. See generally Lessard, *supra* note 69.

To what extent have these suggestions been dealt with in the Supreme Court's 2013 decision in *Quebec v A*?[200] That case involved the exclusion of *de facto* spouses from Quebec's *Civil Code* provisions dealing with spousal support and property division. A bare majority of the Court found that this exclusion violated section 15(1) of the *Charter*. Writing for that majority, Justice Abella reviewed the *Kapp* / *Withler* approach, and noted that the Court's references to prejudice and stereotyping were not intended to "create a new s.15 test", nor to impose "additional requirements" on equality claimants.[201] Rather, stereotyping and prejudice should be seen as "two of the indicia" relevant to whether there is a violation of substantive equality.[202] The majority seemed to accept that discrimination may involve other harms, such as oppression and denial of basic goods, and focused its analysis on broader questions of disadvantage.[203] This aspect of the judgment does respond to one of our major concerns about the *Kapp* / *Withler* approach by broadening the definition of discrimination beyond prejudice and stereotyping. In contrast, the minority's approach would have continued to focus on stereotyping and prejudice as "crucial factors" in the identification of discrimination (although not the only factors).[204]

Both Justice Abella and Justice LeBel acknowledged the place of adverse effects discrimination in the section 15(1) analysis, although the acknowledgements

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[200] It is difficult to predict the influence of *Quebec v A, supra* note 16, because the Court was as badly fractured as it was in the equality trilogy in the mid-1990s. There were four judgments. Abella J wrote only for herself but wrote the 5:4 majority judgment on the s 15(1) issue when Deschamps J (writing for herself, Cromwell J and Karakatsanis J) and McLachlin CJ (writing only for herself) indicated they agreed with her. LeBel J, writing for himself, Fish J, Rothstein J, and Moldaver J, wrote the dissent on the s 15(1) issue. However, on the issue of whether the violation of s 15(1) was justified under s 1, McLachlin CJ held that it was, thereby shifting the majority decision on the outcome — the decision that there was no (unjustified) discrimination — to the judgments of herself and LeBel J. Deschamps J agreed with McLachlin CJ that the discrimination was justified with respect to the property-sharing exclusion but held that it was not justified for the spousal support-sharing exclusion. Abella J held that neither exclusion was justified under s 1. LeBel J wrote at such length on the s 15(1) issue — 282 paragraphs of the 450 paragraph judgment — and with such obvious passion that his decision may yet influence the future direction of equality jurisprudence. See especially his conclusion that Abella J's approach would reduce any analysis of discrimination claims to the simple requirement that only an adverse distinction need be proved, and his warning that her approach therefore deprived lower courts of guidance and potentially affected the legitimacy of their decisions (*ibid* at para 268).

[201] *Quebec v A*, *supra* note 16 at paras 325, 327. The majority also provided definitions of prejudice and stereotyping, which recognized that those terms capture discriminatory attitudes, whereas section 15(1) must also protect against discriminatory conduct and impacts (at paras 326-328).

[202] *Ibid* at para 325.

[203] *Ibid* at para 325 (citing Moreau, *supra* note 126 at 292) and paras 349-357.

[204] *Ibid* at paras 169, 185 (per LeBel J).

were brief and the case itself did not involve adverse effects discrimination.[205] *Quebec v A* therefore does not respond to our concerns about the shortcomings of the *Kapp / Withler* approach for adverse effects cases, except to the extent that the majority minimized the focus on stereotyping and prejudice, which are more difficult to prove in adverse effects cases.

The majority also indicated that courts should avoid a focus on government objectives and rationality under section 15(1), noting that this inquiry belongs under section 1 of the *Charter*.[206] In the case at hand, this meant that considerations of the policy objective behind the exclusion of *de facto* spouses, which was based on their choice of that relationship, should be left to section 1.[207] The majority's deferral of government objectives to section 1 also responds to one of our major critiques of the *Kapp / Withler* approach, although it remains to be seen whether this deferral will prevail in cases involving government benefits rather than private benefits. We also note that there is one point in her judgment where Justice Abella refers to "arbitrary disadvantage",[208] suggesting a continued place for government objectives under section 15, but this may have been simply an unfortunate choice of words.[209]

Although a majority of the Court in *Quebec v A* dealt with two of the issues that we see as critical to the next reinvention of section 15, we still believe that we are not there yet. It will take an adverse effects discrimination claim to truly test the Court's commitment to an effects based analysis that goes beyond stereotyping and prejudice, is flexible towards comparators, and leaves government objectives to section 1. Moreover, as noted above, *Quebec v A* did not involve a "dollars versus rights controversy", nor a case of targeted government benefits that were provided in an underinclusive way. We must wait and see whether the Court will be open to reinventing its approach to section 15(1) and (2) in such cases. The Court's openness to new grounds of discrimination also remains to be tested.

We encourage claimants, lawyers and courts to continue to think about what substantive equality really means, and to advocate and adopt legal approaches that

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[205] *Ibid* at para 171(per LeBel J) and paras 328, 355 (per Abella J).

[206] *Ibid* at para 333.

[207] *Ibid* at paras 334-38. The majority thus "decline[d] to follow *Walsh*" at para 338 (see *Walsh*, *supra* note 90). The dissenting judges on the s 15(1) issue relied upon choice in finding no discrimination (at paras 256-267), and choice formed the basis of Chief Justice McLachlin's swing judgment, where she held that the violation of s 15 could be justified under s 1 of the *Charter* (at paras 435-448).

[208] *Ibid* at para 331.

[209] Justice Abella's opinions in the human rights context often reference "arbitrary" discrimination as well. See e.g. *Moore*, *supra* note 146 at paras at paras 26, 59, 60, 61; *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 at paras 48-49.

will actually achieve it. We are not there yet, but perhaps the next reinvention of section 15 will reinvigorate the promise of equality.