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

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

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EXECUTIVE SUMMARY

Section 15 of the *Canadian Charter of Rights and Freedoms* sets out the right to equal protection and equal benefit of the law without discrimination. The Supreme Court of Canada (the Court) has consistently interpreted this right as protecting substantive equality. This means that laws – as well as government activities and policies – must not simply treat people the same. Instead, the effect that a law has on different groups must be considered.

A law will be found to be unconstitutional under section 15 if it further disadvantages groups based on certain characteristics. These characteristics include race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. These are referred to as "enumerated grounds" because they are explicitly listed in section 15. In addition, "analogous grounds" of discrimination, such as citizenship and sexual orientation, have also been recognized by the courts.

Since 1985, when section 15 came into full effect, courts have tried to find a way to assess section 15 claims consistently and fairly in order to protect substantive equality. The Court's guidance on how to apply section 15 has changed over time.

In its 1999 decision *Law v. Canada (Minister of Employment and Immigration)*, the Court set out guidelines for applying section 15. These guidelines were often used as a three-part test, which included establishing a "comparator group" of people who were in similar circumstances and demonstrating that the disadvantage caused by the law amounted to an impairment of human dignity.

In its 2008 decision *R. v. Kapp* (*Kapp*), the Court acknowledged that aspects of this test had become a barrier for disadvantaged groups. It moved away from the concepts of comparator groups and impairment of human dignity. Instead, it suggested that a section 15 analysis should answer two questions:

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?

This approach has emerged as the key test for section 15 cases, with some modifications since *Kapp*. In *Quebec (Attorney General) v. A* (2013) and *Kahkewistahaw First Nation v. Taypotat* (2015), the Court clarified that evidence of prejudice or stereotyping is not necessary under the second part of the test. Instead, the analysis should be flexible and look to the full context of the situation, with a focus on whether distinctions created by the law either reinforce, perpetuate or exacerbate disadvantages.

In *Fraser v. Canada (Attorney General)* (2020), the Court clarified that section 15 protects against differential treatment regardless of whether it is explicitly stated in law or is simply the result of negative effects stemming from the law.

As a result of the Court's decisions since *Kapp*, the current version of the section 15 test can be stated as follows:

1. Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground?
2. Does it impose burdens or deny benefits in a way that has the effect of reinforcing, perpetuating or exacerbating disadvantage?

This HillStudy outlines the historical development of this test and related issues in the Supreme Court's section 15 jurisprudence.

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

1 INTRODUCTION

Section 15 of the *Canadian Charter of Rights and Freedoms* (the Charter) guarantees the equal protection and equal benefit of the law to all. It states:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. …
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[1]

Several groups seeking to advance their rights in Canadian society have relied on the equality provisions set out in section 15(1) of the Charter.[2] The Supreme Court of Canada's (the Court's) formulation of the section 15 test – the analytical framework against which courts evaluate section 15 claims – has been modified several times. This HillStudy will focus on the current section 15 test, which was articulated by the Court in 2008 in its decision on a fishing rights case, *R. v. Kapp*, and has been further developed in subsequent cases.[3] In 2020, the Court in *Fraser v. Canada (Attorney General)* (*Fraser*)[4] articulated the most recent iteration of the test as follows:

> the first stage of the s. 15 test is about establishing that the law imposes differential treatment based on protected grounds, either explicitly or through adverse impact. At the second stage, the Court asks whether it has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[5]

To understand the current formulation of the test, it is helpful to review the Court's previous thinking, particularly with respect to the Court's seminal early section 15 decisions in *Andrews v. Law Society of British Columbia* (*Andrews*)[6] and in *Law v. Canada (Minister of Employment and Immigration)* (*Law*).[7]

This HillStudy reviews the principles the Court set out in those early cases and outlines the evolution of the current section 15 test through the Court's subsequent section 15 decisions.

2 A BRIEF HISTORY OF SECTION 15 DECISIONS

Although the Charter became law in 1982, section 15 did not come into effect until 1985. This delay was intended to give Parliament and provincial and territorial governments enough time to bring their legislation into conformity with the Charter's equality provisions.[8] The Supreme Court rendered its first section 15 decision in 1989 in *Andrews*. Ten years later, in *Law*, the Court created a multi-step test to formalize the analytical framework in section 15 cases. The *Law* test received criticism from the legal academic community over the decade during which it was applied. In its 2008 decision in *Kapp*, the Court revisited the test and took a different approach, setting aside the rigid structure of the *Law* test.

2.1 *ANDREWS V. LAW SOCIETY OF BRITISH COLUMBIA*: THE REJECTION OF FORMAL EQUALITY

2.1.1 Defining Equality

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

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

Although a formal equality analysis may, at first glance, seem like a fair approach, it can result in inequality. In his interpretation of section 15(1) in the *Andrews* decision, Justice McIntyre used the example of the Court's 1979 decision in *Bliss v. Attorney General of Canada* (*Bliss*) to illustrate how this inequality can come about.[9] In *Bliss*, which was decided under the *Canadian Bill of Rights*, the claimant argued that she was discriminated against on the basis of sex because her pregnancy disentitled her to unemployment benefits. The Court dismissed her claim, holding that because all pregnant persons were treated alike under the impugned law there was no discrimination.

Justice McIntyre unequivocally rejected formal equality as a "seriously deficient" approach since it merely ensured that "similarly situated" groups were treated alike. He argued that this principle could have been used to justify Adolf Hitler's Nuremberg laws or the 1896 United States Supreme Court decision *Plessy v. Ferguson*, which upheld the constitutionality of racial segregation.[10]

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

> [T]he purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.[11]

Although Justice McIntyre did not use the term in *Andrews*, nor did the Court until 1997,[12] this view of equality – in which it is understood that differential treatment may be necessary in order to avoid perpetuating systemic disadvantages – became known as "substantive equality" and has consistently been a major focus of the Court's understanding of section 15.

2.1.2 Defining Discrimination

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

> a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[13]

Justice McIntyre focused on the effects of discrimination. He specifically rejected an analysis that would have required discriminatory intent, emphasizing instead the "impact of the discriminatory act or provision upon the person affected."[14]

2.1.3 Section 1

Andrews was also significant for establishing how section 1 of the Charter applies to section 15 claims. Section 1 stipulates that the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

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

> It is … important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement.[15]

2.1.4 Unresolved Issues

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

2.2 *LAW V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)*: THE FORMALIZATION OF THE SECTION 15 TEST

Between *Andrews* and *Law*, the Supreme Court struggled with its conception of section 15, as Justice Iacobucci noted in his introduction to the *Law* decision. Writing for a unanimous Court, he described section 15 as "perhaps the Charter's most conceptually difficult provision"[16] and made reference to divisions within the Court with respect to the proper interpretation of the Charter's equality provisions.

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

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

> In accordance with McIntyre J.'s caution in *Andrews* … I think it is sensible to articulate the basic principles under s. 15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the *Charter* must be purposive and contextual. The guidelines which I review below are just that – points of reference which are designed to assist a court in identifying the relevant contextual factors in a particular discrimination claim, and in evaluating the effect of those factors in light of the purpose of s. 15(1).[17]

Despite Justice Iacobucci's intention to create flexible guidelines, the *Law* decision essentially resulted in a three-part test for the assessment of section 15 claims, which has been summarized as follows:

- The challenged law imposes (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons;
- The disadvantage is based on a ground listed in or analogous to a ground listed in s. 15; and
- The disadvantage also constitutes an impairment of the human dignity of the claimant.[18]

The claimant was required to prove these three components on a balance of probabilities.[19] In addition, each component of the test included subparts, which the claimant also had to prove. These will be discussed in turn below.

2.2.1 Imposing a Disadvantage in Comparison with Other Comparable Groups

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

2.2.1.1 Imposing a Disadvantage

In the Supreme Court's attempts to define discrimination, one of the features it has emphasized since *Andrews* is the notion that a distinction exists between the claimant and others that imposes a disadvantage on the claimant, resulting in direct or indirect discrimination:

- A claim of direct discrimination was made in *Law* with respect to a surviving spouse being denied survivor benefits because of her age.

- A claim of indirect discrimination was made in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, also known as *Meiorin*.[20] In this case, a female firefighter argued that the provincial law that set out aerobic standards for firefighters was discriminatory. Although the law did not directly discriminate by explicitly excluding female firefighters, its effect was to indirectly discriminate by excluding the vast majority of women by means of physical criteria held by the Court to be beyond the standard necessary for the safe and efficient performance of the job.

2.2.1.2 Comparable Groups

Under the *Law* test, claimants had to demonstrate that a distinction had been made between them and otherwise similar persons. This group of persons is referred to as the "comparator group." On the facts in *Law*, the claimant could compare her treatment, specifically the denial of a survivor benefit, to that of survivors aged 35 or older.

2.2.2 Listed or Analogous Grounds

Section 15(1) of the Charter protects against discrimination, and, "in particular," discrimination based on seven listed or "enumerated" grounds: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. This list is not exhaustive. In *Andrews*, the Supreme Court recognized the first analogous ground: that of citizenship.

Analogous grounds are personal characteristics that, like the enumerated grounds, are "immutable, difficult to change, or changeable only at unacceptable personal cost."[21] Once an analogous ground is established in case law, it functions in the same way as any of the enumerated grounds and can form the basis of future equality claims.

Claimants have to establish that the distinction made between them and others is based on an enumerated or analogous ground. Alternatively, they can argue for the establishment of a new analogous ground. Thus far, citizenship, sexual orientation, marital status and "Aboriginality-residence" have been recognized as analogous grounds.[22] The latter means that the Charter prohibits discrimination against First Nations people on the basis that they live off-reserve.

2.2.3 Impairment of Human Dignity

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

the four contextual factors are listed below to give a complete view of what the *Law* test required claimants to establish:

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

2.2.4 Critiques of *Law*

Although some commentators applauded the Supreme Court's attempt in *Law* to provide structure to section 15(1) analysis,[23] the *Law* decision and the subsequent section 15(1) jurisprudence it generated received a significant amount of criticism. Much of this focused on the human dignity test, comparator groups and, more generally, on the role of substantive equality. These will be discussed below.

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

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

Kapp was the first decision in which the Court signalled some dissatisfaction with the *Law* test. It is significant for three reasons. First, the Court reaffirmed its commitment to employing a substantive equality analysis in evaluating section 15 claims. Second, the Court distanced itself from the human dignity component of the *Law* test. Third, the Court established a much more prominent role for section 15(2), which protects ameliorative programs from claims of discrimination.[24]

3.1 REAFFIRMING SUBSTANTIVE EQUALITY

Chief Justice McLachlin and Justice Abella wrote the majority decision in *Kapp*.[25] They began their analysis with a review of the *Andrews* principles, quoting Justice McIntyre's endorsement of substantive over formal equality. Many critics in the legal academic field had argued that the focus of the analysis in the *Law* test had resulted in a return to formal equality over substantive equality. The Supreme Court acknowledged this criticism, but it noted that the factors cited in *Law* were not intended as a rigid test and should not be read "as if they were legislative dispositions."[26] Instead, the Court emphasized that the *Law* factors should guide an approach to combatting discrimination that incorporates substantive equality.[27]

3.2 RETHINKING HUMAN DIGNITY

The other major criticism Chief Justice McLachlin and Justice Abella addressed on behalf of the Supreme Court was the effect of the human dignity test. They praised the *Law* decision for "unifying what had become, since *Andrews*, a division in [the] Court's approach to s. 15," but noted that the human dignity test had not been "the philosophical enhancement it was intended to be."[28]

Although they emphasized that "human dignity is an essential value underlying the s. 15 equality guarantee," Chief Justice McLachlin and Justice Abella held that "several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*"[29] [emphasis in the original], including that it served as an additional burden on equality claimants.[30]

3.3 A NEW ROLE FOR SECTION 15(2)

Section 15(2) was not a significant component of early section 15 jurisprudence. In 2000, when the Supreme Court had an opportunity to consider the substance of section 15(2), it held that the section was an "interpretive aid" that provided a more fulsome explanation of section 15(1).[31]

The Court adopted a broader view of section 15(2) in *Kapp*. It held that the section is focused on enabling governments to proactively combat discrimination and assist disadvantaged groups.[32] The Court held that section 15(2) "tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15."[33] Essentially, section 15(2) protects ameliorative programs against charges of what is often called "reverse discrimination."[34]

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

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[35]

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

3.4 MOVING FORWARD FROM *R. V. KAPP*

In view of the criticisms of *Law* discussed in section 2.2.4 of this HillStudy, the Supreme Court in *Kapp* reconfirmed its commitment to employing a substantive equality analysis to section 15. It also addressed criticism it had received about the human dignity component of the *Law* test and determined that the test was acting as a barrier to claimants.

Although *Kapp* was understood as rejecting certain aspects of the *Law* test, it was not immediately clear that the *Kapp* decision set out a different section 15(1) test. Because the case was decided on the basis of section 15(2), the decision did not provide an application of the section 15(1) test. Following *Kapp*, some uncertainty remained, and lower courts, including courts of appeal, continued to look to the human dignity factors in their section 15(1) analyses.[36] Further, although the Court seemed somewhat critical of the *Law* test in *Kapp*, it did not explicitly reject the test, instead stating that *Law* "[did] not impose a new and distinctive test for discrimination, but rather affirm[ed] the approach to substantive equality under s. 15 set out in *Andrews*."[37]

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

> (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[38]

This template has emerged in subsequent Supreme Court cases as the legal test for evaluating section 15 claims.

4 *WITHLER V. CANADA (ATTORNEY GENERAL)*: CONFIRMING THE TEST

The facts of *Withler v. Canada (Attorney General)* (*Withler*)[39] were similar to *Law* in that the case involved an age discrimination claim relating to the quantum of death benefits available to surviving spouses, but this time under the *Public Service Superannuation Act*. The unanimous decision was drafted by Chief Justice McLachlin and Justice Abella. The Supreme Court again explicitly rejected formal equality in favour of substantive equality:

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also asks whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.[40]

4.1 THE END OF COMPARATOR GROUPS

Much of the Supreme Court's discussion in *Withler* on substantive equality was with reference to comparator groups. A major critique of *Law* was that the comparator group requirement had become a barrier for equality claims and had even become a means of rejecting claims. According to some commentators, courts (including the Supreme Court) have rejected equality claims because claimants did not choose the correct comparator group and therefore did not adduce sufficient evidence to support their claim with reference to what the court considered to be an appropriate comparator group.[41]

As discussed, the first step of the *Law* test required a demonstration that the claimant experienced a burden or was denied a benefit in comparison with a comparator group. Academics had begun to question the utility of comparator groups in a substantive equality analysis, and the Court in *Withler* appeared to respond to these concerns. The Court cited a decision of Justice Binnie's in which he noted that "a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis" and that the choice of comparator group had been the "Achilles' heel" of many equality claims.[42]

In some cases, a comparator group is relatively easy to identify, as it was in *Law*, where the claimant could compare herself to surviving spouses over the age of 35. In situations where it is more difficult to identify a comparator group, however, claimants may have to invest significant time and money preparing social science data, which could then become irrelevant if a court held that the proposed comparator group was not the appropriate one.[43]

This rejection of a proposed comparator group could even happen at the Supreme Court after a case had already been litigated at trial and on appeal. For example, *Auton (Guardian* ad litem *of) v. British Columbia (Attorney General)* (*Auton*)[44] involved a claim on behalf of autistic children who were denied access to funding for an intensive behavioural therapy to treat their disorder. In *Auton*, the claimants proposed "non-disabled children and their parents" or "adult persons with mental illness" as the comparator groups. The Court substituted its own comparator group, which was significantly more complex and on which it would have been very difficult to adduce evidence:

> a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.[45]

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

> [A] mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify – and, indeed, thwart the identification of – the discrimination at which s. 15 is aimed.[46]

Although the Court recognized that comparator groups may not facilitate substantive equality analyses, it held that "[c]omparison plays a role throughout the [section 15(1)] analysis."[47] However, "[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination."[48] Since *Withler*, then, a specific identification of a comparator group is no longer required.

4.2 ELABORATING ON THE SECTION 15(1) TEST

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

The Court noted that the purpose of the "distinction" component of the test is to establish that the claimant has been treated differently from others in that "he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic" that qualifies as an enumerated or analogous ground.[49] The Court also noted that, for those claiming indirect discrimination, this task will be more challenging. Although the Court did not elaborate on this point, it would appear that the additional "work to do at the first step" would be to adduce social science data to prove the effect the law or policy has on the claimant.[50]

With respect to the second component of the test, the Court sought to elaborate on the creation of disadvantage and the perpetuation of prejudice and stereotyping. Again moving away from the approach taken in *Law*, the Court held that the four factors that formed the basis of the human dignity test need not be explicitly canvassed in every case. The four factors might be useful indicators as to whether substantive inequality is at play, but other factors may be relevant as well. The Court concluded that "all factors that are relevant to the analysis should be considered,"[51] although it did not provide additional guidance for determining which factors are relevant in a given case.

5 *ALBERTA (ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT) V. CUNNINGHAM*: APPLYING THE SECTION 15(2) TEST

In *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* (*Cunningham*), the Supreme Court heard a claim brought by Métis people who were removed from the Peavine Métis Settlement's membership list when they registered for status under the *Indian Act*.[52] The Chief Justice, writing for a unanimous Court, held that there was no discrimination.

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

> The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. … Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people … equally, they may be precluded from using targeted

> programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.[53]

The Court used fairly categorical terms in holding that section 15(2) can insulate a wide array of ameliorative programs from Charter scrutiny. The Court held that if the conditions in the *Kapp* section 15(2) test are met, namely that the program is genuinely ameliorative and that there is a correlation between the program and the disadvantage suffered by the target group, then section 15(2) "protects all distinctions drawn on enumerated or analogous grounds that 'serve and are necessary to' the ameliorative purpose."[54]

6 *QUEBEC (ATTORNEY GENERAL) V. A*: MODIFYING THE *KAPP* TEST (PREJUDICE OR STEREOTYPING)

The first section 15 decision after *Kapp* in which the Supreme Court expressed disagreement on the application of the section 15 test was in January 2013 in the case of *Quebec (Attorney General) v. A* (*Quebec v. A*).[55] This case involved an equality claim made within the context of family law, with particular reference to distinctions under Quebec law between the rights of married and unmarried couples upon the dissolution of their relationships.

In *Quebec v. A*, a woman unsuccessfully challenged the laws that prohibited her from seeking a share of family property or spousal support from her former partner. The result was a lengthy decision with four separate judgments dissenting and concurring with portions of other judgments.

6.1 JUSTICE LEBEL ON SECTION 15(1)

Although the case deals with a complex support and property regime under Quebec's *Civil Code*, section 15(1) is, as Justice Lebel asserts, "at the heart of this case."[56] Justice Lebel wrote for the majority in the result, but Justice Abella's judgment was the majority decision on the section 15(1) analysis.

Justice Lebel provided a lengthy history of the development of section 15(1) from *Andrews* and *Law* through to *Kapp* and *Withler*. His analysis turned on "the broad range of values embraced by s. 15," a phrase he borrowed from *Andrews*.[57] The main value he emphasized was human dignity, which in his view appeared to depend largely upon personal autonomy, self-determination and personal choice. Further, he asserted that

> substantive equality is not denied solely because a disadvantage is imposed. Rather, it is denied by the imposition of a disadvantage that is unfair or objectionable, which is most often the case if the disadvantage perpetuates prejudice or stereotypes.[58]

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

6.2 JUSTICE ABELLA ON SECTION 15(1)

Justice Abella, writing for the plurality on section 15(1), began her review of the facts of the case by noting that A had asked her partner to get married at least twice, but he refused. Her focus was on whether excluding an "economically vulnerable" spouse from "mandatory support and property division regimes simply because he or she was not in a formally created union"[59] is a violation of section 15(1). She noted the "disproportionate number of women who experienced poverty when they separated."[60]

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

> We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*.[61] [Emphasis in the original]

One criticism of *Kapp* in the academic literature was that its apparent reliance on prejudice and stereotyping in identifying discrimination risked overlooking other significant harms, which could include "marginalization, oppression, and deprivation of significant benefits."[62] Unlike Justice Lebel, who would have maintained prejudice and stereotyping as necessary elements of the test, Justice Abella argued that the emphasis in the analysis should be on the impact of a law on the claimant, not on whether the claimant can prove the attitudes or motives of others. As she noted above, this is more in keeping with Justice McIntyre's definition of discrimination in *Andrews*.

Another issue Justice Abella raised, harkening back to *Andrews*, was the need to maintain an analytical distinction between section 15 and section 1 of the Charter. Justice McIntyre argued in *Andrews* that this distinction was appropriate given the evidentiary burdens: claimants should not be expected to prove government intent. Justice Abella noted another potential danger with collapsing the section 1 and section 15 analyses, however. Specifically, she argued that if courts consider government intent as part of the section 15(1) analysis – rather than as part of the section 1 analysis – it may be easy to dismiss a policy decision to exclude a group

from a statutory benefit as "reasonable," and section 15(1) would become merely "a prohibition on intentional discrimination based on irrational stereotyping" rather than a tool to promote substantive equality.[63]

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

In applying the *Kapp* test, Justice Abella held that the *Civil Code* provisions created a distinction and that this distinction was discriminatory. She focused on the historical disadvantage that unmarried couples have faced and their vulnerability in comparison with the situation of married spouses. She held that this discrimination was not justified under section 1 of the Charter. However, the majority of the Court upheld the *Civil Code* provisions, either finding no discrimination, as Justice Lebel did, or finding that the discrimination could be justified under section 1.

7 *KAHKEWISTAHAW FIRST NATION V. TAYPOTAT*: CONFIRMING *QUEBEC V. A*

As mentioned above, Justice Abella's interpretation of section 15(1) in *Quebec v. A* formed the majority on that issue on a divided Supreme Court. Essentially, she relied on the *Kapp* test but held that the second component of the test, in which courts must determine whether a distinction amounted to discrimination, is to be applied in a flexible manner and that evidence of "prejudice and stereotyping" are not necessary elements of the test. This approach was confirmed in the Court's 2015 decision in *Kahkewistahaw First Nation v. Taypotat* (*Taypotat*).[64]

Taypotat dealt with a provision of the *Kahkewistahaw Election Act* requiring that candidates for chief or band councillor have at least a Grade 12 education. Louis Taypotat was a member of the Kahkewistahaw First Nation who had served as the elected chief for more than 27 years. In 2011, his application for candidacy was rejected because he did not meet the new education requirement. He challenged the provision as discriminatory on various grounds, including on the basis of race, age and that residential school survivors constituted an analogous group for purposes of section 15.

Writing for the Court, Justice Abella took the opportunity to explain the overarching purpose of section 15, emphasizing that the focus must be on

> laws that draw *discriminatory* distinctions – that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group.[65] [Emphasis in the original]

Justice Abella applied the *Kapp* test to the facts of the case, finding that although there may have been an intuitive link between the education requirement and a potential discriminatory impact, there was no evidence before the Court to demonstrate such a link, and therefore the Court could not find an infringement of section 15.[66]

Notably, Justice Abella provided further guidance on the second part of the *Kapp* test based on her reasons in *Quebec v. A*, but this time writing for the entire Court rather than a narrow majority. She reiterated that section 15 requires a flexible and contextual inquiry, and stated that

> [t]he second part of the analysis focuses on arbitrary – or discriminatory – disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[67]

The absence of any mention of prejudice or stereotyping in the decision effectively confirmed that these elements are not required under the second part of the test, as Justice Abella had previously stated in *Quebec v. A.* Justice Abella instead emphasized that the evidence required to establish discriminatory disadvantage will vary depending on the context of the claim, and that evidence of historical disadvantage will be relevant.[68] Notably, unlike evidence of prejudice or stereotyping, historical disadvantage can be established without proof of intentions. Moreover, it is not seen as a necessary component of the test but rather as a factor to consider.[69]

Finally, Justice Abella indicated that a breach of section 15 based on a substantive equality argument could be found in cases where "facially neutral" laws have a "disproportionate effect," even though the evidence in this particular case did not lead to such a finding.[70] This broad understanding of the scope of section 15 would be tested five years later in *Fraser*.

8 *FRASER V. CANADA (ATTORNEY GENERAL)*: CLARIFYING ADVERSE EFFECT DISCRIMINATION

In *Fraser*, three retired members of the Royal Canadian Mounted Police (RCMP) alleged that their pension plan was discriminatory towards women. The plan did not allow RCMP members who participated in a job-sharing program to "buy back" their benefits, but it did allow members who had been suspended or taken unpaid leave to do so. Most participants in the job-sharing program were women who had temporarily reduced their hours for child care purposes.

Writing for the majority, Justice Abella summarized academic literature relating to "adverse effect discrimination," which she defined as occurring "when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground."[71] Academic commentators had argued that adverse effect discrimination is more prevalent and often a greater threat to equality than direct discrimination and that it can arise as a by-product of innocent intentions.[72]

Justice Abella linked the concept of adverse effect discrimination to the Supreme Court's existing section 15 jurisprudence on the concept of substantive equality, ultimately finding that there was a section 15 breach in this case. Applying the *Kapp* test as articulated in *Quebec v. A* and *Taypotat*, Justice Abella found that the pension plan institutionalized women's disproportionate responsibility for child care and less stable working hours as a basis for unequal pension benefits.

Justice Abella noted that the *Kapp* test did not need to be revised in order to apply to adverse effect cases. Rather, in applying the test, courts must look to the impact of the law or policy and whether it is disproportionately negative with respect to a protected group. The intent of the legislature is irrelevant to this analysis. Instead, the focus is on evidence about the situation of the claimant group and the results of the law. In some cases, adverse effect discrimination may arise simply from an absence of accommodation for members of protected groups.[73]

Finally, citing *Andrews* and other cases, Justice Abella reiterated the importance of keeping the section 15 test separate from the analysis of whether infringement is justified under section 1 of the Charter.[74]

In dissent, Justices Brown and Rowe argued that the concept of substantive equality "has become an open-ended and undisciplined rhetorical device by which courts may privilege, without making explicit, their own policy preferences."[75] They argued that the RCMP plan sought to ameliorate disadvantage faced by women by providing flexibility and questioned whether a court could strike down a statutory scheme for being "*insufficiently* remedial" [emphasis in the original].[76] Using the same version of the *Kapp* test articulated by Justice Abella, Justices Brown and Rowe concluded that the policy did not breach section 15.

Justice Côté also dissented from the majority decision, arguing that while the plan created a distinction specifically based on being a woman with children, it did not create a distinction based on the enumerated ground of sex. She noted that caregiving, parental status and family status are not recognized as analogous grounds under section 15, and therefore section 15 had not been breached.[77]

While there was division on the Court with respect to the application of the *Kapp* test to the facts of the case, and disagreement about the centrality of substantive equality in the section 15 analysis, the Court was unanimous in using the *Kapp* test as articulated in *Quebec v. A* and *Taypotat*. The Court has continued to apply this test in subsequent cases, even when their application of the test has brought them to different conclusions.[78]

9 CONCLUSION

The Supreme Court's interpretation of section 15 of the Charter has developed significantly since its first decision in *Andrews*. A common thread in these cases has been the Court's commitment to substantive equality, though at times there has been disagreement about the precise meaning of this term and the appropriate test to use when seeking to protect it.

The Court began with a relatively fluid approach to section 15 in the *Andrews* decision, which emphasized the effects of a law on the claimant. In 1999, the Court provided guidelines which effectively formalized a section 15 test. In *Kapp* and several subsequent cases, the Court moved away from the rigid structure of the *Law* test, apparently influenced at least in part by scholarly arguments that the *Law* test had been acting as an impediment to equality claimants.[79]

The challenge of establishing a consistent and workable test for section 15 claims reflects the fact that equality is a broad concept that can mean different things to different people. The Court has described the mandate of section 15 as "ambitious but not utopian," with the ability to reduce inequality one case at a time.[80] Future section 15 cases will demonstrate whether the current test is effective at achieving this purpose.

NOTES

1. Canadian Charter of Rights and Freedoms (the Charter), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15.

2. For example, in *Egan v. Canada* (*Egan*), sexual orientation was recognized as an analogous ground, and in *M. v. H.*, the Supreme Court of Canada (the Court) held that same-sex couples should be read into the definition of common-law spouses under Ontario family law legislation. In *Corbiere v. Canada (Minister of Indian and Northern Affairs*) (*Corbiere*), off-reserve First Nations residents challenged the *Indian Act* provisions that prevented them from voting in band elections. See *Egan v. Canada*, [1995] 2 S.C.R. 513; *M. v. H.*, [1999] 2 S.C.R. 3; and *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
3. *R. v. Kapp*, 2008 SCC 41.
4. *Fraser v. Canada (Attorney General)* (*Fraser*), 2020 SCC 28.
5. Ibid., para. 81.
6. *Andrews v. Law Society of British Columbia* (*Andrews*), [1989] 1 S.C.R. 143.
7. *Law v. Canada (Minister of Employment and Immigration)* (*Law*), [1999] 1 S.C.R. 497.
8. Peter W. Hogg, "Chapter 55: Equality," *Constitutional Law of Canada*, 5th ed. (looseleaf), 2010, p. 10.
9. *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.
10. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
11. Ibid.
12. The first description of the *Andrews* approach as "substantive, and not merely formal equality" was in *Eldridge v. British Columbia (Attorney General)*. See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 61.
13. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, p. 174.
14. Ibid., p. 173.
15. Ibid., p. 178.
16. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 2.
17. Ibid., para. 6.
18. Peter W. Hogg, "Chapter 55: Equality," *Constitutional Law of Canada*, 5th ed. (looseleaf), 2010, p. 19.
19. A "balance of probabilities" is a standard of proof used in courts when a claimant must show that something is more probable than not.
20. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.
21. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 60.
22. Citizenship was recognized in *Andrews*, sexual orientation in *Egan* and marital status in *Miron v. Trudel*. "Aboriginality-residence," relating to discrimination against First Nations people on the basis that they live off-reserve, was recognized in *Corbiere*. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; and *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
23. See, for example, Ian Peach, "Section 15 of the *Canadian Charter of Rights and Freedoms* and the Future of Federal Regulation of Indian Status," *University of British Columbia Law Review*, Vol. 45, No. 1, 2012.
24. Ameliorative programs are those intended to improve the condition of a disadvantaged group. The marginal note for section 15(2) refers to such programs as "affirmative action programs."
25. Although there was a dissent, it was on another ground, meaning that the Court was unanimous in its application of section 15.
26. *R. v. Kapp*, 2008 SCC 41, paras. 22 and 24.
27. Ibid., para. 24.
28. Ibid., paras. 20 and 22.
29. Ibid., para. 21.
30. Ibid., para. 22.
31. *Lovelace v. Ontario*, 2000 SCC 37.

32. *R. v. Kapp*, 2008 SCC 41, paras. 33 and 37.

33. Ibid., para. 38.

34. This was the explanation the Court provided in its next section 15(2) decision in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, discussed later in this paper. See *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, para. 41.

35. *R. v. Kapp*, 2008 SCC 41, para. 41.

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

37. *R. v. Kapp*, 2008 SCC 41, para. 24.

38. Ibid., para. 17.

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

40. Ibid., para 39.

41. The Court reviewed critiques from legal academics in *Withler*. See *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 59.

42. Ibid., para. 48, citing *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, para. 18.

43. The Court alludes to this possibility in *Withler*. See *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 59.

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

45. Ibid., para. 55.

46. *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 60.

47. Ibid., para. 61.

48. Ibid., para. 63.

49. Ibid., para. 62.

50. Ibid., para. 64.

51. Ibid., para. 66.

52. *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37.

53. Ibid., para. 41.

54. Ibid., para. 45.

55. *Quebec (Attorney General) v. A*, 2013 SCC 5.

56. Ibid., para. 134.

57. Ibid., para. 135.

58. Ibid., para. 180.

59. Ibid., para. 291.

60. Ibid., para. 300.

61. Ibid., para. 327.

62. Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 Charter Showdown," *Constitutional Forum*, Vol. 22, No. 1, 2013, p. 32.

63. *Quebec (Attorney General) v. A*, 2013 SCC 5, para. 333, quoting Sheila McIntyre, "Deference and Dominance: Equality Without Substance," in Sanda Rodgers and Sheila McIntyre, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, 2006, p. 104.

64. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

65. Ibid., para. 18.

66. Ibid., paras. 15 and 34.

67. Ibid., para. 20.

68. Ibid., para. 21.

69. This was later confirmed in *Ontario (Attorney General) v. G*. See *Ontario (Attorney General) v. G*, 2020 SCC 38, para. 39.

70. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, paras. 15 and 21.

71. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 30.

72. Ibid., paras. 35–39.

73. Ibid., paras. 54, 56–58 and 69.

74. Ibid., paras. 79–80. This distinction was addressed again in *R. v. C.P.*, which challenged the absence of a procedural protection under the *Youth Criminal Justice Act* (YCJA) that was available to adults. Chief Justice Wagner and three other justices argued that there was no breach of section 15 given the full context, including the fact that the YCJA protects youth from a prolonged process. Justice Abella and two other justices argued that the objective of timeliness should have been considered under section 1 rather than as part of the section 15 analysis. In concurring reasons, Justice Kasirer agreed with Justice Abella on this point, while Justice Côté, in dissent, declined to address the Charter issues in the case. See *R. v. C.P.*, 2021 SCC 19, paras. 96–98, 153–154, 167–168 and 303.

75. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 146.

76. Ibid., para. 168.

77. Ibid., para. 238.

78. See *Ontario (Attorney General) v. G*, 2020 SCC 38; and *R. v. C.P.*, 2021 SCC 19. In both cases, the Court continued to use the same test as articulated in *Fraser*, though there were dissenting judgments on unrelated points.

79. This dialogue with the academic community appears to be a relatively recent trend. In *Law*, the Court did not rely on a single secondary source despite the fact that it was significantly altering its approach to section 15(1) analysis. See Sheila McIntyre, “The Equality Jurisprudence of the McLachlin Court: Back to the 70s,” in Sanda Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*, 2010, p. 158.

80. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 136.