

Development of *Charter* Equality Rights: The Contribution of the Right Honourable Antonio Lamer

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INTRODUCTION	3
I. PHASES OF EQUALITY JURISPRUDENCE.....	5
A. PRE-CHARTER.....	5
B. 1989–1995 – <i>ANDREWS, SCHACHTER</i> AND <i>RODRIGUEZ</i>	6
C. DIFFERENCES EMERGE – THE “TRILOGY” OF 1995.....	15
D. INTERIM PERIOD – <i>EATON, BENNER, ELDRIDGE</i> , AND <i>VRIEND</i>	17
E. ATTEMPTED SYNTHESIS – THE <i>LAW</i> GUIDELINES – 1999.....	19
F. APPLICATION OF THE <i>LAW</i> GUIDELINES – CASES BETWEEN 1999 AND 2008.....	20
II. SUMMARY OF THE CONTRIBUTION OF CHIEF JUSTICE LAMER TO S. 15 EQUALITY JURISPRUDENCE	22
III. THE RECENT DECISION IN <i>KAPP</i>	23
CONCLUSION.....	31

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INTRODUCTION

It is an honour and a pleasure to be part of this conference, and to have the opportunity to address the topic of the development of equality rights under the *Canadian Charter of Rights and Freedoms*,¹ with special attention to the contribution of former Chief Justice Antonio Lamer. He was on the Supreme Court of Canada during the crucial early days of s. 15 interpretation, and served as Chief Justice for the decade between 1990 and 2000, when some of the toughest issues emerged.

The equality rights are new in the pantheon of recognized rights and freedoms—both in Canada and elsewhere in the world. The effective date of s. 15 was later than that of other *Charter* provisions because of the perceived need to allow time for governments to bring legislation into compliance with its requirements of equality before and under the law, and the equal benefit and protection of the law for all individuals.²

In some quarters and in some ways, the s. 15 equality rights are still seen as controversial and peculiarly intrusive. This is for three main reasons, I suspect: (1) they are associated with political movements—equality-seeking groups (women, disabled persons, racialized minorities, gays and lesbians)—that were instrumental in bringing about the wording of the *Charter* provision and then in arguing cases involving it; (2) they are potentially sweeping in their effect; and (3) they are newer than the traditional rights and freedoms and do not have the same patina of age as the “fundamental rights and freedoms” specified in s. 2 of the *Charter*, the “democratic rights” in s. 3, or the “legal rights” protected in ss. 7–11 of the *Charter*.

Indeed, it is likely, and it would be wrong to pretend otherwise, that Chief Justice Lamer at certain junctures saw the equality rights as

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

² *Charter*, s. 32(2).

novel and potentially inconsistent with the full protection of other important rights and interests. Nevertheless, as I will describe, he made some important contributions to their development, not only in his support for majority decisions in a number of milestone cases, but also in the reasons he wrote in equality cases.

Many commentators have observed that the *Charter* equality rights jurisprudence has become complex and sometimes highly contradictory. When I was an academic commentator and not a trial judge, I made such observations myself.

Having followed the development of equality jurisprudence from prior to the *Charter's* enactment until the present, I have observed a number of distinct phases in a long and somewhat tortured process. I will briefly review those phases, up to the present day, with particular reference to Chief Justice Lamer's contributions during his twenty years on the Court, from March 28, 1980 to January 6, 2000.

I will suggest that what may be seen in the Right Honourable Antonio Lamer's decisions on equality is consistent with his decisions on the rights of criminally accused persons: robust support for a set of values emphasizing individual autonomy and the fundamental importance of the rule of law, and a willingness to draw a firm line between the individual and the state. In an early decision, *R. v. Swain*,³ he stated that "the basic principles underlying our legal system are built on respect for the autonomy and intrinsic value of all individuals." At the same time, he frequently articulated the view that it is for the legislatures, not the courts, to decide public policy issues. These principles shaped his approach to s. 15 equality rights.

After the review, I will conclude with some thoughts about the most recent section 15 decision from the Supreme Court of Canada (*R. v. Kapp*),⁴ because it may mark the beginning of a whole new phase in equality jurisprudence.

³ [1991] 1 S.C.R. 933 at para. 34.

⁴ 2008 SCC 41 [*Kapp*].

I. PHASES OF EQUALITY JURISPRUDENCE

In describing these phases, I draw on an earlier work, by Professor William Black and myself, entitled “The Equality Rights,”⁵ which provides more detail than the brief overview that follows.

A. PRE-CHARTER

The quasi-constitutional equality rights in the *Canadian Bill of Rights*,⁶ aside from one early case (*R. v. Drybones*),⁷ were interpreted in a manner that essentially nullified their effect. As is too well known to repeat, the decisions in cases like *Bliss v. Canada (Attorney General)*⁸ and *Lavell v. Canada (Attorney General)*⁹ adopted an approach that was circular and wholly ineffective: so long as all pregnant persons were treated alike, or all Indian women who married non-Indian men were treated alike, there was no infringement of the right to equality before the law and the equal protection of the law. (I note that Antonio Lamer did not join the Supreme Court until after *Bliss* was decided; nor did he take part in the later decision in *Brooks v. Canada Safeway Ltd.*¹⁰ that overruled it.)

At the same time, human rights tribunals and courts were devising a much more effective interpretation of human rights guarantees, recognizing, in cases like *Ontario Human Rights Commission et al. v. Simpson Sears*,¹¹ that equality is not always served by identical treatment and that reasonable accommodation may be required in order to avoid discrimination.

⁵ William Black & Lynn Smith, “The Equality Rights” (2005) 27 Sup. Ct. L. Rev. (2d), also published in G.A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2005).

⁶ S.C. 1960, c. 44.

⁷ [1970] S.C.R. 282.

⁸ [1979] 1 S.C.R. 183 [*Bliss*].

⁹ [1974] S.C.R. 1349.

¹⁰ [1989] 1 S.C.R. 1219.

¹¹ [1985] 2 S.C.R. 536 [*O'Malley*].

B. 1989–1995 – ANDREWS,¹² SCHACHTER¹³ AND RODRIGUEZ¹⁴

In the long lead-up to the first Supreme Court of Canada decision on the *Charter* equality rights in 1989, there were contending approaches for the interpretation of s. 15, the chief of which were: (1) follow the U.S. approach in its Fourteenth Amendment jurisprudence; (2) follow the approach taken by the Supreme Court of Canada under the *Canadian Bill of Rights*; or (3) follow the approach taken in the Canadian human rights jurisprudence. There was also an overriding question: given that governments draw distinctions for reasons, and will often seek to justify those distinctions on the basis of overall sound public policy, should the “heavy lifting” as to justification be done at the proof of infringement stage (where the burden is on the plaintiff) or at the s. 1 stage (where the burden is on the government)?

Early lower-court cases and academic commentary pointed in divergent directions. The spectrum included an approach that would find a distinction of any kind to constitute an infringement, leaving it to the government to justify all distinctions under s. 1, and an approach that considered whether or not the distinction was reasonable and fair, having regard to the purposes and aims of the distinction and to its effect on the person concerned (the approach adopted by the British Columbia Court of Appeal in *Andrews*).¹⁵

The Supreme Court of Canada in *Andrews* basically adopted the direction set by the Canadian human rights jurisprudence, placing weight on the fact that s. 15 refers to grounds commonly included in human rights legislation. It rejected the Court of Appeal’s “reasonable and fair” test and the proposition that any distinction in the law infringes s. 15. The definition of “discrimination” *per* McIntyre J. is very frequently referred to:

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

¹² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. [Andrews].

¹³ *Schachter v. Canada*, [1992] 2 S.C.R. 679 [Schachter].

¹⁴ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [Rodriguez].

¹⁵ *Andrews v. Law Society (British Columbia)*, [1986] 4 W.W.R. 242, 27 D.L.R. (4th) 600 (B.C. C.A.).

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.¹⁶

In its most recent s. 15 decision, *Kapp*,¹⁷ the Supreme Court of Canada has emphasized that *Andrews*, in particular the decision of McIntyre J., provides the template for analyzing claimed infringements of s. 15. This is a noteworthy statement, since there had been some question as to the continuing significance of *Andrews* in the light of more recent decisions of the Supreme Court.¹⁸

It is worth spending a moment to remember what the Court said in *Andrews*, which concerned the disqualification of non-citizens from practising law in the Province of British Columbia. Lamer J., as he then was, concurred with McIntyre J. that the disqualification infringed s. 15; in this respect McIntyre J. wrote for the majority. The majority, in reasons written by Wilson J., held that the disqualification was not justifiable under s. 1. However, Lamer J. concurred with McIntyre J., dissenting on this point, that the legislative disqualification was a reasonable limit under s. 1 and should not be struck down. McIntyre and Lamer JJ. observed that:

Public policy, of which the citizenship requirement in the *Barristers and Solicitors Act* is an element, is for the Legislature to establish. The role of the *Charter*, as applied by the courts, is to ensure that in applying public policy the Legislature does not adopt measures which are not sustainable under the *Charter*. It is not, however, for the courts to legislate or to substitute their views on public policy for those of the Legislature...¹⁹

The Court in *Andrews* staked out three positions that set the parameters for future s. 15 interpretation.

¹⁶ *Andrews*, *supra* note 12 at para. 37.

¹⁷ *Supra* note 4.

¹⁸ See e.g. *Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2007 NBCA 10, 280 D.L.R. (4th) 97 at para. 35.

¹⁹ *Andrews*, *supra* note 12 at para. 59.

First, it said that the meaning of “equality” is to be found in the fact that certain grounds, already specified in human rights legislation, were again specified in s. 15. Rather than a generic kind of “equality before and under the law” that could permit a constitutional attack on any kind of legislated distinction, s. 15 is aimed at the inequalities experienced by disadvantaged groups, such as racialized minorities, persons with disabilities, women, religious minorities and non-citizens. This point is emphasized in *R. v. Turpin*, a case decided not long after *Andrews*, where Wilson J. for a unanimous court (including Lamer J.) wrote:

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. McIntyre J. emphasized in *Andrews* (at p. 167):

For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.

Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

McIntyre J. recognized in *Andrews* that the “‘enumerated and analogous grounds’ approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above” (p. 182) and suggested that the alleged victims of discrimination in *Andrews*, i.e., non-citizens permanently resident in Canada were “a good example of a ‘discrete and insular minority’ who came within the protection of s. 15” (p. 183). Similarly, I suggested in my reasons in *Andrews* that the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is “not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political

and legal fabric of our society” (p. 152). If the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation. A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge is likely, in my view, to result in the same kind of circularity which characterized the similarly situated similarly treated test clearly rejected by this Court in *Andrews*.²⁰

The second important parameter *Andrews* set for s. 15 interpretation was that the assessment of possible justification for provisions distinguishing between persons on the basis of enumerated or analogous grounds should take place at the s. 1 stage and should not be rolled into the determination of whether there is an infringement of s. 15. As to the relationship between s. 15 and s. 1, the Court elaborated in *Turpin*:

The argument that s. 15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a violation would be novel and disturbing is not, in my respectful view, an acceptable approach to the interpretation of *Charter* provisions. Moreover, the Court of Appeal’s test of whether a distinction is “unreasonable,” “invidious,” “unfair” or “irrational” imports limitations into s. 15 which are not there. It is inconsistent with the proper approach to s. 15 described by McIntyre J. in *Andrews*. The equality rights must be given their full content divorced from justificatory factors properly considered under s. 1. Balancing legislative purposes against the effects of legislation within the rights sections themselves is fundamentally at odds with this Court’s approach to the interpretation of *Charter* rights....²¹

Third, *Andrews* made clear that the definition of “discrimination” to be applied under s. 15 encompasses the unintended effects of legislation or government activities, and that the accommodation of differences is the essence of true equality. McIntyre J. in his reasons stated:

²⁰ [1989] 1 S.C.R. 1296 at paras. 44–46 [*Turpin*].

²¹ *Ibid.* at para. 40.

It is, of course, obvious that legislatures may—and to govern effectively—must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.²²

One of the most important cases on constitutional remedies reached the Supreme Court during this period, and arose in the context of an equality claim. In *Schachter*, decided July 9, 1992, the issue was whether differentiation between biological and adoptive parents with respect to Unemployment Insurance benefits infringed s. 15. The infringement of s. 15 was conceded by the government on appeal to the Federal Court of Appeal and subsequently to the Supreme Court of Canada. At trial, the government had made no attempt to support an argument that if there was an infringement it was justified under s. 1.

Lamer C.J.C. stated the Court's dissatisfaction with that state of affairs, and said that it precluded the Court from examining the s. 15 issue on its merits, whatever doubts might exist as to the finding below. However, Lamer C.J.C. took the opportunity in *Schachter* to write a decision that provided the roadmap for consideration of remedial issues under the *Charter*.²³ While the law with respect to remedies has continued to evolve, the overall direction set by *Schachter* remains in effect. Notably, the breadth of remedial options contemplated in *Schachter*—severance, reading in, temporarily suspending legislation in order for it to be amended, or reading down—has been particularly significant in s. 15 cases where benefits of the law have been denied or restricted, such as in *Vriend v. Alberta*.²⁴

Chief Justice Lamer's discussion in *Schachter* of the governing principles for determining remedies emphasized the importance of respecting the role of the legislature and the purposes of the *Charter*. On behalf of the Court, he concluded that severance or reading in may

²² *Andrews*, *supra* note 12 at 168–169, McIntyre J.

²³ *Schachter*, *supra* note 13 at para. 23.

²⁴ [1998] 1 S.C.R. 493 [*Vriend*].

sometimes be the appropriate remedy where striking down the legislation poses a potential danger to the public or otherwise threatens the rule of law, or when the problem is underinclusiveness rather than overbreadth.²⁵ As Porter points out, the Supreme Court of Canada thereby affirmed that s. 15 is a “hybrid” of negative and positive rights.²⁶

Although the Supreme Court’s decision to strike down the *Criminal Code* provisions on abortion²⁷ in *R. v. Morgentaler*²⁸ did not turn on any arguments under s. 15, it did address some equality issues and provided a backdrop to the later *Rodriguez* decision. Decided prior to *Andrews*, *Morgentaler* shows the majority of the Court divided as to the reasoning, but concurring that the provisions of the *Criminal Code* then limiting access to therapeutic abortion were unconstitutional due to infringement of s. 7. Dickson C.J., with Lamer J., wrote that:

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman’s bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman’s body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.²⁹

This acceptance of the importance of personal autonomy and decision-making power in the case of women wishing to obtain therapeutic abortion was widely viewed as having the effect of reinforcing

²⁵ *Schachter*, *supra* note 13 at para. 85.

²⁶ Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectations” (2005) 23 Windsor Y.B. Access Just. 145 at 6.

²⁷ *Criminal Code*, R.S.C. 1970, c. C-34, s. 251.

²⁸ [1988] 1 S.C.R. 30 [*Morgentaler*].

²⁹ *Ibid.* at 56–57.

the equality rights of women, as were the later decisions in *Tremblay v. Daigle*³⁰ and *R. v. Sullivan*.³¹

In *Rodriguez*, in 1993, Lamer C.J.C. wrote one of his few s. 15 judgments. Sue Rodriguez was diagnosed with Amyotrophic Lateral Sclerosis with a prognosis of death within a short time (2–14 months). She did not want to die so long as she still had the capacity to enjoy life, but wished that a qualified physician be allowed to set up technological means by which she might end her life by her own hand, at the time of her choosing, when she was no longer able to enjoy life. She challenged s. 241(b) of the *Criminal Code*,³² which makes it a criminal offence to assist another person to commit suicide, punishable by imprisonment up to 14 years. Ms. Rodriguez claimed that the statute infringed s. 7, s. 12 and s. 15(1) of the *Charter*. The majority dismissed her claim.

Lamer C.J.C. dissented, being alone on the Court in concluding that the legislation infringed s. 15.³³ His reasoning was that deprivation of the right to choose could be a disadvantage or burden within the meaning of s. 15(1). He referred to the manner in which the common law recognizes the right of each individual to make decisions regarding his or her own person, stating:

Like the *Charter* itself in several of its provisions, therefore, the common law recognized the fundamental importance of individual autonomy and self-determination in our legal system. That does not mean that these values are absolute. However, in my opinion s. 15(1) requires that limitations on these fundamental values should be distributed with a measure of equality.³⁴

³⁰ [1989] 2 S.C.R. 530 [*Daigle*].

³¹ [1991] 1 S.C.R. 489 [*Sullivan*]. Both decisions affirmed that a foetus has no rights as legal person in Canada: the former decision denied a man an injunction to stop his partner from getting an abortion; the latter acquitted two midwives accused of criminal negligence causing the death of a “child” during childbirth.

³² R.S.C. 1985, c. C-46.

³³ The majority in the court (per Sopinka J.) found that there was an infringement of s. 7, saved by s. 1, and that even if there was an infringement of s. 15, it was saved by s. 1. Four judges (the Chief Justice, Cory, McLachlin and L’Heureux-Dubé JJ.) dissented. McLachlin and L’Heureux-Dubé JJ. found an infringement of s. 7, not saved by s. 1, but said there was no infringement of s. 15. Cory J. agreed with them, and also agreed with Lamer C.J.C. that there was an infringement of s. 15, not saved by s. 1.

³⁴ *Rodriguez*, *supra* note 14 at para. 61.

Since, as *Andrews* stated, s. 15(1) rights extend to protect against adverse effect discrimination, physical disability is among the personal characteristics listed in s. 15(1) of the *Charter*, and s. 241(b) of the *Criminal Code* adversely affects those persons with physical disabilities with respect to their ability to commit suicide, Lamer J. concluded that s. 241(b) infringes the right to equality guaranteed in s. 15(1) of the *Charter*. He summarized his conclusion:

... This provision has a discriminatory effect on persons who are or will become incapable of committing suicide themselves, even assuming that all the usual means are available to them, because due to an irrelevant personal characteristic such persons are subject to limitations on their ability to take fundamental decisions regarding their lives and persons that are not imposed on other members of Canadian society ...³⁵

The essence of his s. 15 reasoning is that s. 241(b) of the *Criminal Code* is an example of a provision that fails to afford equality even though it affords identical treatment.

In considering whether the provision passed muster under s. 1 of the *Charter*, Lamer C.J.C. again referred to the importance of self-determination:

As I noted above, however, s. 241(b), while remaining facially neutral in its application, now gave rise to a deleterious effect on the options open to persons with physical disabilities, whose very ability to exercise self-determination is premised on the assistance of others. In other words, can it be said that the intent of Parliament in retaining s. 241(b) after repealing the offence of attempted suicide was to acknowledge the primacy of self-determination for physically able people alone? Are the physically incapacitated, whether by reason of illness, age or disability, by definition more likely to be vulnerable than the physically able? These are the vexing questions posed by the continued existence of the offence of assisted suicide in the wake of the repeal of the attempted suicide provision.

The objective of s. 241(b) also must be considered in the larger context of the legal framework which regulates the control individuals may exercise over the timing and circumstances of

³⁵ *Ibid.* at para. 70.

their death. For example, it is now established that patients may compel their physicians not to provide them with life-sustaining treatment (*Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.)); and patients undergoing life-support treatment may compel their physicians to discontinue such treatment (*Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. S.C.)), even where such decisions may lead directly to death. The rationale underlying these decisions is the promotion of individual autonomy; see *Ciarlariello, supra*, at p. 135. An individual's right to control his or her own body does not cease to obtain merely because that individual has become dependent on others for the physical maintenance of that body; indeed, in such circumstances, this type of autonomy is often most critical to an individual's feeling of self-worth and dignity. As R. Dworkin concisely stated in his recent study, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993), at p. 217: "Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny."

I also wish to stress, however, that the scope of self-determination with respect to bodily integrity in our society is never absolute. While there may be no limitations on the treatments to which a patient may refuse or discontinue, there are always limits on the treatment which a patient may demand, and to which the patient will be legally permitted to consent. Palliative care, for example, which is made available to ease pain and suffering in the terminal stages of an illness even though the effect of the treatment may be to significantly shorten life, may not necessarily be made available to a person with a chronic illness but whose death is not imminent: see M. A. Somerville, "Pain and Suffering at Interfaces of Medicine and Law" (1986), 36 U.T.L.J. 286, at pp. 299–301. Most important of these limits is s. 14 of the Criminal Code, which stipulates that an individual may not validly consent to have death inflicted on him or her. Additionally, it is well established that, under the common law, there are circumstances under which an individual's consent to an assault against him or her will not be recognized: *R. v. Jobidon*, [1991] 2 S.C.R. 714.³⁶

³⁶ *Ibid.* at paras. 75–77.

Lamer C.J.C. would have made a declaration of constitutional invalidity, suspended for one year, and would have granted a constitutional exemption to Ms. Rodriguez under conditions similar to those crafted by McEachern C.J.B.C., who had dissented in the British Columbia Court of Appeal below.³⁷

The *Rodriguez* decision is significant for a number of reasons, and Chief Justice Lamer's dissenting judgment is intrinsically interesting—it draws on a variety of sources, and is both strongly worded and closely reasoned. As well, in my opinion, Lamer C.J.C. applied what the Court had said in *Andrews*, doing so in a context where he thereby reinforced what he had frequently stated to be fundamental values—individual autonomy and self-determination.

C. DIFFERENCES EMERGE – THE “TRILOGY” OF 1995

By 1995, strong differences appeared on the Supreme Court as to the proper approach to interpretation of the s. 15 equality rights, in three cases inevitably called “the trilogy”: *Egan v. Canada*,³⁸ *Miron v. Trudel*,³⁹ and *Thibaudeau v. Canada (Minister of National Revenue)*.⁴⁰ A three-way division appeared, with four judges maintaining the *Andrews/Turpin* approach, one judge (L'Heureux-Dubé J.) arguing for an approach that emphasized impact on “human dignity” as a touchstone, and four judges (Lamer C.J.C., LaForest, Gonthier and Major JJ.) bringing a new step into the analysis—consideration of whether the distinction on an enumerated or analogous ground is relevant to the “functional values” underlying the legislation. That new step entailed inquiring as to “whether a distinction rests upon or is the expression of some objective physical or biological reality, or fundamental value.”⁴¹ That approach, endorsed by Lamer C.J.C., failed to prevail in *Miron*, where legislation restricting certain benefits to legally married (as opposed to common law) spouses was held to be unconstitutional.

³⁷ *Rodriguez v. British Columbia (Attorney-General)*, [1993] 3 W.W.R. 553, 76 B.C.L.R. (2d) 145 (B.C. C.A.).

³⁸ [1995] 2 S.C.R. 513 [*Egan*].

³⁹ [1995] 2 S.C.R. 418 [*Miron*].

⁴⁰ [1995] 2 S.C.R. 627 [*Thibaudeau*].

⁴¹ *Miron*, *supra* note 39 at para. 19, Gonthier J.

However, the approach did prevail in *Egan*, and legislation denying benefits under the *Old Age Security Act*⁴² to same-sex spouses was upheld. In *Egan*, LaForest J. wrote for the same group of four judges as in *Miron* and concluded that part of the purpose of the law was to take account of the importance of marriage to society as the institution responsible for procreation; distinguishing between heterosexual and same-sex couples was relevant to this purpose and hence was not discriminatory. The majority in *Miron per McLachlin J.* (as she was then) pointedly rejected this approach, arguing that it is highly indeterminate and circular in its reasoning.

In both *Miron* and *Egan*, Sopinka J. agreed that the legislation infringed s. 15, but only in *Egan* concluded that it was saved by s. 1.

In the third case, *Thibaudeau*, the division on the Court was more complex; the ultimate outcome, however, was to uphold legislation making child support payments taxable in the hands of the recipient and deductible by the payor. (Lamer C.J.C. did not take part in the decision in *Thibaudeau*.)

The issue of how to balance competing constitutional rights arose in a few cases during this period, in the context of the criminal law, and the approaches of members of the Court in *R. v. O'Connor*⁴³ show striking differences. In *O'Connor* the Court addressed the Crown's duty to disclose counselling records of complainants in sexual assault cases. L'Heureux-Dubé J.'s reasons discuss the equality interests at stake, given that the great preponderance of complainants are women or children; Lamer C.J.C.'s dissenting reasons do not address equality issues, instead expressing an overriding concern for the fairness of criminal trials.

Later, in *R. v. Mills*,⁴⁴ the Supreme Court addressed the constitutionality of further legislation passed by Parliament in response to *O'Connor*. The majority upheld the legislation, which tracked in some ways the dissenting reasons in *O'Connor*. The Court majority referred to the legislation's preamble, quoting its reference to:

... the incidence of sexual violence and abuse in Canadian society, its prevalence against women and children, and its 'particularly disadvantageous impact on the equal participation of women and

⁴² R.S.C. 1985, c. O-9.

⁴³ [1995] 4 S.C.R. 411 [*O'Connor*].

⁴⁴ [1999] 3 S.C.R. 668 [*Mills*].

children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the [*Charter*].⁴⁵

Lamer C.J.C. wrote the sole dissent, finding that the legislation infringed the s. 7 rights of accused persons and failed to constitute a reasonable limit under s. 1.

D. INTERIM PERIOD – EATON,⁴⁶ BENNER,⁴⁷ ELDRIDGE,⁴⁸ AND VRIEND

In a number of cases decided after the “trilogy” but before *Law v. Canada (Minister of Employment and Immigration)*,⁴⁹ the Supreme Court did not re-visit its differences of opinion as to the correct approach to section 15 analysis, but rather, reached conclusions that were said to follow from either of the two leading approaches.

In *Eaton*, a school board’s decision to remove a special needs child from the regular classroom was upheld; in *Benner*, *Citizenship Act* provisions⁵⁰ were struck down that differentiated between children with one non-Canadian parent where the non-Canadian parent was a woman rather than a man.

Eldridge and *Vriend*, decided in this period, in some ways are high-water marks in *Charter* equality jurisprudence: *Eldridge* because of the Supreme Court’s conclusion that s. 15 was infringed when government agents failed to provide sign-language interpretation for deaf patients wishing to obtain medical or hospital treatment; and *Vriend* because of the remedy granted by the majority, which was to read in to the provincial human rights legislation the protection against employment discrimination based on sexual orientation that the legislature had deliberately failed to provide.

⁴⁵ *Ibid.* at para. 48.

⁴⁶ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

⁴⁷ *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

⁴⁸ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*].

⁴⁹ [1999] 1 S.C.R. 497 [*Law*].

⁵⁰ *Citizenship Act*, R.S.C. 1985, c. C-29, ss. 3(1), 4(3), 5(1)(b), (2)(b), 12(2), (3), 22(1)(b),(d), (2)(b).

Lamer C.J.C. took part in all four of these decisions, which were unanimous on the s. 15 issues. This included the decision written by LaForest J. in *Eldridge*, where the Court not only stated in theory, but ruled in practice, that governments will sometimes be required to take positive action in order to afford equality.

Charter equality concepts are important not only when s. 15 claims are advanced in order to strike down legislation, but also when the interpretation of other principles of law or *Charter* provisions is at issue. *O'Connor* and *Mills* are examples that have already been mentioned.⁵¹ Another example is *R. v. R.D.S.*,⁵² where the meaning of “bias” or “reasonable apprehension of bias” fell to be interpreted in the context of a trial judge’s observations regarding relations between young black men and the police. Lamer C.J.C. joined in the dissent of Major J. and Sopinka J. in that case. The dissenting judges disagreed with the majority as to the outcome. They particularly disagreed with the reasons of McLachlin and L’Heureux-Dubé JJ., who addressed the question of when it is appropriate and necessary for judges to take into account social context, stating:

Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.⁵³

The dissent, in which Lamer C.J.C. concurred, saw it very differently. Major J. wrote:

The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most

⁵¹ Other examples include *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Williams*, [1998] 1 S.C.R. 1128; and *R. v. Gladue*, [1999] 1 S.C.R. 688.

⁵² [1997] 3 S.C.R. 484 [*R.D.S.*].

⁵³ *Ibid.* at para. 49.

trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.

The trial judge could not decide this case based on what some police officers did in the past without deciding that all police officers are the same. As stated, the appellant was entitled to call evidence of the police officer's conduct to show that there was in fact evidence to support either his bias or racism. No such evidence was called. The trial judge presumably called upon her life experience to decide the issue. This she was not entitled to do.

The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown's duty to present all the evidence fairly. The system depends on each side's producing facts by way of evidence from which the court decides the issues. Our system, unlike some others, does not permit a judge to become an independent investigator to seek out the facts.⁵⁴

E. ATTEMPTED SYNTHESIS – THE *LAW* GUIDELINES – 1999

In 1999 in *Law*, the Court, in a unanimous decision written by Iacobucci J., set out a detailed framework for analysis of *Charter* equality claims, including in that framework a number of elements drawn from the disparate points of view put forward in the decisions in the trilogy.

The three steps and four contextual factors delineated in *Law* are well known and I will not pause to review them here,⁵⁵ but will instead refer to them in the final part of this paper when I comment on the *Kapp* decision and the extent to which it may have modified the *Law* analytical framework.

⁵⁴ *Ibid.* at paras. 13–15.

⁵⁵ For a more detailed description and analysis of *Law*, *supra* note 49, see William Black & Lynn Smith, *supra* note 5.

F. APPLICATION OF THE *LAW* GUIDELINES – CASES BETWEEN 1999 AND 2008

Chief Justice Lamer retired from the court on January 7, 2000. Prior to that date, he participated in three post-*Law* decisions interpreting s. 15: *M. v. H.*,⁵⁶ *Corbiere v. Canada (Minister of Indian and Northern Affairs) (Corbiere)*⁵⁷ and *Winko v. British Columbia (Forensic Psychiatric Institute) (Winko)*.⁵⁸

M. v. H. involved a successful challenge to the *Ontario Family Law Act*⁵⁹ definition of a common law spouse, which excluded same-sex couples. In *Corbiere*, Indian band members sought and obtained a declaration that the requirement under the *Indian Act*⁶⁰ that they be “ordinarily resident” on reserve in order to vote in band elections was unconstitutional. In *Winko*, an inmate challenged the constitutionality of *Criminal Code* provisions⁶¹ prohibiting persons found not criminally responsible by reason of mental disorder from obtaining absolute discharges. In the first two cases, applying the *Law* approach, legislation was struck down as infringing s. 15. In the third, the legislation was found not to infringe s. 15. Lamer C.J.C. was in the majority in all decisions.

The criticism of the jurisprudence since *Law* has been along these general lines: (1) the process of s. 15 analysis has become much more complex than it needs to be; (2) the focus on “dignity” makes the analysis subjective and outcomes unpredictable; (3) the recent emphasis on choice of comparators has led to a revival of the “similarly situated” test; (4) the addition in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,⁶² of a question relating to “benefit under the law” adds to the complexity and indeterminacy; (5) the analytical framework as applied

⁵⁶ [1999] 2 S.C.R. 3 [*M. v. H.*].

⁵⁷ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*].

⁵⁸ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 [*Winko*].

⁵⁹ R.S.O. 1990, c. F.3, s. 29.

⁶⁰ R.S.C., 1985, c. I-5, s. 77(1).

⁶¹ R.S.C., 1985, c. C-46, s. 672.54.

⁶² [2004] 3 S.C.R. 657.

fails to give any meaningful role to s. 1; and (6) the approach overall has proved to be ineffective in achieving the underlying purpose of s. 15.⁶³

⁶³ The Supreme Court of Canada in *Kapp*, *supra* note 4 at para. 22, n. 1, acknowledged that there had been extensive critical commentary regarding the additional burden that the *Law* test has placed on claimants, citing the following articles: Donna Greschner, “Does *Law* Advance the Cause of Equality?” (2001) 27 *Queen’s L.J.* 299; Sheila Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 *Can. Bar Rev.* 299; Donna Greschner, “The Purpose of Canadian Equality Rights” (2002) 6 *Rev. Const. Stud.* 291; Debra M. McAllister, “Section 15 - The Unpredictability of the *Law* Test” (2003-2004) 15 *N.J.C.L.* 3; Christopher D. Bredt & Adam M. Dodek, “Breaking the *Law*’s Grip on Equality: A New Paradigm for Section 15” (2003) 20 *Sup. Ct. L. Rev.* (2d) 33; Daphne Gilbert, “Time to Regroup: Rethinking Section 15 of the *Charter*” (2003) 48 *McGill L.J.* 627; Daniel Proulx, “Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles” (2003) 63 *R. du B.* 485; Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006) 24 *Windsor Y.B. Access Just.* 111; Christian Brunelle, “La dignité dans la *Charte des droits et libertés de la personne* : de l’ubiquité à l’ambiguïté d’une notion fondamentale” in Alain-Robert Nadeau, ed., *Revue du Barreau du Québec, La Charte québécoise : origines, enjeux et perspectives* (Montreal: Yvon Blais, 2006), at 143; R. James Fyfe, “Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada” (2007) 70 *Sask. L. Rev.* 1; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) vol. 2 at 55-28, 55-29; Alexandre Morin, *Le droit à l’égalité au Canada* (Montreal: LexisNexis, 2008) at 80-82.

In *Kapp*, *supra* note 4 at para. 22, n. 2, the Court also cited the following commentary on the artificial nature of the comparator test, which has resulted in a focus on treating likes alike: Sophia Reibetanz Moreau, “Equality Rights and the Relevance of Comparator Groups” (2006) 5 *J.L. & Equality* 81; Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006) 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, “Equality, Comparison, Discrimination, Status,” in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 73; Dianne Pothier, “Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What’s the Fairest of Them All?” in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Butterworths, 2006) at 135. See also Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 *C.J.W.L.* 37; 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.* (2d) 103; Mayo Moran, “Protesting Too Much: Rational Basis Review Under Canada’s Equality Guarantee,” in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Butterworths, 2006) at 71; Sheila McIntyre, “Deference and Dominance: Equality Without Substance,” in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Butterworths, 2006) at 95.

In its decision in *Kapp*, the Supreme Court addresses a number of these points of criticism and suggests that a re-visiting of the *Law* framework is underway, as I will describe below.

I note that there is considerable interest in what the Supreme Court of Canada will decide with respect to the future approach to s. 15 analysis not only because of the impact on *Charter* cases but also because it remains an open question whether the s. 15 analytical framework (in particular, the *Law* guidelines) should be applied in anti-discrimination cases arising under human rights legislation. Some courts have held that the traditional human rights approach (as set out in *O'Malley*) should continue to be used.⁶⁴ On the other hand, certain other courts and tribunals have held that the *Law* guidelines should form part of the analysis even when s. 15 is not invoked.⁶⁵

II. SUMMARY OF THE CONTRIBUTION OF CHIEF JUSTICE LAMER TO S. 15 EQUALITY JURISPRUDENCE

Chief Justice Lamer was not an equality specialist, and he did not write frequently in cases involving s. 15 issues. At the risk of oversimplifying, I venture to suggest that he came to equality issues from the perspective of a criminal law specialist and a legal scholar acutely aware of the dangers of unfair trials, wrongful convictions and abusive state intrusion into the lives of individuals. He also shared the concern of others on the Supreme Court about the implications for democracy of substituting the views of judges for the views of legislators on questions of public policy. Yet, in *Rodriguez* he would have struck down the prohibition against assisted suicide on equality grounds, and in *Schachter* he designed a template for *Charter* remedies with particularly important implications for equality claims, which often involve challenges to underinclusive benefit schemes. He was with the majority in a number of the Supreme Court's most significant equality decisions: *Andrews*

⁶⁴ *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, 262 D.L.R. (4th) 360; *Canada (Human Rights Commission) v. M.N.R.*, 2003 FC 1280, [2004] 1 F.C.R. 679 at para. 15; *Barrett v. Cominco*, 2001 BCHRT 46; *Dame v. South Fraser Health Region*, 2002 BCHRT 22.

⁶⁵ *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* (2005), 78 O.R. (3d) 194, 260 D.L.R. (4th) 515 (Ont. Div. Ct.); *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685, 217 D.L.R. (4th) 341; *Marakkaparambil v. Ontario (Minister of Health and Long-Term Care)*, 2007 HRTO 24, Vice Chair Wright.

(though he would have found the legislation to constitute a reasonable limit); *Turpin*; *Egan*; *Eldridge*; *Vriend*; *Law*; and *Corbiere*. As well, his respect for the important values of individual autonomy and self-determination led him to concur in decisions in *Morgentaler*, *Daigle* and *Sullivan* that are seen as having the effect of supporting women's equality rights.

Finally, I note that in one of his many roles as the Chief Justice of Canada, he was the Chair of the Board of Governors of the National Judicial Institute. In that capacity he presided over that organization at a time when it devised and implemented an ambitious and successful program (the Social Context Education Program) to assist Canadian judges in understanding and applying the mandate of equality in their courts.

III. THE RECENT DECISION IN *KAPP*⁶⁶

Kapp marks the Supreme Court's first detailed development of an analytical framework for the assessment of arguments that programs constitute affirmative action programs under s. 15(2). At the same time, the Court also took the opportunity to address some of the criticisms of its approach under s. 15(1) and to indicate future directions in that regard.

In *Kapp*, under the federal government's Aboriginal Fisheries Strategy pilot sales program, a 24-hour communal licence to fish salmon in the mouth of the Fraser River had been granted to three aboriginal bands. A protest fishery was held by commercial fishers, mainly non-aboriginal, who were not members of those bands, and they were charged with offences under the *Fisheries Act*.⁶⁷ They challenged the constitutionality of the communal fishing licence and the Aboriginal Fisheries Strategy, claiming discrimination on the basis of race.

At trial,⁶⁸ Kitchen P.C.J. conducted a detailed review of the evidence, including a good deal of information about the background of the defendant commercial fishers, who included Vietnamese-Canadian, Japanese-Canadian and others. He also reviewed the evidence regarding the purpose for the pilot sales program. He found that its original purpose was not connected with the alleviation of economic disadvantage.

⁶⁶ *Supra* note 4.

⁶⁷ R.S.C. 1985, c. F-14, s. 78.

⁶⁸ *R. v. Kapp*, 2003 BCPC 279, [2003] 4 C.N.L.R. 238 (B.C. Prov. Ct. (Crim. Div.)).

However, he believed that not only the original purpose should be considered, but also whether the program could have the effect of alleviating economic disadvantage of the bands to which the commercial licences were granted. He concluded in that regard that there was little evidence of financial disadvantages experienced by the two bands whose members had participated in the pilot sales fishery (the Musqueam and the Tsawwassen), but went on to say:

My conclusion is that there may be non-financial disadvantages experienced by the Musqueam and Tsawwassen Bands but there is no rational connection between the preferential treatment given these bands in the fishery, and these disadvantages.⁶⁹

He concluded as follows:

Although probably well intentioned, the program was misconceived, illogical, and ineffective in any way in dealing with any disadvantages the three bands may experience. The pilot sales program therefore offends the provisions of Section 15 of the *Charter of Rights and Freedoms* and violates the rights of the accused thereunder.⁷⁰

In his reasons addressing whether the program constituted a reasonable limit under s. 1, Kitchen P.C.J. noted:

The literature from the Department expressed the hope that the pilot sales fishery would provide stability to the commercial fishery by improving Aboriginal catch data, increasing cooperation in enforcement, and reducing protests and confrontation. The weight of the evidence is that none of this has occurred and the program has been counterproductive in each of these areas.

If the program is intended to address other disadvantages of the bands, it is poorly designed and ineffectual. It is not a communal fishery. Money in the hands of individual band members is doing nothing for the social and health problems of the community. The evidence was that the band members who were most successful in the pilot sales fishery were those who were also commercial fishers and operated fully equipped commercial fishing vessels. The pilot sales fishery cannot be rationally connected to any

⁶⁹ *Ibid.* at para. 202.

⁷⁰ *Ibid.* at para. 204.

attempt to deal with the disadvantages of the bands as
Aboriginals.⁷¹

He found that the program did not constitute a reasonable limitation on equality rights under s. 15, and imposed a stay of proceedings with respect to the charges against the protest fishers.

On the appeal to the Supreme Court of British Columbia,⁷² Brenner C.J.S.C. overturned the decision below, holding that discrimination within the meaning of s. 15(1) had not been established because the program did not perpetuate or promote the view that those who were forbidden to fish on the days when the pilot sales program fishery was open are less capable or worthy of recognition or value as human beings or members of Canadian society. The stays of proceedings were lifted and convictions were entered against the protest fishers.

The British Columbia Court of Appeal agreed with that outcome,⁷³ with five members of the Court each giving reasons, summarized as follows in the Supreme Court of Canada decision:

Low J.A. concluded that the pilot sales program did not constitute denial of a benefit under s. 15 when the matter was viewed in a contextual rather than formalistic way. Mackenzie J.A. rejected the claim of discrimination on the basis that a discriminatory purpose or effect had not been established, endorsing the view of Brenner C.J.S.C. on the summary convictions appeal. Kirkpatrick J.A. dismissed the s. 15 claim on the basis that s. 25 of the *Charter*, which protects rights and freedoms pertaining to the aboriginal peoples of Canada, insulated the scheme from the discrimination charge. Finch C.J.B.C. concurred with both Low J.A. and Mackenzie J.A. on the s. 15 issue, and found that s. 25 was not engaged. Finally, Levine J.A. agreed with Finch C.J.B.C. on the s. 15 issue, but declined to express a view on whether s. 25 was engaged.⁷⁴

The Supreme Court of Canada (*per* McLachlin C.J. and Abella J.), with Bastarache J. concurring for different reasons, dismissed the appeal

⁷¹ *Ibid.* at paras. 213–214.

⁷² *R. v. Kapp*, 2004 BCSC 958, 31 B.C.L.R. (4th) 258.

⁷³ *R. v. Kapp*, 2006 BCCA 277, 56 B.C.L.R. (4th) 11.

⁷⁴ *Kapp*, *supra* note 4 at para. 12

from the British Columbia Court of Appeal, with the result that the pilot sales program was upheld.

The Court majority found that the pilot sales program did not infringe s. 15(1) because it was an affirmative action program within the meaning of s. 15(2). Bastarache J. upheld the program because he concluded that the constitutional challenge was barred by s. 25 of the *Charter*.

The majority emphasized that the *Andrews* case set the template for the Court's commitment to "substantive equality" and quoted the words of McIntyre J. in *Andrews*:

To approach the ideal of full equality before and under the law—and in human affairs an approach is all that can be expected—the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.⁷⁵

McLachlin C.J. and Abella J. stated:

... While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.⁷⁶

Later, they referred to *Andrews* again, and to the fact that McIntyre J. had emphasized that "a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds."⁷⁷

⁷⁵ *Ibid.* at para. 15, citing *Andrews*, *supra* note 12 at 165, McIntyre J.

⁷⁶ *Ibid.* at para. 15.

⁷⁷ *Ibid.* at para. 18.

The majority said that there are different and complementary roles for s. 15(1) and 15(2), with 15(1) “aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds” and 15(2) enabling governments “to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation.”⁷⁸

The majority set out a two-step test for showing discrimination under s. 15(1) (describing it as, in substance, the same as the three-step test prescribed in *Law*):

... (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 stereotype? ...⁷⁹

Referring to some of the criticism of the Court’s s. 15 jurisprudence, the majority said that several difficulties have arisen from the attempt in *Law* to employ human dignity as a legal test, observing that while human dignity is an essential value underlying the s. 15 equality guarantee, it is an abstract and subjective notion, difficult to apply, and has proven to be an additional burden on equality claimants. The Court majority also noted the criticism of “the way *Law* has allowed the formalism of some of the Court’s post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.”⁸⁰

The response is to understand that “the factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern of s. 15 identified in *Andrews*—combating discrimination, defined in terms of perpetuating disadvantage and stereotyping.”⁸¹

Since the appellants had established that they were treated differently based on an enumerated ground, race, and because the government argued that the program ameliorated the conditions of a disadvantaged group, the majority determined that it should take a more detailed look at s. 15(2).

⁷⁸ *Ibid.* at para. 16

⁷⁹ *Ibid.* at para. 17.

⁸⁰ *Ibid.* at paras. 21–22.

⁸¹ *Ibid.* at para. 24.

It held that the Court's only previous decision on s. 15(2), *Lovelace v. Ontario*,⁸² had not gone far enough in terms of giving s. 15(2) independent force. It concluded that if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all⁸³ because the ameliorative program is constitutional.

As for the analytical framework to be followed thereafter in assessing whether a program meets the criteria of s. 15(2), the majority said, while acknowledging that future cases may demand further adjustment, that:

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.⁸⁴

The majority in *Kapp* elaborated on some key elements of the test.

First, the majority stated that the "object" of the legislation or program should be determined with reference to the government's purpose, asking whether it was "the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged," considering not only statements made by the drafters of the program, but also whether the legislature chose means rationally related to the purpose. The assessment will encompass whether it appears at least plausible that the program may indeed advance the stated goal of combating disadvantage.⁸⁵ The test is stated as follows:

Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve

⁸² [2000] 1 S.C.R. 950.

⁸³ *Kapp*, *supra* note 4 at para. 37.

⁸⁴ *Kapp*, *supra* note 4 at para. 41

⁸⁵ *Ibid.* at paras. 48–49.

the disadvantaged but in practice serves other non-remedial objections.⁸⁶

The Court majority also held that it is unnecessary for the ameliorative purpose to be the program's exclusive objective; however, the importance of the ameliorative purpose within the scheme may help determine the *scope* of s. 15(2) protection, adding:

We offer as a tentative guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.⁸⁷

Second, as to the meaning of "amelioration," McLachlin C.J. and Abella J. referred to some cases considering analogous concepts such as "for the benefit of," and stated:

These precedents suggest that the meaning of "amelioration" deserves careful attention in evaluating programs under s. 15(2). We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. Nor, as already discussed, should the focus be on the effect of the law. This said, the fact that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts.⁸⁸

Third, addressing the meaning of "disadvantaged," they referred to the Court's previous decisions in *Andrews*, *Miron*, and *Law*, stating that the term connotes "vulnerability, prejudice and negative social characterization," and adding:

Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.⁸⁹

⁸⁶ *Ibid.* at para. 49.

⁸⁷ *Ibid.* at para. 52.

⁸⁸ *Ibid.* at para. 54.

⁸⁹ *Ibid.* at para. 55.

The Court held that the pilot sales program was a (small) part of an attempt to find a negotiated solution to aboriginal fishing rights claims, providing economic opportunities to the bands and thereby promoting band self-sufficiency. The majority said that in those ways the government was hoping to redress the social and economic disadvantage of the targeted bands. It held that the means (special fishing privileges) chosen to achieve the purpose are rationally related to serving the purpose, and that the Crown had established a credible ameliorative purpose for the program. It held that those aims correlate to the “actual economic and social disadvantage suffered by members of the three aboriginal bands.” Using language that suggests considerable deference to government, the majority stated:

Mr. Kapp suggests that the focus must be on the particular forms of disadvantage suffered by the bands who received the benefit, and argues that this program did not offer a benefit that effectively tackled the problems faced by these bands. As discussed above, what is required is a correlation between the program and the disadvantage suffered by the target group. If the target group is socially and economically disadvantaged, as is the case here, and the program may rationally address that disadvantage, then the necessary correspondence is established.⁹⁰

McLachlin C.J. and Abella J. concluded that the program fell within the meaning of s. 15(2) and accordingly did not violate the equality guarantee of s. 15 of the *Charter*.⁹¹

The Supreme Court of Canada decision in *Kapp* contains a number of notable statements flagging the possible future direction of s. 15(1) analysis. These include:

- 1) its re-emphasis of the *Andrews* conclusion that s. 15 is aimed at the promotion of substantive equality;
- 2) its warning that the *Law* guidelines, in particular the four “contextual factors,” are not to be read as if they are statutory provisions;
- 3) its recognition that the focus on “dignity” has led to a lack of clarity and predictability in the jurisprudence and a heavier onus on claimants;

⁹⁰ *Ibid.* at para. 60.

⁹¹ *Ibid.* at para. 61.

- 4) its directive to avoid an “artificial comparator analysis” because that can lead to formalism, and instead to focus on the factors that identify when the impact of a distinction amounts to discrimination; and
- 5) its re-statement of the test for infringement of s. 15(1). Although the re-statement does not include reference to effects-based analysis, in context the Court clearly means to retain that direction.

Further, the decision breaks new ground, giving s. 15(2) exemptive force, and providing a tentative framework for analysis of that subsection.

Finally, the dissent of Bastarache J. would establish a strong role for s. 25. He found that s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group, and that in this case s. 25 would bar the constitutional challenge under s. 15. Bastarache J. also commented on the role of s. 28 of the *Charter*, stating that s. 28 means that the shield provided by s. 25 is not absolute, because s. 28 provides for gender equality “[n]otwithstanding anything in this *Charter*.”

CONCLUSION

I have suggested in this paper that, perhaps more than any other part of the *Charter*, the equality rights have proved to be challenging for the courts. The jurisprudence, viewed over the past 23 years, shows a number of different approaches to s. 15 and some strong disagreements about central issues such as the relationship between s. 15 and s. 1. Though rarely writing decisions in s. 15 cases, Chief Justice Lamer took part in the debates and helped to shape them. In *Kapp*, the Supreme Court noted some of the concerns about the jurisprudence to date, and clearly stated that it intends to move forward with the *Andrews* approach, guided by an overall commitment to substantive equality, and to streamline the analytical framework under s. 15(1) while giving an expanded role to s. 15(2).