

**(c) 2010 Margot Young**

**First published in the *Supreme Court Law Review*,  
Second Series, Vol. 50**

# Unequal to the Task: “Kapp”ing the Substantive Potential of Section 15

Margot Young\*

## I. INTRODUCTION

It was not an insignificant commitment. In 1989 and in the first section 15 case to reach the Supreme Court of Canada, the Court declared its intention to move the Court beyond mere formal equality, recognizing that the standard mantra of formal equality (the similarly situated test) was “seriously deficient”,<sup>1</sup> “not helpful”,<sup>2</sup> and too limited a “formula”.<sup>3</sup> Justice McIntyre, the author of this judgment in *Andrews v. Law Society of British Columbia*, elaborated: “mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights”.<sup>4</sup> While the term “substantive equality” was not used by McIntyre J. and did not appear in a Supreme Court majority judgment until eight years later in *Eldridge v. British Columbia (Attorney General)*,<sup>5</sup> *Andrews* is widely seen as having committed the Court to the project of substantive equality.<sup>6</sup> Indeed, after *Eldridge*, it is

---

\* Associate Professor, Faculty of Law, University of British Columbia. Many thanks to Sheila McIntyre for perspicacious editing and generous collegiality. Thanks also to Ted Murray for indefatigable research assistance. I am grateful for comments from an Osgoode Hall Law School audience. Funding for this research provided by the Foundation for Legal Research and the SSHRCC CURA Social Rights Project.

<sup>1</sup> *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 166 (S.C.C.), per McIntyre J. [hereinafter “*Andrews*”].

<sup>2</sup> *Id.*, at 168, per McIntyre J., quoting Kerans J.A. in *Mahe v. Alberta*, [1987] A.J. No. 709, 54 Alta. L.R. (2d) 212, at 244 (Alta. C.A.).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 61 (S.C.C.) at para. 61 [hereinafter “*Eldridge*”]. Prior to this judgment, four dissenting judgments identified the version of equality enshrined by McIntyre J. in *Andrews* as substantive equality: *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695, at 820 (S.C.C.), per L’Heureux-Dubé J. (dissenting); *Willick v. Willick*, [1994] S.C.J. No. 94, [1994] 3 S.C.R. 670, at 705-706 (S.C.C.), per L’Heureux-Dubé J. (dissenting); *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609, at para. 73 (S.C.C.), per L’Heureux-Dubé J. (dissenting) and at para. 208, per McLachlin J. (dissenting in part).

<sup>6</sup> The Women’s Legal Education and Action Fund (“LEAF”) repeatedly references and argues for substantive equality in its intervener’s factum in *Andrews* at the Supreme Court. “Factum of the Women’s Legal Education and Action Fund: *Andrews v. The Law Society of British Columbia*

only a few Supreme Court decisions under section 15 that do not invoke the ideal of substantive equality, or that fail to attribute that commitment to *Andrews*. For example, the unanimous Court in *Law v. Canada* stated that its judgment “confirm[ed] *Andrews*’ interpretation of s. 15 as a guarantee of substantive, and not just formal, equality”.<sup>7</sup> And, off the bench, Beverley McLachlin C.J.C. has declared that: “[s]ubstantive equality is the only equality of our time.”<sup>8</sup>

But substantive equality is tricky. Its absence can be difficult to perceive and its mandates are certainly out of political style.<sup>9</sup> Again in the words of the Chief Justice, the challenge section 15 presents is both “exciting” and “daunting” for the judiciary.<sup>10</sup> To take the Chief Justice’s words perhaps beyond their original meaning, it is “exciting” because it offers at its best an opportunity for the realities of oppression to be seen and “daunting” because this revelation is possible only at the price of owning up to and undoing “the dominant group’s belief in its own natural entitlement”.<sup>11</sup> For this latter reason, the strictures of a substantive equality aspiration play out on a political field, and in relation to a set of mainstream social values, that is comfortable mostly only with formal equality.<sup>12</sup>

The result? Enragingly, while our courts continue to flaunt a commitment to substantive equality, they flout it consistently. Indeed, the Supreme Court uses “the language of equality to deny the claims of equality-seekers”.<sup>13</sup> Equality claims, at least statistically, are overwhelmingly not likely to be successful — whether one stops the count at section 15 or

---

and the Attorney General of British Columbia”, in Women’s Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery Publications Limited, 1996) 3.

<sup>7</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter “*Law*”].

<sup>8</sup> The Right Honourable Beverley McLachlin, P.C., “Equality: The Most Difficult Right” (2001) 14 S.C.L.R. (2d) 17, at 22 [hereinafter, “McLachlin, ‘Equality: The Most Difficult Right’”].

<sup>9</sup> See generally, Janine Brodie, “Reforming Social Justice in Neoliberal Times” (2007) 1 *Studies in Social Justice* 93 [hereinafter “Brodie”].

<sup>10</sup> McLachlin, “Equality: The Most Difficult Right”, *supra*, note 8, at 17.

<sup>11</sup> Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press: 1998), at 23 [hereinafter “Razack”].

<sup>12</sup> Judith Keene, “The Supreme Court, the *Law* Decision, and Social Programs: The Substantive Equality Deficit” [hereinafter “Keene”] in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law 2009), at 345, 346 [hereinafter “Faraday, Denike & Stephenson”].

<sup>13</sup> *Id.*, at 345.

includes outcomes of those cases that proceed to section 1 justification.<sup>14</sup> This is particularly true for those cases that involve government benefit programs.<sup>15</sup>

Much has been written of this judicial failure to follow through on the Court's professed commitment to substantive equality. Particularly, this scholarship has focused on the doctrinal nuances that have made section 15 one of the most complex and challenging of rights for claimants. But, too much of this scholarship, like the Court itself, uses the term "substantive equality" as an unelaborated, cryptic guidepost pointing to the equality outcome the author prefers.<sup>16</sup> It is timely, therefore, to spell out in more detail just what substantive equality requires and how it contrasts with both the formal equality McIntyre J. rejected so early on in the 25-year history of section 15 jurisprudence and the ongoing equality jurisprudence of the Supreme Court of Canada.

The jurisprudential focus for this elaboration of substantive and formal equality is the Supreme Court of Canada's latest key section 15 case. The case, of course, is *R. v. Kapp*<sup>17</sup> — a decision that brings together a dense complex of issues involving equality, affirmative action, race and Aboriginal rights. This paper takes on only a piece of this tangle — focusing on three issues that speak to the Court's continuing failure to engage fully with the promise of *Andrews*' rejection of a formal equality framework for section 15. This failure exists, I argue, despite the clear intention of the Court in *Kapp* to reinvigorate and place back at the foreground the reasoning of *Andrews*. The issues I discuss are: the Court's re-emphasis on stereotyping as evidence of discrimination; the section 15(2) trump; and the division of labour the Court draws between section 15(1) and section 15(2). It is ironic that the Court, even as it explicitly crafts a return to *Andrews*, creates doctrine that seems geared to put us farther and farther away from reaching the promise of what was best and clearest in *Andrews*.

---

<sup>14</sup> See, for relatively recent stocktaking, Bev Baines, "Is Substantive Equality A Constitutional Doctrine?" [hereinafter "Baines"] in Y. Gendreau, ed., *La doctrine et le développement du droit/Developing Law with Doctrine* (Montreal: Les Editions Thémis, 2005) 59, at 64-65; Sheilah Martin, "Balancing Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299; Sheila McIntyre, "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2005) 31 Queen's L.J. 731, at 742-44 [hereinafter "McIntyre, 'Impoverished'"].

<sup>15</sup> Keene, *supra*, note 12, at 346.

<sup>16</sup> Not all of it does and to the authors of these scholarly papers I am indebted for much of the equality framework of this paper. For example, see the work of Sheila McIntyre and Hester Lessard cited within this paper.

<sup>17</sup> [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "*Kapp*"].

I say “best and clearest” in *Andrews* to underscore that that decision is, as a whole, rather flawed and murky, particularly about what a substantive equality analysis generally — and an analysis of discrimination in particular — requires. Even as McIntyre J. sets out the promise of substantive equality, he crafts an understanding of the harms section 15 targets that moves his judgment back most coherently into the territory of formal equality.<sup>18</sup> It is not surprising that subsequent case law stumbles, as *Andrews* sets a number of fault-lines in place. I will elaborate on this point after that part of this paper that sets out fully the understanding of formal and substantive equality on which I rely. However, I want to first discuss a tangential, but important, side set of politics, one that I believe should animate our equality conversations and that points us in the direction of substantive equality and justice, and away from mere formal equality outcomes. It illustrates why the focus on substantive equality is the right choice. It also illustrates by contrast the unfriendly environment current equality law sets for progressive political aspirations and strategies.

## II. A CONCERN FOR SOCIAL JUSTICE

The enactment of section 15 was heralded by many as setting in place a new potential in Canadian law.<sup>19</sup> As Bruce Porter documents, many of the social and legal activists who spoke to the form equality rights should take in the new constitution argued explicitly from a social justice perspective.<sup>20</sup> This was a complicated and contested position to occupy in the neo-liberal state Canada was well on the way to becoming.

Janine Brodie, a Canadian political scientist, has written on social justice in neo-liberal times. She talks not only about the origin of the notion of social justice but also about the evolution of the significance of the attachment of the term “social” to the concept of “justice”. Her argument begins by noting that it is common in thinking about “social justice” to focus on the presence of “justice”, rather than on the key importance of the term “social”. But as Janine Brodie points out, the idea of the social is not unimportant and has undergone a series of

---

<sup>18</sup> For elaboration of this, see Margot Young, “Blissed Out: Section 15 at Twenty” [hereinafter “Young, ‘Blissed’”] in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns* (Markham, ON: LexisNexis Canada, 2006) 45 [hereinafter “McIntyre and Rodgers”].

<sup>19</sup> Others were less optimistic. See Doris Anderson, “The Adoption of Section 15: Origins and Aspirations” (2006) 5 J.L. & Equality 5, at 39.

<sup>20</sup> Bruce Porter, “Expectations of Equality” (2005) 23 Windsor Y.B. Access Just. 145.

transformations shaped by the emergence of industrial capitalism, growing in complexity, and ultimately becoming a “distinctive idiom” in Western politics.<sup>21</sup>

Brodie also writes about the emergence of the “social citizen”<sup>22</sup> as an historical icon, speaking of this notion as “the product of over a century of discursive and political struggles around the inherent gap between liberalism’s promise of citizen equality and the structural inequalities of capitalism.”<sup>23</sup> The “social citizen” is the person to whom social justice is owed and stands in significant contrast with the citizen of the neo-liberal state.

The neo-liberal citizen has evolved from the recent ideological, material and structural shifts that have resulted in renegotiation and recalibration of the relation between the state and society, between public and private. Cast as entrepreneur, the citizen of the neo-liberal state is wilful, self-actualizing, a biographer of his or her own life chances and circumstance.<sup>24</sup> To this citizen is owed not *social* justice — but rather justice more individually understood: economic reward and assignment of societal resources based on individual accomplishment and ambition, strategic and prudent choice.<sup>25</sup> Equally, bad choices, poor outcomes, are the individual’s responsibility and can disentitle the citizen from collective or state consideration and compensation. Social

---

<sup>21</sup> Brodie, *supra*, note 9.

<sup>22</sup> Use of the terms “citizen” and “citizenship” is unavoidably problematic and neglects the important question of to whom justice is owed. In many ways, this is a question prior to the question of what the content of social justice obligations are. (Nancy Fraser, “Reframing Justice in a Globalizing World” (2005) 36 *New Left Review* 69 [hereinafter “Fraser”], at 71.) While the theory of social citizenship, since at least T.H. Marshall, seeks to engage a fuller understanding of state provided entitlements, the “concept of citizenship ... comes laden with inherently exclusionary roots of membership in political community”: Hester Lessard, “Substantive Universality: Reconceptualizing Feminist Approaches to Social Provision and Child Care” [hereinafter “Lessard, ‘Substantive Universality’”] in Shelley A.M. Gavigan & Dorothy E. Chunn, eds., *The Legal Tender of Gender: Law, Welfare and the Regulation of Women’s Poverty* (Oxford: Hart Publishing, 2010) 217, at 232. As Lessard points out, the notion invokes “broader systemic patterns of marginalization and exclusion. The unreflective invocation of social citizenship risks ignoring and thus “consolidating a fundamentally racialized and gendered ... order.” (*Id.*, at 238.) However, there is no obvious substitute for this concept that does not raise similar concerns.

<sup>23</sup> Brodie argues that the use of the concept of social justice as an imperative of social organization has an ancient lineage. But its modern usage, a product of 18<sup>th</sup>-century industrial and French revolutions, was popularized in the 19th century and became central to policy debates in the mid-20th century. Liberal democracies in their move towards variants of the welfare state came to understand social justice as an ethical foundation of modern societies. (Brodie, *supra*, note 9, at 95-97.) Notably, however, this understanding has in recent decades been, to a large extent, abandoned by many states, including Canada.

<sup>24</sup> Brodie, *id.*, at 23.

<sup>25</sup> Brodie, *id.*

problems are seen as individual failings. Citizenship status alone promises only a limited set of entitlements — not the broader set of social and economic entitlements “social” citizenship brings. Thus, as the notion of the model citizen has changed with the emergence of the latest modality of capitalism in our century, the dominant idea of justice has correspondingly thinned.

But it is critical to remind ourselves about just what social justice — as a more fecund notion — might promise and how the idea can offer an important moral and philosophical underpinning for a particular language of politics,<sup>26</sup> as it did in the activism around the drafting and implementation of the text of section 15 itself. Several key assumptions that are useful in setting parameters to a social justice perspective can be drawn from Brodie’s discussion.<sup>27</sup>

First, the liberal promise of citizen equality is central to social justice.

Second, justice is a virtue that applies not only to the individual but also to social institutions and to the collective.

Third, social justice demands an understanding of inequalities as structural or systemic.

Fourth, social justice calls for redistribution of collective resources by society as a whole and by the state, not simply individual or charitable response to injustices.

Fifth, claims for social justice must include recognition of a wide swath of resources to be distributed, at a level that is consistent with standards generally enjoyed. (Nancy Fraser, for instance, has recently argued that justice claims target properly a range of injustices, variously requesting socio-economic redistribution, legal or cultural recognition, and/or political recognition.<sup>28</sup>)

In total, these assumptions give the notion of social justice considerable political content — for example, a concern with social justice could speak to the alleviation of poverty and social and political exclusion, and to the reduction of inequalities as a matter of justice, not merely charity, and as a matter of state, not individual, responsibility.<sup>29</sup>

---

<sup>26</sup> See Brodie, *id.*, at 97.

<sup>27</sup> This list is culled and developed from Brodie’s discussion of the new language of politics made possible by the idea of social justice. See, Brodie, *id.*

<sup>28</sup> Fraser, *supra*, note 22.

<sup>29</sup> Brodie, *supra*, note 9, at 97.

The claims that rely on a promise of these aspects of social justice are often thought of as claims to social and economic rights<sup>30</sup> — the “Cinderella” of human rights, to quote a British scholar.<sup>31</sup> That is, these are claims that entail entitlements to material needs and to distributional consequences and that have to do with the social and economic status of individuals. The “implications that the assertion of such rights have for power relations within societies”<sup>32</sup> are clear. They are, perhaps, the most transformative of any rights a liberal bill of rights, like the *Canadian Charter of Rights and Freedoms*,<sup>33</sup> might conceivably recognize.

This brings us back to section 15 as an obvious entry point for recognition of social and economic rights in our Charter and to the observation that section 15 jurisprudence has been so disappointing in that regard. It is clear, 25 years after section 15 came into force, that those earlier versions of social justice, so eloquently and persistently pressed by equality-seeking communities at the time our Charter was drafted, have yet to be realized. Section 15 is not yet recognizable as the equality rights provision of their aspirations.

### III. SOCIAL JUSTICE UNDER SECTION 15 OF THE CHARTER

The debate over social justice is translated within the confines of section 15 argument to the contest over the meaning of equality and over the requirements the concept imposes on the state. A number of terms circulate to elaborate more narrowly and precisely what the concept of equality can embrace. For instance, Nancy Fraser talks of “substantive social equality”.<sup>34</sup> Rosemary Hunter in an article questioning the usefulness of the concept of equality notes that feminists have generated

---

<sup>30</sup> See Marjorie Griffin Cohen & Jane Pulkingham, “Introduction: Feminist Public Policy in Canada” [hereinafter “Cohen & Pulkingham”] in Marjorie Griffin Cohen & Jane Pulkingham, eds., *Public Policy For Women: The State, Income Security, and Labour Market Issues* (Toronto: University of Toronto Press 2009) 3-49, at 12.

<sup>31</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 2 [hereinafter “Fredman”].

<sup>32</sup> Paul O’Connell, “Introduction”, *Vindication Socio-Economic Rights: International Standards and Comparative Experiences*, unpublished Ph.D. thesis, National University of Ireland at 4 (on file with author) [hereinafter “O’Connell, ‘Introduction’”].

<sup>33</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”]. See, generally, for example, Martha Jackman, “What’s Wrong With Social and Economic Rights?” (2000) 11 N.J.C.L. 235; Bruce Porter, “ReWriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada” in W. Cragg & C. Koggel, eds., *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004), at 373.

<sup>34</sup> Nancy Fraser, *Justice Interruptus* (New York: Routledge, 1997), at 80.



a range of conceptions of in/equality.<sup>35</sup> Others fragment the conversation with elaborate schemes and grids. Thus, Bev Baines in a 2005 article cites four distinctive (she argues) principles that the concept of equality references: the “similarly situated” principle; the “discrimination” principle; the “dignity” principle; and the “substantive equality” principle.<sup>36</sup> She argues that all four principles inform jurisprudence under section 15 of the Charter.

However, despite and in the face of all of this learned and useful elaboration of equality principles, my analysis sticks with a continuum with only two poles: formal equality and substantive equality. I do this because it is this axis along which the Supreme Court itself claims to understand its jurisprudence. For this reason alone the distinction is strategically explored. But also I argue that fundamental and critical differences in the politics of equality analyses are well portrayed by the contrast. The distinction between formal equality and substantive equality is a powerful one, and within Canadian jurisprudence and scholarship, frequent and common. There is much value in avoiding a complicated classification scheme and cutting to the nub of what is at issue. And there is increasing worth in setting out what substantive equality involves. While formal equality is often described, substantive equality is typically only invoked. I worry that we have forgotten the “sharp edges” of just what substantive equality entails as it comes more and more under attack politically and is more and more obscured legally. Too often what goes under the guise of substantive equality is really simply only a contextualized, richer form of formal equality. So a return to a full elaboration of these two conceptions of equality, and the differences between them, is, I hope, useful.

### 1. Formal Equality

Within recent debates over Canadian equality law, there are, to repeat the point, two well-referenced poles of argument about how equality should be conceptualized: formal equality and substantive equality. The first and simplest conception, formal equality, is underpinned by an idealized vision of the liberal individual: autonomous, self-interested

---

<sup>35</sup> Rosemary Hunter, “Alternatives to Equality” in Rosemary Hunter, ed., *Rethinking Equality Projects in Law: Feminist Challenges* (Oxford: Hart Publishing, 2008) 81-104, at 82.

<sup>36</sup> Baines, *supra*, note 14, at 61.

and self-determined.<sup>37</sup> The individual is otherwise unencumbered by particularity of history, social location or circumstance. According to this perspective, rights attach to individuals, not groups, and individuals are not “legally defined or socially ascribed by immutable personal characteristics such as race, national origin or sex or by social status, caste or other group affiliation”.<sup>38</sup> Thus, Sheila McIntyre notes, formal equality understands “the polity as a community of individual citizens who do or should stand as formal equals in the assignment and exercise of the political and legal rights and freedoms of citizenship”.<sup>39</sup> The goal of individual well-being is enhanced as choice expands and individual preference, correspondingly, is assumed to hold sway.<sup>40</sup> The individual is held responsible for the choices she or he makes, as both tribute to and consequence of this vision of rational free-will and self-interest: “The individual who has failed has simply chosen badly.”<sup>41</sup> The free market as a minimally regulated sphere of otherwise unconstrained individual wilful action stands as the “compelling metaphor” of this model.<sup>42</sup>

Typically, the legal standard of formal equality is framed in terms of the simple Aristotelian formulation of treating “likes alike”, positing same treatment as its “defining feature”.<sup>43</sup> This is also known as the “similarly situated” test. The hallmark is that the assessment of the question of “similarly situatedness” operates in deliberate blindness to such things as race, gender, sexual orientation, and other markers of individual, but group based, difference. That is, differences of this sort will not disrupt similarity. Equally, as counterpart of treating likes alike, some differences are understood as really marking difference and will, consequently, demand different treatment. Such differences become “the appropriate antithesis of equality, becoming inequality’s explanation and legitimation”.<sup>44</sup> Differences that justify different treatment are those

---

<sup>37</sup> Mary Becker, “Patriarchy and Inequality: Towards a Substantive Feminism” (1999) 7 U. Chicago Legal F. 21, at 32-33 [hereinafter “Becker”].

<sup>38</sup> Sheila McIntyre, “Backlash Against Equality: The ‘Tyranny’ of the ‘Politically Correct’” (1993) 38 McGill L.J. 1, at 27 [hereinafter “McIntyre, ‘Backlash’”].

<sup>39</sup> *Id.*, at 26-27.

<sup>40</sup> Becker, *supra*, note 37, at 32.

<sup>41</sup> Razack, *supra*, note 11, at 24. See also, generally, Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment” [hereinafter “Majury, ‘Women’”] in Faraday, Denike, & Stephenson, *supra*, note 12, 209.

<sup>42</sup> McIntyre, “Backlash”, *supra*, note 38, at 29.

<sup>43</sup> Diana Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 Osgoode Hall L.J. 297, at 304 [hereinafter “Majury, ‘Charter’”].

<sup>44</sup> Joan Scott, “Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism” in D. Kelly Weisberg, ed., *Applications of Feminist Legal Theory to Women’s*

things that can be ascribed as individual traits, products of the assumed unassailable: nature or choice. These differences, say merit, talent or inclination, justify unequal, different treatment, effectively foreclosing an equality analysis.

Rather than assessing outcomes or distributional results, a formal equality analysis looks at state action with its eye on the goal of equality of opportunity.<sup>45</sup> The state is not prescriptive as to outcome<sup>46</sup> but is charged simply with ensuring that state restrictions do not unfairly impinge on individual choice. The concern is predominantly with process or procedure; the ultimate distributional outcomes are simply beyond the ken of this liberal state. The upshot is that the norm to which a formal equality analysis aspires is same treatment, even in the face of significant difference. Simply, as Hester Lessard notes, this approach is blind to the material conditions, attributes, attitudes, structures or norms that instantiate social inequality.<sup>47</sup>

Formal equality is an appealing standard: it is analytically simple and “resonates with ... liberal and individualistic traditions”.<sup>48</sup> It does not require careful or subtle calibration of state action in response to nuances of individual/group difference. The result is that it can be a powerful tool for addressing discrimination where the difference between the claimant and others is along an obvious and singular dimension, such that, indeed, the claimant is “not really that different”.<sup>49</sup> It is also a malleable tool. As popular and legal understandings of what counts as “real” difference shift, formal equality analyses grow in usefulness and critical bite.<sup>50</sup> An insistence on formal equality counts for many of the practical gains women, particularly white, middle-class women for example, have made in Canadian society in the 20th century. Women have used this frame to

---

*Lives: Sex, Violence, Work and Reproduction* (Philadelphia: Temple University Press, 1996) 611, at 617, quoted in Majury, “Women”, *supra*, note 41, at 218.

<sup>45</sup> Majury, “Women”, *id.*, at 304.

<sup>46</sup> McIntyre, “Backlash”, *supra*, note 38, at 28.

<sup>47</sup> Lessard, “Substantive Universality”, *supra*, note 22, at 214.

<sup>48</sup> Becker, *supra*, note 37, at 34.

<sup>49</sup> For discussion of this point, see Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 Queen’s L.J. 179 [hereinafter “Iyer”]; Margot Young, “Sameness/Difference: A Tale of Two Girls” (1997) 4 Rev. Const. Stud. 150 [hereinafter “Young, ‘A Tale of Two Girls’”]. For illustration of this kind of case, consider a recent case at the B.C. Court of Appeal on the equality claims of women ski jumpers left out of the 2010 Winter Olympics. From purely a formal equality analysis, these women had a compelling equality rights case, although they did lose the case on other grounds. See Margot Young, “The IOC Made Me Do It: Women’s Ski Jumping, VANOC, and the 2010 Winter Olympics” (2010) 18 Const. Forum Const. 95.

<sup>50</sup> See Hester Lessard, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism” [hereinafter “Lessard, ‘Charter Gridlock’”], in McIntyre & Rodgers, *supra*, note 18, at 291.

at least be able to “do what men do in the ways that men do it, whether in science, the professions, business, or government”.<sup>51</sup> Not a complete victory, certainly; a containment of the radical potential of equality to dismantle persistent, systemic hierarchies, definitely; but a significant advance, nonetheless, for many women. The irony is that the greater the inequality in a society, the less inequality a formal equality lens will see.<sup>52</sup> This is because the more unequal individuals are, the more “truly” or “naturally” different they will seem and the less their different treatment will register as unequal treatment.<sup>53</sup> So, ultimately, while a formal equality approach, especially one that is at times quite open to understanding similarity in a contextualized and sophisticated manner, can chip away at inequalities, there is much deep and persistent inequality left unacknowledged and intact. Too often under the lens of formal equality, subordinated groups “are not oppressed, merely different”.<sup>54</sup> Thus, there is a deep irony to formal equality. While it is explained and justified by liberalism’s radical but abstract commitment to an “infinitely expandable inclusion”<sup>55</sup> based on everyone’s shared humanity, formal equality is “fundamentally exclusive at the level of application”.<sup>56</sup>

## 2. Substantive Equality

The world looks very different (both dissimilar and rife with difference) viewed through a substantive equality lens: individuals are richly various and interpellated by dense webs of social and economic structures and relations. Instead of a world peopled by the “same” and the “different”,<sup>57</sup> in this world everyone is different. Relative treatment cannot therefore be justified or assessed along the simply (formal) metric of who is alike and who is not.

Individual autonomy also is understood in a particular way. Here, individual choice is appreciated as constructed and limited by systemic and individual material and symbolic conditions. One theorist refers to

---

<sup>51</sup> Becker, *supra*, note 37, at 21.

<sup>52</sup> Becker, *id.*, at 36, paraphrasing Catharine MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), at 108.

<sup>53</sup> Becker, *supra*, note 37, at 36; Bruce Ryder, Cidalia C. Faria & Emily Lawrence. “What’s Law Good For? An Empirical Overview of Charter Equality Rights Decisions” (2004) 24 S.C.L.R. (2d) 103 [hereinafter, “Ryder, Faria & Lawrence, ‘What’s Law Good For?’”].

<sup>54</sup> Razack, *supra*, note 11, at 24.

<sup>55</sup> Lessard, “Substantive Universality”, *supra*, note 22, at 243.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

this as the “social meaning of choice”.<sup>58</sup> Another talks of a “more skeptical, more problematized approach to choice”.<sup>59</sup> Autonomy or freedom is qualified by, indeed, rests upon, historical and current systems of constraint and oppression.<sup>60</sup> Social and economic structures “channel outcomes”<sup>61</sup> for individuals and shape the options, circumstances and characteristics of individuals: “preferences might themselves be a result of deep-seated constraints within the social structure”.<sup>62</sup> Through such processes inequality is systemically enforced: “perspectives of the powerful define and shape individual and cultural definitions of value ... rationaliz[ing] existing unequal distributions of power”.<sup>63</sup> That an individual can be understood to have “chosen” something is not necessarily adequate to justify the outcomes that follow from such a “choice”. This is, at least partly, because “choice” is seldom unconstrained or unframed by context and circumstances.<sup>64</sup> By recognizing both the problematic nature of “choice” and its inadequacy as a sufficient condition of justice, a substantive equality frame is sensitive to the “lived patterns of exclusion and need” that a formal equality analysis is not.<sup>65</sup>

Individuals thus are importantly understood in terms of their socio-economic contexts. Group experiences — as shapers of individual circumstances — are relevant and the right to equality is about both groups and individuals as members of oppressed or marginalized groups. As Sherene Razack notes, “responses to subordinate groups are socially organized to sustain existing power arrangements”.<sup>66</sup> There is no “ground zero”<sup>67</sup> at which historical and social context and group membership are irrelevant. And to understand inequality, we must perceive the social and group aspect of oppression.

Social, political and economic structures, systems and institutions are implicated in this perpetuation of inequality. Marjorie Griffin Cohen

<sup>58</sup> Fredman, *supra*, note 31, at 14.

<sup>59</sup> Majury, “Women”, *supra*, note 41, at 215.

<sup>60</sup> See generally, Razack, *supra*, note 11, c. 2; Carol Pateman, *The Sexual Contract* (Cambridge: Polity, 1988).

<sup>61</sup> McIntyre, “Backlash”, *supra*, note 38, at 29.

<sup>62</sup> Fredman, *supra*, note 31, at 14.

<sup>63</sup> McIntyre, “Backlash”, *supra*, note 38, at 29.

<sup>64</sup> It is also because even “meaningful” choice may result in subordinating and oppressive outcomes that a substantive equality analysis might condemn, regardless of the fact that these outcomes were “chosen”. Substantive equality, as I detail later, requires assessment of equality of outcome, regardless of the process (or choice) that constructs such an outcome.

<sup>65</sup> Lessard, “Charter Gridlock”, *supra*, note 50, at 294. See also, Young, “Blissed”, *supra*, note 18, 54-63.

<sup>66</sup> Razack, *supra*, note 11, at 8.

<sup>67</sup> *Id.*

and Jane Pulkingham note that “social and economic structures have been built with inequality as an inherent component in their design”.<sup>68</sup> These structures “stigmatize individuals, marginalize them, or perpetuate their domination by others”.<sup>69</sup> In such a world, the world as understood by a substantive equality frame, formal equality achieves merely the “accrual of substantive inequality”.<sup>70</sup> Thus a substantive equality analysis should challenge privileged understandings of the world and of how it is organized.<sup>71</sup>

The substantive equality ambition, instead, is focused on an outcome of distribution equality in both material and symbolic or representational resources.<sup>72</sup> Importantly, it entails a richer picture of freedom and asks whether individuals are in a position to enjoy freedom.<sup>73</sup> Thus, an analysis that values substantive equality has the purpose to “name, expose, and ultimately eradicate the socially and economically inferior position of oppressed groups in society”.<sup>74</sup> As Hester Lessard writes, substantive equality is characterized by “a commitment to redistributive justice and radical inclusion” that also celebrates and creates space for difference.<sup>75</sup> To achieve these goals, a substantive equality analysis must entail a number of features.

First, a substantive equality analysis is explicitly cognizant of and concerned with *power differentials*: “how subjects are constituted through structural and hierarchical systems of inequality”.<sup>76</sup> That is, individuals come to understand themselves and are understood by others through a mesh of material and social power relations.<sup>77</sup> A substantive equality analysis thus requires a critical theory of difference. Such analysis must

---

<sup>68</sup> Cohen & Pulkingham, “Introduction”, *supra*, note 30, at 15.

<sup>69</sup> Sophia R. Moreau, “The Wrongs of Unequal Treatment” (2004) 54 U.T.L.J. 291, at 292 [hereinafter “Moreau, ‘The Wrongs of Unequal Treatment’”].

<sup>70</sup> McIntyre, “Backlash”, *supra*, note 38, at 31.

<sup>71</sup> Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” [hereinafter “McIntyre, ‘Siren’”] in Faraday, Denike & Stephenson, *supra*, note 12, at 108.

<sup>72</sup> I adopt Nancy Fraser’s framework of justice claims here. See, generally, Fraser, *supra*, note 22.

<sup>73</sup> Fredman, *supra*, note 31, at 9.

<sup>74</sup> Pascale Fournier, “Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a Comparative Dialogue” [hereinafter “Fournier”] in Susan H. Williams, ed., *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge: Cambridge Press, 2009) 157, at 158.

<sup>75</sup> Lessard, “Substantive Universality”, *supra*, note 22, at 243.

<sup>76</sup> Fournier, *supra*, note 74, at 158.

<sup>77</sup> Razack, *supra*, note 11, at 34.

understand difference as historically and socially based,<sup>78</sup> and as contingent and shared.<sup>79</sup> Inequality is not a result of difference simply; it is the result of the difference that “difference” makes.<sup>80</sup> Terminology appropriate to such power differentials includes the notions of oppression and subordination — these are problems that a substantive equality analysis names and seeks to remedy.

This requires, second, an analysis that is sensitive to the *effects* of law — how that law interacts with the social and economic environments in which it plays out. The effects of a practice or policy determine that practice or policy’s equality impact.<sup>81</sup> An analysis of law under such an approach looks to how a specific law symbolically and in terms of its effects is or is not implicated in “[re]producing] systemic conditions of oppression”.<sup>82</sup>

This entails, third, deeply *contextual* analysis, looking to individual and group-based circumstances and details.<sup>83</sup> It involves understanding what Martha Nussbaum in a different context has described as “the manifold ways in which context bears on individual striving”.<sup>84</sup> An appreciation of the intersectional character of discrimination, of the complex harm discrimination entails for members of multiply marginalized groups, is part of such a contextualization of the claim to equality. Sherene Razack argues that this involves looking to the “complex operations of hierarchies ... [and] understanding how various systems interlock to produce specific effects”.<sup>85</sup> That is, Razack elaborates, “interlocking systems” work in complex ways to bolster each other and to position both subordinated groups and dominant groups in necessary relations to one another.<sup>86</sup> Nussbaum speaks of how “the close scrutiny

---

<sup>78</sup> Majury, “*Charter*”, *supra*, note 43, at 304.

<sup>79</sup> See generally, Iyer, *supra*, note 49; Young, “A Tale of Two Girls”, *supra*, note 49; Majury, “*Charter*”, *supra*, note 43, at 309; Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 C.J.W.L. 37 [hereinafter “Pothier, ‘Connecting Grounds of Discrimination’”].

<sup>80</sup> Becker, *supra*, note 37, at 38 referencing Catharine MacKinnon generally; see also, generally, Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 Dalhousie L.J. 5 [hereinafter “Hughes, ‘Equality’”].

<sup>81</sup> Majury, “*Charter*”, *supra*, note 43, at 304.

<sup>82</sup> Fournier, *supra*, note 74, at 158.

<sup>83</sup> Majury, “*Charter*”, *supra*, note 43, at 309.

<sup>84</sup> Martha C. Nussbaum, “Foreword: Constitutions and Capabilities: ‘Perception’ Against Lofty Formalism” (2007 – 2008) 121 Harv. L. Rev. 4, at 25 [hereinafter “Nussbaum, ‘Constitutions’”].

<sup>85</sup> Razack, *supra*, note 11, at 13.

<sup>86</sup> *Id.*, at 13.

of history and context is more important for the powerless” and key to moving beyond merely favouring existing power interests.<sup>87</sup>

Finally, fourth, substantive equality rights recognize and often require *positive* and *broad* state duties. Whereas negative obligations strictly understood call for state non-interference, positive obligations dictate active government provision: government proaction not simply forbearance. But the distinction between negative duties and positive duties is not a meaningful one.<sup>88</sup> Government inaction — “even if that were an intelligible category”<sup>89</sup> — must be held accountable to equality obligations to the same extent as laws, programs and policies already enacted. A substantive account of equality will do so.

A substantive equality analysis therefore recognizes that different and variable, and proactive, treatment is often required by equality,<sup>90</sup> necessitating “deeply selective responses to socio-economic difference”.<sup>91</sup> Thus, a systemic understanding of equality is not simply reducible to an easy calculus of treating everyone the same: an asymmetrical application of state obligation under the equality guarantee is often appropriate.<sup>92</sup> A member of a disadvantaged group may have an equality right to protections not presumptively available to members of otherwise advantaged groups, or even of differently disadvantaged groups.

Why such an elaborate set of conditions for a substantive equality analysis? It is because conclusions of sameness and difference, of identical and dissimilar treatment, require complex political inquiries and concrete, practical placement in historical and current distributions of material and symbolic resources. Inequality is a question of power and privilege — who has it and who does not. And power and privilege to those who have them, at least, are often invisible or uncomfortable to discern. An equality analysis must do its best to force that discomfort, to reveal as constructed and dependent what is otherwise taken for granted as natural and inevitable.

The legal form of substantive equality is, not surprisingly, not easy to standardize. But, any analysis that excludes any of these elements cannot make the claim to substantive equality. Our Supreme Court has tussled with this task since *Andrews* and it is a challenge that explains

---

<sup>87</sup> Nussbaum, “Constitutions”, *supra*, note 84, at 30.

<sup>88</sup> Fredman, *supra*, note 31, at 12.

<sup>89</sup> *Id.*, at 15.

<sup>90</sup> Majury, “Charter”, *supra*, note 43, at 304-305.

<sup>91</sup> Lessard, “Substantive Universality”, *supra*, note 22, at 244.

<sup>92</sup> Majury, “Charter”, *supra*, note 43, at 310.



much of the intractability, convolution and complexity of jurists', academics' and activists' discussion of equality issues. A template that mandates rich contextual analysis of the effects of state action, that forces recognition of the contingent and relative nature of difference, and that looks to the outcome in terms of addressing persisting or deepened disadvantage and marginalization is required. There is no simple rule that will ensure such an inquiry takes place. No doctrinal formulation or carefully enumerated series of steps and questions can guarantee that result.

Many equality analyses fall short of reaching a substantive outlook, achieving merely a contextualized formal analysis. Such approaches typically fail to consider or lack understanding of power and hierarchy. Thus, the examination of outcome in terms of oppression and hierarchy is too often the neglected element and the fulcrum on which the analysis converts into a formal one. It is also true that a substantive equality analysis, in its challenge to the justice of existing distributional outcomes, ill fits our political times. This is perhaps why courts toy with contextuality, sometimes can confound difference, but seldom discuss adequately the task of outcome fairness — that is, the hierarchies of power that might persist and the dismantling of which often requires redistribution of resources.

This is the fix in which *Andrews* puts us. Unlike others, perhaps,<sup>93</sup> I would not argue that *Andrews* set a straightforward and solid foundation for a substantive equality approach to section 15. While McIntyre J. does acknowledge and commit the Court to a number of the features of substantive equality — different treatment where warranted, effects-based analysis, and, a contextual analysis — he does not detail an analysis that understands difference as constituted by social and economic systems of hierarchy, of privilege and marginalization. Thus, for example, McIntyre J. can speak of such concepts as “merit” as unproblematic markers for different, beneficial treatment.<sup>94</sup> The result is that the analysis set out in *Andrews* is inadequately attuned to power differentials, to systemic and historical patterns of exclusion, critical contextual and analytical elements of substantive equality as set out

---

<sup>93</sup> See, McIntyre, “Siren”, *supra*, note 71, at 100.

<sup>94</sup> “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.” (*Andrews*, *supra*, note 1, *per* McIntyre J., at 174-75.)

above.<sup>95</sup> This leaves unclear and confused the important account of how and when different treatment amounts to discriminatory treatment. And, it makes it unlikely that any equality analysis that follows McIntyre J.'s formula will be transformative of a social reality in which difference too often means subordinated.<sup>96</sup>

There certainly are some post-*Andrews* Supreme Court decisions where the right equality outcome was reached.<sup>97</sup> Typically those are cases where a formal equality analysis was sufficient to that result — testament to the still powerful and changeable character of a formal equality framework. And, on occasion, justices appear to have a solid understanding of substantive equality. For example, McLachlin J., as she then was, wrote: "... if equality is to be realized, we must move beyond formal legalism to measures that will make a practical difference in the lives of members of groups that have been traditionally subject to tactics of subordination."<sup>98</sup> But notable in section 15 case law are those cases where a substantive equality analysis was necessary for a just outcome and where the Court did not show adequate understanding of the perniciousness of a formal equality analysis. In these cases — for example, *Gosselin v. Quebec (Attorney General)*,<sup>99</sup> *Nova Scotia (Attorney General) v. Walsh*,<sup>100</sup> *Eaton v. Brant County Board of Education*<sup>101</sup> — the lack of such an analysis mattered.<sup>102</sup>

#### IV. *R. v. KAPP*: FULL CIRCLE TO THE NEW LAW

This next section looks at *R. v. Kapp*,<sup>103</sup> the latest instalment in the Supreme Court's many-chaptered development of section 15 rights. This section appraises the case through the lens of substantive equality, as just described, arguing that the case, like others that precede it, continues the Supreme Court's failure to walk its substantive equality talk.

---

<sup>95</sup> See, Young, "Blissed", *supra*, note 18, at 56.

<sup>96</sup> Young, "A Tale of Two Girls", *supra*, note 49.

<sup>97</sup> See, for example, *Eldridge*, *supra*, note 5 and *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.) [hereinafter "*Vriend*"].

<sup>98</sup> Right Honourable Chief Justice Beverley McLachlin, "The Evolution of Equality" (1996) 54 *Advocates' Q.* 559, at 563.

<sup>99</sup> [2002] S.C.J. No. 85, 2002 SCC 84 (S.C.C.) [hereinafter "*Gosselin*"].

<sup>100</sup> [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 (S.C.C.) [hereinafter "*Walsh*"].

<sup>101</sup> [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.).

<sup>102</sup> For a discussion of these cases and their failures to engage fully with a substantive equality analysis, see Young, "Blissed", *supra*, note 18.

<sup>103</sup> *Kapp*, *supra*, note 17.

*Kapp* originates in a long-running dispute over fishing rights on the coast of British Columbia. In 1992, the Canadian government created the *Aboriginal Fisheries Strategy*. As the Supreme Court of Canada notes in its decision, the policy has three key objectives: to ensure that the Aboriginal fishing rights acknowledged in *R. v. Sparrow*<sup>104</sup> are respected, to provide Aboriginal communities with enhanced managerial involvement in the fisheries, and to minimize disruption of non-Aboriginal fisheries.<sup>105</sup> A piece of the policy is the issuance of communal fishing licences to Aboriginal communities under the *Pilot Sales Program* pursuant to the *Aboriginal Communal Fishing Licences Regulations*.<sup>106</sup>

A communal fishing licence was issued on August 19, 1998 by the federal Minister of Fisheries and Oceans to the Musqueam, Burrard and Tsawwassen First Nations. The licence granted exclusive sockeye fishing rights for a period of 24 hours between August 19, 1998 and August 20, 1998 for food, social and ceremonial purposes, and for sale. Several of the Aboriginal fishers entitled to fish under this special licence were also licensed commercial fishers and consequently entitled to fish at other openings.

The response to the limited communal fishing licence was, it is fair to say, fierce and vocal. A group of commercial fishers excluded from the special fishery staged a protest fishery during the same time frame, calling themselves the British Columbia Fisheries Survival Coalition. Charged with fishing without licences, the group used the prosecution to mount a constitutional challenge to the *Aboriginal Fisheries Strategy*, the *Aboriginal Communal Fishing Licences Regulations*, and the communal fishing licence. The claim was that all three were unconstitutional race discrimination contrary to section 15 of the Charter.

Results in the lower courts were somewhat mixed. The Provincial Court held that the communal fishing licence did indeed breach the appellants' equality rights and could not be saved under section 1 of the Charter. The Supreme Court of British Columbia overturned that decision, ruling that the *Pilot Sales Program* lacked discriminatory purpose or effect and thus was not contrary to section 15. Appeal from

---

<sup>104</sup> [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.).

<sup>105</sup> *Kapp, supra*, note 17, at para. 7, per McLachlin C.J.C and Abella J. For a discussion of some of the Aboriginal law issues in the case, see Constance MacIntosh, "Developments in Aboriginal Law: The 2008-2009 Term" (2009) 48 S.C.L.R. (2d) 1 [hereinafter "MacIntosh, 'Developments'"].

<sup>106</sup> SOR/93-332.

this decision was dismissed at the Court of Appeal, albeit in five separate judgments.

At the Supreme Court of Canada, the appeal was again dismissed, with the Court using the occasion to reflect more broadly on the state of equality analysis under section 15. The Chief Justice and Abella J. wrote the main opinion. Justice Bastarache penned a separate concurring opinion, which, although focusing on section 25 as the basis for upholding the programs constitutionality, notes “complete agreement with the restatement of the test for the application of s. 15 that is adopted by the Chief Justice and Abella J. in their reasons for judgment”.<sup>107</sup>

More specifically, in brief, McLachlin C.J.C. and Abella J.’s judgment maintained that the race-based distinction<sup>108</sup> central to the issuance of the communal fishing licence, met the criteria of section 15(2). Consequently, the program was protected from attack under section 15(1). In reaching this result, the judgment crafts new doctrine for both section 15(1) and section 15(2), although only the latter of these results is explicitly acknowledged by the justices.

For the last 10 years or so, equality argument under the Charter has been tightly orchestrated by the unanimous 1999 decision in *Law v. Canada (Minister of Employment and Immigration)*.<sup>109</sup> This case settled an, at times, rocky jurisprudence<sup>110</sup> but has, to an astonishing degree, been met by what one scholar recently called an “academic onslaught” or “barrage of scholarly criticism”.<sup>111</sup>

In *Kapp* the Court acknowledges that “several difficulties have arisen”<sup>112</sup> from *Law* — specifically from that case’s invocation of human dignity and its comparator analysis. However, the Court’s own characterization of *Law*’s flaws is understated compared to the richness of critique referenced in the judgment’s two accompanying footnotes.<sup>113</sup>

---

<sup>107</sup> *Kapp, supra*, note 17, at para. 77, *per* Bastarache J., concurring.

<sup>108</sup> Commentators have been critical of the conclusion both the majority and minority reach that the program at issue drew a distinction based on race. Constance MacIntosh calls this characterization “sloppy and deeply problematic” given the “complex and unique history” that lends meaning to Aboriginal group membership and issues. MacIntosh, “Developments”, *supra*, note 105, at 16-17.

<sup>109</sup> *Law, supra*, note 7.

<sup>110</sup> McLachlin C.J.C. and Abella J. characterize this as resolving what was “since *Andrews*, a division in this Court’s approach to s. 15”: *Kapp, supra*, note 17, at para. 20.

<sup>111</sup> Bruce Ryder, “*R. v. Kapp*: Taking Section 15 Back to the Future”, *The Court* (July 2, 2008), online: thecourt.ca <<http://www.thecourt.ca/2008/07/02/r-v-kapp-taking-section-15-back-to-the-future/>> [hereinafter “Ryder, “Taking Section 15 Back to the Future””].

<sup>112</sup> *Kapp, supra*, note 17, at para. 21, *per* McLachlin C.J.C. and Abella J.

<sup>113</sup> *Id.*, at para. 22, footnotes 1 and 2.

Nor is it clear just how the judgment incorporates such critique. Dianne Pothier notes:

These are trenchant criticisms indeed, which are apparently embraced, and then left hanging. There is no suggestion that any particular case is wrongly decided. There is no acknowledgement that key authors of the court's post-*Andrews* jurisprudence are still on the court, including the Chief Justice herself, who is writing in *Kapp*. It is hard to know how seriously this self-criticism should be taken, when it is not really acknowledged as self-criticism.<sup>114</sup>

If one appreciates that much of this academic criticism focuses on the failure of the Court, in *Law* and post-*Law* cases particularly, to apply a substantive equality frame to its analysis,<sup>115</sup> then the answer to Pothier's musings is clear. The Court continues to misunderstand substantive equality, setting itself up for a new round of similar criticism, this paper's included.

But McLachlin C.J.C. and Abella J. in *Kapp* do certainly attempt to downplay *Law*, foregrounding *Andrews* as the case that "set the template ... enriched but never abandoned"<sup>116</sup> by subsequent cases. The majority judgment reminds us of *Andrews*' commitment to substantive equality and its rejection of formal equality — an approach McLachlin C.J.C. and Abella J. claim "has remained central to the Court's approach to equality claims".<sup>117</sup> Chief Justice McLachlin and Abella J. go on to state that the formula newly set out in *Law* "does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under section 15 set out in *Andrews* and developed in numerous subsequent

---

<sup>114</sup> Dianne Pothier, "Kapp gives affirmative action programs wide margin," *The Lawyers Weekly*, September 19, 2008. online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=762>> [hereinafter, "Pothier, 'Kapp' gives affirmative action programs wide margin"].

<sup>115</sup> For example, from the articles and commentary cited in *Kapp*, at least the following can be understood to make a substantive equality critique of *Law* and post-*Law* decisions of the Court: Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 *McGill L.J.* 627; Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Doooms Section 15" (2006) 24 *Windsor Y.B. Access Just.* 111; Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006) 5 *J.L. & Equality* 81; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?," in McIntyre & Rodgers, *supra*, note 18; Pothier, "Connecting Grounds of Discrimination", *supra*, note 79; Ryder, Faria & Lawrence, "What's *Law* Good For?," *supra*, note 53; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in McIntyre & Rodgers, *supra*, note 18, at 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in McIntyre & Rodgers, *id.*, at 95.

<sup>116</sup> *Kapp*, *supra*, note 17, at para. 14, *per* McLachlin C.J.C. and Abella J.

<sup>117</sup> *Id.*, at para. 15, *per* McLachlin C.J.C. and Abella J.

decisions”.<sup>118</sup> This is a startling statement and as Dianne Pothier speculates: “... quite a revelation to many litigators, courts, and critics who had thought otherwise”.<sup>119</sup>

Underpinning *Kapp*’s doctrinal elaboration is the Court’s continuing association of section 15 with substantive equality. Indeed, it is in a section entitled “The Purpose of Section 15” that the Court recalls *Andrews*’ emphasis on substantive equality. The Court, however, adds no additional descriptive elements to what it means by substantive equality, merely reiterating McIntyre J.’s words from *Andrews*:

Substantive equality, as contrasted with formal equality, is grounded in the idea that: “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, consideration”.<sup>120</sup>

In the rest of the paragraph, the judgment reminds us of *Andrews*’ insight that equality does not necessarily entail identical treatment, that an equality analysis must look to effect and impact, and that irrelevant personal differences should not be that basis for legal burden or benefit.<sup>121</sup> It is a sparse picture of equality — formal or substantive — that the Court is willing to share, or that shapes its elaboration of section 15.

From this background flow the doctrinal innovations of *Kapp*. In this paper, I focus on only three — use of the notion of stereotype, the division of labour between section 15(1) and section 15(2), and the role assigned section 15(2).<sup>122</sup> My purpose in picking these three elements is to illustrate my argument that *Kapp* continues and indeed amplifies the

---

<sup>118</sup> *Id.*, at para. 24, per McLachlin C.J.C. and Abella J. Indeed the four factors of the *Law* test are simply folded by the judgment in *Kapp* into the test for perpetuation of disadvantage and stereotyping: *id.*, at para. 23, per McLachlin C.J.C. and Abella J.

<sup>119</sup> Dianne Pothier, “*Kapp* gives affirmative action programs wide margin”, *supra*, note 114. It is true that the Court said in *Law*, and in subsequent cases (such as *Lovelace*), that *Law* merely sets out an approach, not a rigid template for consideration of claims under s. 15(1), and that the four factors to be considered in the third stage of determining the question of discrimination were an open list of suggestions only. However, over the years since *Law*, both the Court and litigants alike have been mechanistic in casting argument in strict adherence to these factors and steps.

<sup>120</sup> *Kapp*, *supra*, note 17, at para. 15, per McLachlin C.J.C. and Abella J., quoting from *Andrews*, *supra*, note 1, at 171, per McIntyre J., for the majority on the s. 15 issue.

<sup>121</sup> *Kapp*, *id.*, at para. 15, per McLachlin C.J.C. and Abella J.

<sup>122</sup> For a more general overview of all the developments in *Kapp*, see Ryder, “Taking Section 15 Back to the Future”, *supra*, note 111; Jennifer Koshan, “Evidence of amelioration: What does *Kapp* require of governments under s. 15(2) of the Charter? What will courts permit?” *ABlawg.ca* at 6 online: [http://ablawg.ca/wp-content/uploads/2009/10/blog\\_jk\\_cunningham\\_abca\\_mar2009.pdf](http://ablawg.ca/wp-content/uploads/2009/10/blog_jk_cunningham_abca_mar2009.pdf) [hereinafter “Koshan”]; Pothier, “*Kapp* gives affirmative action programs wide margin”, *supra*, note 114.

move away from substantive equality that even *Andrews* itself began. In what follows, I discuss each of these doctrinal elaborations and their awkward fit with substantive equality analysis. This discussion is not intended to set out a complete elaboration of where equality law sits after *Kapp*. Instead, its purpose is simply to flag important underlying conceptual issues about the doctrinal pathways the Court appears to be taking.

### 1. Section 15(1): Stereotype

In recasting the test under section 15(1) from *Andrews*, McLachlin C.J.C. and Abella J. begin by noting that McIntyre J. in *Andrews* had two concerns about discrimination: perpetuation of prejudice or disadvantage and stereotyping.<sup>123</sup> The result of this observation is the formal articulation in *Kapp* of a two-stage test for section 15(1) analysis. The first stage asks: “Does the law create a distinction based on an enumerated or analogous ground?” The second stage then asks: “Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?”<sup>124</sup> This second stage engages directly with the vision of equality underpinning section 15 analysis: it names the harms that focus the equality rights of section 15(1) as those flowing from prejudice or stereotyping. My focus in this paper is on stereotyping because this latter notion, I think, clearly merits considerably more reflection than the Court in *Kapp* gives it.<sup>125</sup>

It seems fairly clear that what the Court means by “stereotype” is falsely assigned characteristics. This understanding of the harm of discrimination is oft cited to the 1984 Abella Report on Equality in Employment where Abella J., then an Ontario Family Court Judge and now, of course, a Supreme Court of Canada justice and co-author of the majority judgment in *Kapp*, wrote that:

---

<sup>123</sup> *Kapp*, *supra*, note 17, at para. 18.

<sup>124</sup> *Id.*, at para. 17, *per* McLachlin C.J.C. and Abella J. who claim that this is simply a more cogent statement of the test in *Andrews*, and indeed also *Law*.

<sup>125</sup> Although, as Sophia Moreau points out, the two concepts are clearly related:

Given our shared public sense of the inappropriateness of allowing prejudice to determine who receives a benefit, prejudice functions most often simply as a motive and not as part of the public justification for a particular policy. Stereotyping, however, functions both as a factor in motivation and as a factor in public justification (in some cases, by providing a convenient rationalization for treatment that was in fact motivated by prejudice).

(Moreau, “The Wrongs of Unequal Treatment”, *supra*, note 69, at 297.)

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. ..."<sup>126</sup>

This Report definition is cited in both *Andrews* and *Kapp*. And, in *Kapp*, McLachlin C.J.C. and Abella J. state that it is this problem — the problem of stereotyping — that McIntyre J. named in *Andrews*:

... the prohibition against non-citizens practising law was based on a stereotype that non-citizens could not *properly* discharge the responsibilities of a lawyer ... — a view that denied non-citizens a privilege ... on the basis of ... “attributed rather than actual characteristics”.<sup>127</sup>

The idea of “stereotyping” as one of the harms of inequality has circulated in Supreme Court jurisprudence for some time.<sup>128</sup> For example, Sophia Moreau notes that two post-*Law* cases can be understood to have rejected the equality claimants' arguments of discrimination because of the Court's belief that no stereotyping was operative in the government programs under issue.<sup>129</sup> In *Gosselin*<sup>130</sup> the majority rejected the claimant's allegation that the significantly reduced welfare benefit for those under 30 years of age was based on the stereotype that young persons were better able to find jobs. Chief Justice McLachlin, author of the majority opinion, appeared herself to accept the accuracy of such a characterization of the circumstances of persons under 30 and correspondingly rejected the equality claim. Similarly, in *Walsh*,<sup>131</sup> the claimant argued that the government's assumption that heterosexual unmarried cohabitants have made a choice to avoid the legal obligations imposed by marriage was false. The majority in that case rejected this argument, accepting that such a choice was reasonably imputed to those in the claimant's circumstances and thus defeating the equality argument.

The notion of “stereotype”, of course, has interest to more than equality lawyers. It is, for example, a fairly well discussed concept in

---

<sup>126</sup> Rosalie S. Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984), at 2 [hereinafter “Abella Report”], quoted in *Andrews*, *supra*, note 1, at 174.

<sup>127</sup> *Kapp*, *supra*, note 17, at para. 18, quoting Abella Report, *id.*, at 2 (emphasis in original).

<sup>128</sup> See, for example, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, at paras. 5, 61 (S.C.C.); Moreau, “The Wrongs of Unequal Treatment”, *supra*, note 69, at 297.

<sup>129</sup> Moreau, *id.*, at 297, fn 16.

<sup>130</sup> *Gosselin*, *supra*, note 99.

<sup>131</sup> *Walsh*, *supra*, note 100.



social psychology. And the insights of that science are interesting. Greenwald and Krieger, in a recent American law review article, discuss a number of unconscious mental processes that bear on the issue of discrimination under the law.<sup>132</sup> They note that a “social stereotype” is “a mental association between a social group or category and a trait”.<sup>133</sup> The association may or may not be based on a statistical reality. If it is, then members of the group are more likely to exhibit that trait than others not members of the group. If the association rests on a “defining trait” there is a near perfect correlation between members of the group and the trait and it is not considered a stereotype. For instance, “physical stamina for basketball players” is such a “defining trait” and therefore a mental association of physical stamina with basketball players is not considered a social stereotype.<sup>134</sup> Stereotypes, or “implicit associations” can be either favourable or not.<sup>135</sup> These authors also note that stereotyping is common, indeed, standard to a variety of communicative and cognitive practices, and thus in many contexts not problematic. Like the practice of generalization or categorization, stereotyping can be highly functional, and it is often unavoidable. Two social psychologists describe it as balancing “cognitive economy against pragmatic goals”.<sup>136</sup>

But this is not how the Court appears to understand the concept of “stereotype”. As noted above, the Court sees a “stereotype” as a false attribution of characteristics and thus desirably avoided. This, of course, assumes that stereotypes are avoidable and that we can communicate, legislate and interpret without them. All of this is contestable. One wonders if such a notion is as useful to a section 15(1) doctrinal test as the Court thinks. Or, at least, one wonders if the Court should spend some more time considering the concept, its critical exegesis by other disciplines, and what it may or may not offer to advancing substantive equality aims.

In any case, just what leverage can the notion of stereotype alone lend an equality analysis?<sup>137</sup> A “stereotype”, as apparently understood

---

<sup>132</sup> Anthony G. Greenwald & Linda Hamilton Krieger, “Implicit Bias: Scientific Foundations” (2006) 94 Cal. L. Rev. 945.

<sup>133</sup> *Id.*, at 949.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*, at 950.

<sup>136</sup> *Gosselin, supra*, note 99.

<sup>137</sup> Susan T. Fiske & Peter Glick, “Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change” (1995) 51 *Journal of Social Issues* 97, at 101.

<sup>137</sup> It is fair to say that the Supreme Court is not alone in understanding discrimination in terms of this limited idea of stereotype. Other courts and many academics use the notion similarly.

by the Court, can be either true or false, leaving aside for the moment how we know it is one or the other. If the government relies on a stereotype that is “false”, that is, if the stereotype conveys things about an individual or a group that are clearly not true, this may be useful knowledge. But, not necessarily, as deciding the equality issue simply on that basis ignores critical appraisal of the outcome of the treatment based on the stereotype, a step crucial to substantive equality. Reliance on a false but favourable stereotype could have different implications than reliance on a false and disfavourable stereotype. Invocation of “stereotype” is not therefore necessarily enough to justify a conclusion of discrimination, although if it is attached to disadvantage it should raise a red flag. The Court understands at least this.

But, clearly, the antidote to stereotype assumed in *Kapp* is to focus on real, as opposed to falsely or irrationally attributed, characteristics. Yet, to posit the key question, how do we know a characteristic is “true” or “false”? That is, how do we know that someone is “truly” different, or that a characterization of this person is truly “untrue”? This idea of judging the truth or falsehood of a “stereotype” assumes that individuals or groups, and particularly those complaining of oppression, “possess a series of knowable characteristics and can be ... known, and managed accordingly by the colonizers whose own complicity remains masked”.<sup>138</sup> Yet, judges’ social locations may inhibit hearing the stories of the equality claimants before them: “The stories of [claimants’] lives are stories of oppression and they are largely being told to individuals who are members of the dominant group.”<sup>139</sup> Are such stories “even translatable”?<sup>140</sup> Whose voices do we privilege in the task of sorting out what is or is not false about the characterization of a group that is at issue in an equality case? Indeed, those most in need of equality rights — the most oppressed, most marginalized, those who look the most “truly” different — will be the most difficult for judges to “know”. The farther an individual is from the “norm”, the more the harm complained of as discrimination will appear to be simply a product of that individual’s idiosyncratic and personal “true” traits.<sup>141</sup> Where “systemic discrimination is the ‘norm’”,<sup>142</sup> it is hard to pick out stereotyping as “false”. Those most stereotyped and most oppressed seems most genuinely different.

---

<sup>138</sup> Razack, *supra*, note 11, at 10.

<sup>139</sup> *Id.*, at 40.

<sup>140</sup> *Id.*

<sup>141</sup> Young, “Blissed”, *supra*, note 18, at 63.

<sup>142</sup> Cohen & Pulkingham, *supra*, note 30, at 15.

Moreover, the more powerful (and damaging) a stereotype, the more entrenched it may be and the more difficult it will be to see it as false. And, understandings evolve and shift — sometimes dramatically: “It is the customary fate of new truths to begin as heresies ... .”<sup>143</sup> There is no fixed truth to easily, if at all, “mine”. Judges, especially, are ill suited to the task.

What about those cases where the characterization or basis of different treatment is true — that is, it is not reliant on a “stereotype” as the Court understands it? Then, according to *Kapp*, there may be no equality harm, no discrimination. But this is an unreliable conclusion about the absence of inequality, for there has been no appraisal of whether disadvantage, subordination or oppression is nonetheless present. From a substantive equality perspective, assessment of outcome is more relevant than the conclusion that the characterization of the claimant is “true” or “false”. Even a true characterization can result in oppressive treatment, in subordination, that equality rights should recognize, address and fix. Most pointedly, equality law must be sensitive to the “oppressive effects of differential treatment, not whether the treatment was based upon stereotyping or inaccurate generalizations”.<sup>144</sup>

So, “stereotype” is an unreliable concept — ultimately, I would argue, not useful enough to a substantive equality analysis, for it misses key necessary elements of such an analysis. The outcome of treatment — the question of underlying relations of oppression or marginalization — is more relevant than any ascribed truth or falseness of the basis of that treatment.

The concept, however, is not an empty one, nor a useless but nonetheless harmless one. Its deployment is risky. What counts as a stereotype, or not, will always have a larger political logic and will most often, at least in the judicial context, be coherent with larger, dominant politics, with what David Schneiderman calls “constitutional culture”<sup>145</sup> and with middle-class and elite values. Reliance on the concept can allow the very attitudes or norms that it (falsely) appears to scrutinize to be reasserted, now with the gloss of judicial authority. As we can see

---

<sup>143</sup> Thomas H. Huxley, “The Coming of Age of the Origin of Species” in *Science and Culture and Other Essays* (London: MacMillan and Co., 1881), cited in Geraldine Van Bueren, “Including the Excluded: the Case for an Economic, Social and Cultural Human Rights Act” [2002] P.L. 456.

<sup>144</sup> Moreau, “The Wrongs of Unequal Treatment”, *supra*, note 69, at 323.

<sup>145</sup> David Schneiderman, “Social Rights and Common Sense: *Gosselin* Through a Media Lens” in Margot Young *et al.*, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2008) 57, at 57 [hereinafter “Young *et al.*, *Poverty*”].

from the case law, the labelling of an unjustifiable stereotype is too often largely dependent on invocation of judicial common sense. Thus, in *Gosselin*, as answer to the claim that the benefit program mismatched the needs of the claimant group, McLachlin C.J.C. argued:

... the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the workforce than older people, the incentive to participate in programs specifically designed to provide them with training and experience was supported by logic and common sense.<sup>146</sup>

Unavoidably, judges make decisions on the basis of what makes sense to them. To assume that assessment of stereotype is straightforward in the way that the Court in *Kapp* does ignores all these issues.

To sum up, reliance on “stereotype” is inadequate shorthand for both the harms and the method of discrimination and inequality. As Sophie Moreau argues, “stereotyping” is too “narrow” an idea of the unfairness that is discrimination.<sup>147</sup> The concept of stereotype is thus, at best, of unreliable utility in revealing the equality flaws of dominant structures, norms and institutions of our society. At worst, reliance on it will function to continually reassert larger, dominant and discriminatory understandings of those who most need a sharply focused, critical and self-reflexive equality analysis. Thus, reducing inequality to a matter of stereotyping consigns the Court to repeating the errors of formal equality. The notion of “stereotype” simply becomes code for who counts as alike and who counts as different: who is properly treated differently because of a “true” difference and who is improperly treated differently because they are really the “same”. The Court fails to engage an analysis of the structures and institutions that create and normalize difference and of the oppressive power differentials that are then attached to those rationalized and “inferiorizing” differences. In so doing, the Court sidesteps (in one large leap) a substantive equality analysis.

## 2. Section 15(2)

While the section 15(1) comments in *Kapp* are interesting, they are technically *obiter*. The case was decided on the basis of what the Court had to say about section 15(2). The Supreme Court ruled that the communal fishing licence was part of a larger program calibrated to

---

<sup>146</sup> *Gosselin*, *supra*, note 99, at para. 44.

<sup>147</sup> Moreau, “The Wrongs of Unequal Treatment”, *supra*, note 69, at 293, fn 8.

regulate the fishery in light of Aboriginal interests such that the special licence was an ameliorative program with regard to a disadvantaged group under section 15(2). This results in the Court taking a relatively new tack on the relationship between section 15(1) and section 15(2). Section 15(2) emerges as “trump” within the context of section 15 generally. If the government can show that its program is protected by section 15(2) then such a showing will negate the necessity of having to consider the claim under section 15(1): “[I]f 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 all.”<sup>148</sup> An “ameliorative program aimed at combatting disadvantage” cannot be discriminatory and a section 15(1) analysis is therefore unnecessary.<sup>149</sup>

Thus section 15(2) assumes an “independent role”,<sup>150</sup> in effect inserting, when relevant, another question between the two stages of the section 15(1) analysis that *Kapp* maintains are mandated by *Andrews*. That is, after a section 15 claimant has shown that there is a distinction made on an enumerated or analogous ground, the government then has the option of showing that the impugned law or program is ameliorative according to the terms of section 15(2). If successful, the government will have established that the law is constitutional, and resort to the second stage of analysis under section 15(1) — whether the distinction is based on prejudice or stereotype — is unwarranted.<sup>151</sup> Applied in such a manner, section 15(2) precludes section 15(1) review for those distinctions on enumerated or analogous grounds, that are necessary to an ameliorative purpose that, in turn, relates to a disadvantaged group. In *Kapp*, specifically, the government program satisfied these criteria and, for the majority, consequently, a full section 15(1) analysis was unnecessary.<sup>152</sup> Such an interpretation of the constitutional provision certainly preserves the ability of the government, key to substantive equality, to respond through positive action to substantive inequality.

---

<sup>148</sup> *Kapp*, *supra*, note 17, at para. 37. In another part of the judgment, they make a more absolute statement that an equality claim “must” fail if the challenged program satisfies section 15(2)’s requirements. (*Id.*, at para. 3.)

<sup>149</sup> *Id.*, at para. 38, *per* McLachlin C.J.C. and Abella J.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*, at para. 40, *per* McLachlin C.J.C. and Abella J. For a discussion of the two-question, three-factor analysis relevant to establishing a s. 15(2) program, see *Kapp*, *id.*, at paras. 41-55, *per* McLachlin C.J.C. and Abella J.

<sup>152</sup> Patricia Hughes questions whether the program was properly characterized as an ameliorative program relevant to s. 15(2). Patricia Hughes, “Resiling from Reconciling? Musing on *R. v. Kapp*” (2009) 47 S.C.L.R. (2d) 255, at 256 [hereinafter “Hughes, ‘Resiling’”]. *Kapp*, *id.*, at para. 61, *per* McLachlin C.J.C. and Abella J.

But, less positively, it may guarantee, for a while at least, that section 15(2) is a government's automatic first line of defence, with the section being used to attempt, at least, to insulate challenged laws from full constitutional equality review.

Indeed, the *Kapp* section 15(2) test is deeply deferential to government. To reiterate for emphasis, the test for section 15(2) looks to the *purpose* of the program. This, the Court states, allows the government to experiment and to have leeway to develop ameliorative programs.<sup>153</sup> Thus, in *Kapp*, because one of the (several) governmental objectives for the program was to provide economic opportunities to Aboriginal communities, section 15(2) is successfully invoked. Yet, this test may well turn out to be significantly problematic on a number of counts. Despite McLachlin C.J.C. and Abella J.'s caution that the Court will not "slavishly accept the government's characterization of its purpose",<sup>154</sup> we have already seen that the Court can be unduly complacent or credulous in ascribing a benign or ameliorative purpose to government action. For example, in *Gosselin*, McLachlin C.J.C.'s analysis for the majority slid easily into uncritical reliance on the government's stated ameliorative purpose, with the result that the claimant's challenge failed. The Court's refusal to scrutinize the purportedly ameliorative purpose underlying grossly inadequate benefit rates for recipients under 30, in terms of its actual *effects* on those recipients, sits uneasily with a substantive equality emphasis on context and outcome. The result in *Gosselin* was a set of reasons containing assumptions about welfare recipients and welfare benefits that has been justifiably roundly and widely condemned as ill informed, biased and contextually barren.<sup>155</sup> Chief Justice McLachlin, by so easily adopting the government's own justification of the program, simply replicated and reinforced the discriminatory social and economic relations at the heart of the claim. Other members of the *Gosselin* Court, writing in dissent, were forceful about the danger of McLachlin C.J.C.'s reliance on government purpose and of a court insufficiently rigorous in challenging government's stated objectives.<sup>156</sup> But the *Kapp* analysis of section 15(2) continues to engage this danger, ignoring even *Andrews*'

<sup>153</sup> *Kapp, id.*, at paras. 46-47, *per* McLachlin C.J.C. and Abella J.

<sup>154</sup> *Id.*, at para. 46.

<sup>155</sup> Dianne Pothier, "But It's for Your Own Good", in Young *et al.*, *Poverty, supra*, note 145, 40; Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases" in *id.*, 23.

<sup>156</sup> Justice Bastarache wrote: "At the s. 15 stage, it is not appropriate to accept at face value the legislature's characterization of the purpose of the legislation and then use that to negate the otherwise discriminatory effects." *Gosselin, supra*, note 99, at para. 244.

caution to keep section 15 and section 1 tasks distinct.<sup>157</sup> It also threatens to smuggle back into discrimination analysis the excuse or defence of non-discriminatory government intent. If a claimant cannot discredit the government's claim of an ameliorative purpose, the immediate challenge risks failure while the larger goal of an effects-based equality analysis where state intent is irrelevant is threatened. And, a substantive equality analysis stays elusive.

*Kapp's* section 15(2) analysis also fails to allow something the Court in *Lovelace v. Ontario* recognized as key, namely, "the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review".<sup>158</sup> The impact of an ameliorative program on other disadvantaged groups — that is, "vis-à-vis other equality claims"<sup>159</sup> — is, according to *Kapp*, irrelevant. Use of section 15(2) as trump ignores that there may be a broader range of significant *effects* at issue, consideration of which can now be left out of the section 15 analysis. Patricia Hughes notes that many affirmative action programs will have at least an indirect negative effect on other disadvantaged groups. This need not mean, Patricia Hughes continues, that the impugned program will necessarily be unconstitutional. That will depend on the context of both the program and the groups affected. But it does mean, she concludes, that a more complicated analysis may be needed.<sup>160</sup>

The Supreme Court's own decision in *Vriend v. Alberta*<sup>161</sup> is often cited as a highpoint of equality jurisprudence under the Charter.<sup>162</sup> Yet, in that case, had the *Kapp* jurisprudence been available to the government, it might have been able to frame the exclusion of gays and lesbians from Alberta's human rights legislation as constitutional by virtue of section 15(2). The legislation clearly had as its primary purpose amelioration of discrimination against members of other disadvantaged groups and it is at least arguable that it fits the *Kapp* test for section 15(2). But the *Vriend*

---

<sup>157</sup> *Andrews, supra*, note 1.

<sup>158</sup> *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950, at para. 108 (S.C.C.).

<sup>159</sup> Hughes, "Resiling", *supra*, note 152, at 269.

<sup>160</sup> *Id.*, at 272. In *Kapp*, itself, the group complaining of discrimination contained Japanese Canadians, a group whose history in the B.C. fishing industry at significant times is characterized by exclusion and discrimination. See Jess Eisen, "Rethinking Affirmative Action Analysis in the Wake of *Kapp*: A Limitations-Interpretation Approach" (2008) 6 J.L. & Equality 1 [hereinafter "Eisen"].

<sup>161</sup> *Vriend, supra*, note 97.

<sup>162</sup> See, for example, Sheila McIntyre's contribution in this volume ("The Equality Jurisprudence of the McLachlin Court: Back to the 70s"). See also Baines, *supra*, note 14. *Vriend, id.*, saw the Supreme Court write anti-discrimination protection for gays and lesbians into Alberta's *Individual's Rights Protection Act* on the ground that the Act's failure to do so was an unjustifiable contravention of s. 15.

Court was correct in coming to the conclusion that the legislation was unconstitutional because of the discrimination it levied against lesbians and gays by expressly excluding them from the province's human rights guarantees. And it would be a great shame if such discrimination would become unexaminable by virtue of an overly simplistic, automatic section 15(2) block.

To conclude, the analysis of section 15(2) leaves possible "underlying complications" unaddressed.<sup>163</sup> Surely it cannot be the case that ameliorative purposes targeted at benefiting some ought always to justify the oppression of those denied the benefit at issue.<sup>164</sup> One can imagine cases where the government in crafting an ameliorative program and in striking a balance between affected disadvantaged groups has "a heavy thumb on the scales"<sup>165</sup> in favour of one group, to the significant disadvantage of another, also disadvantaged, group. This may be an equality problem. Yet, how can those cases where ameliorative action is a justification be distinguished from those where it should not be? This is the task section 15(1) bears. Failure to acknowledge that effects can be both ameliorative for some and oppressive for others — and that some scrutiny of this outcome is necessary despite the presence of an actual, or merely asserted, ameliorative government purpose<sup>166</sup> — ignores the complex and interlocking character of inequality and privilege. Context and effect are tossed aside: "the complainant's experience is literally irrelevant to the judicial outcome".<sup>167</sup> In this respect, the Court's treatment of section 15(2)'s relationship to section 15(1) fails utterly to engage a substantive equality analysis.

### 3. Division of Labour Between Section 15(1) and Section 15(2)

The majority judgment characterizes *Kapp* as engaging the issue of "the interplay between s. 15(1) and s. 15(2) of the Charter".<sup>168</sup> The Court states that these two sections "work together to promote the vision of substantive equality that underlies s. 15 as a whole".<sup>169</sup> And, while the

---

<sup>163</sup> Hughes, "Resiling", *supra*, note 152, at 273.

<sup>164</sup> Moreau, "The Wrongs of Unequal Treatment", *supra*, note 69, at 307.

<sup>165</sup> Michael Plaxton, "Developments in Constitutional Law: The 2007-2008 Term — Hugs All Around" (2008) 43 S.C.L.R. (2d) 63, at 130.

<sup>166</sup> Patricia Hughes also makes a similar argument. See Hughes, "Resiling", *supra*, note 152, at 277.

<sup>167</sup> Eisen, *supra*, note 160, at 11.

<sup>168</sup> *Kapp*, *supra*, note 17, at para. 2, *per* McLachlin C.J.C. and Abella J.

<sup>169</sup> *Id.*, at para. 16, *per* McLachlin C.J.C. and Abella J.



case hinges primarily on the role section 15(2) plays in this joint task, the Court does have something to say about what the division of labour between the two subsections is:

... The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to proactively combat discrimination. Read thus, the two sections are confirmatory of each other. Section 15(2) supports a full expression of equality, rather than derogating from it.<sup>170</sup>

Casting such simple and simplistic formulae for section 15 tasks is surely misadvised, particularly after the formalistic default of *Law's* doctrinal tests. It is tempting perhaps, to try to put the section into tidy "boxes", but that invites the kind of argumentative casuistry and "hair splitting" that is at odds with the more subtle, complex and "untidy" analyses that a substantive equality approach requires. It also introduces a limited and limiting set of purposes for section 15 analysis without much discussion or recognition of what is at stake in framing the foci of the two subsections in this manner.

More specifically, this schematic raises the distressing spectre of freezing out positive rights obligations under section 15. While section 15(2) clearly permits affirmative actions, it does not require them, and section 15(1) is cast as requiring only that government forbear from discriminatory distinctions. But, it is now common dogma that all human rights entail a tripartite obligation on the state: the obligation to respect, protect and fulfil.<sup>171</sup> No obvious or clear distinction based on the type of obligation to which a right gives rise usefully categorizes rights. Nor does such a distinction usefully and meaningfully qualify or disqualify an obligation for justiciability. Every right imposes a mix of both negative and positive state obligations: civil and political rights no less than social and economic rights.<sup>172</sup> Even traditional "negative" rights

---

<sup>170</sup> *Id.*, at para. 37, *per* McLachlin C.J.C. and Abella J. (emphasis in original).

<sup>171</sup> Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights" in Asbjørn Eide, Catarina Krauss & Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 2d ed. (The Hague: Kluwer Law International, 2001) 9, at 23, cited in O'Connell, "Introduction", *supra*, note 32, at 17.

<sup>172</sup> See, generally, Margot Young, "Section 7 and the Politics of Social Justice" (2005) 35 U.B.C. L. Rev. 539; Margot Young, "Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v. Adams* (BCSC) (2009) 164 B.C. Stud. 163.

must be supervised and supported by the state using public resources.<sup>173</sup> Thus, any tidy scheme whereby some judicially protected rights are limited to negative obligations is logically and historically flawed. Some judges, in some contexts, have understood this.<sup>174</sup> But the contrast between negative and positive rights, “long abandoned under international human rights law and increasingly rejected in other constitutional democracies”,<sup>175</sup> apparently lives on in Canadian constitutional discourse.

Of course, whether or not section 15 places positive obligations on the government to provide social benefits or to institute a fairer distribution of some resources is currently somewhat of an open jurisprudential question. Past case law jumps around.<sup>176</sup> But it is fair to say that there have been enough nudges in the direction of positive obligations in some recent cases that the issue is a debatable one.<sup>177</sup> It is also clear that absent such a commitment, judicial understandings of section 15 will significantly limit the social justice promise of our constitutional equality rights. Not recognizing positive obligations means that: “the right to

---

<sup>173</sup> Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton, 1999), at 51-52.

<sup>174</sup> In *Gosselin*, *supra*, note 99, at para. 218, Bastarache J. argues in his dissenting judgment that:

The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions.

<sup>175</sup> Martha Jackman, “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Kent Roach, ed., *Taking Remedies Seriously* (Montreal: Les Éditions Yvon Blais, forthcoming), at 1.

<sup>176</sup> Some earlier cases seem to be open to such a reading of s. 15. For example, in *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at 721 (S.C.C.), Lamer C.J.C. stated that: “Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.” Subsequent judgments have denied such a reading. See, for example, L’Heureux-Dubé J. in *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627, at 655 (S.C.C.): “Although s. 15 of the *Charter* does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality.” But McLachlin C.J.C.’s judgment in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, 2004 SCC 78, [2004] 3 S.C.R. 657 (S.C.C.), is not helpful to the argument that s. 15 encompasses positive government obligations to provide benefits.

<sup>177</sup> See, for example, *Eldridge*, *supra*, note 5, and *Vriend v. Alberta*, *supra*, note 97. For arguments that these two cases should incline the Court to recognition of positive obligations, see Bruce Porter, “Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*” (1998) 9 Const. Forum Const. 71 and Martha Jackman, “Giving Real Effect to Equality: *Eldridge v. British Columbia (Attorney General)* and *Vriend v. Alberta*” (1998) 4 Rev. Const. Stud. 352. But see also Margot Young, “Change at the Margins: *Eldridge v. British Columbia (A.G.)* and *Vriend v. Alberta*” (1998) 10 C.J.W.L. 244.

equality would not place obligations on governments to take any particular action to address disadvantage or to provide particular benefits”.<sup>178</sup> Section 15 will not be useful to enhancing social participation and social and economic justice, both central goals of substantive equality.<sup>179</sup> Positive obligations are critical to elimination of systemic inequality and to addressing broad patterns of disadvantage and marginalization.<sup>180</sup> So, *Kapp* is not helpful in this regard — either in being clear about the scope of section 15 or in setting out an interpretation that facilitates a social justice underlay to equality rights. Equality rights so conceptualized and constrained are not compatible with substantive equality.

#### V. POST-KAPP: POST-LAW?

While the Court clearly moves away from the *Law* test, it was not immediately obvious just what status that test now occupies. *Law* is not explicitly overruled nor is it plainly rejected, although it is, to paraphrase Bruce Ryder, rebuked.<sup>181</sup> The Court states in *Kapp* that *Law* did not set a new and distinctive test for discrimination, but rather was simply an affirmation of the substantive equality approach to section 15 set out in *Andrews*.<sup>182</sup> Indeed, most lower court cases that immediately followed *Kapp* continued to employ the *Law* framework, albeit as an elaboration on the two-stage test from *Andrews* as formulated in *Kapp*. The import of *Kapp* seemed minimal and cosmetic more than anything else.<sup>183</sup>

However, subsequent cases from the Supreme Court, starting with the decision in *Ermineskin Indian Band and Nation v. Canada*,<sup>184</sup> have corrected any such misapprehension. In *Ermineskin*, *Law* is not even cited. Rather, apart from *Kapp*, only two previous equality cases,

<sup>178</sup> Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectations” (2005) 23 Windsor Y.B. Access Just. 145, at 6 [hereinafter “Porter, ‘Twenty Years’”].

<sup>179</sup> Porter, “Twenty Years”, *id.*, at 7.

<sup>180</sup> This is not to say that positive obligations, traditionally understood, have to do all the heavy lifting in equality rights. Much straightforward state action, under a substantive analysis, is also problematic and requires only what is traditionally understood as negative obligations to desist discriminatory differentiation and under-inclusion.

<sup>181</sup> Ryder, “Back to the Future”, *supra*, note 111.

<sup>182</sup> *Kapp*, *supra*, note 17, at para. 24, *per* McLachlin C.J.C. and Abella J.

<sup>183</sup> See discussion of this in Jonnette Watson Hamilton & Jennifer Koshan, “The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges”, *The Court* (April 15, 2009), online: thecourt.ca <<http://www.thecourt.ca/2009/04/15/the-end-of-law-a-new-framework-for-analyzing-section-151-charter-challenges/>> [hereinafter “Hamilton & Koshan”].

<sup>184</sup> [2009] S.C.J. No. 9, 2009 SCC 9, [2009] 1 S.C.R. 222 (S.C.C.).

*Andrews* and *R. v. Turpin*,<sup>185</sup> are mentioned. More specifically, the idea of “human dignity” is absent; *Law*’s four factors make no appearance; and the test is the two-step section 15(1) test as articulated in *Kapp*. In the two Supreme Court cases dealing with section 15 that follow *Ermineskin*, this pattern is confirmed. The 2009 cases of *C. (A.) v. Manitoba (Director of Child and Family Services)*<sup>186</sup> and *Alberta v. Hutterian Brethren of Wilson Colony*<sup>187</sup> rely on the two-step test from *Kapp* and make no explicit mention of *Law* and its analysis.<sup>188</sup> It is clear that the hybrid *Kapp/Andrews* is now the leading case on section 15.<sup>189</sup> *Law* seems no longer the law, so to speak.

The post-*Kapp* cases are also similar because none has any significant discussion of section 15 and all simply state, without real explanation, that there is no discrimination. This makes section 15 discussions at the Supreme Court conclusory and “Delphic”. Remarkably little guidance is given to lower courts, promising a period of creative, diverse and weak lower court judgments on the issue of stereotyping and discrimination. One should be considerably less than sanguine that a clear thread of substantive equality analyses will emerge from this jumble.

The decision in *Hutterian Brethren*<sup>190</sup> illustrates well the concerns expressed in this paper. In that case, the Court’s response to the section 15(1) challenge is remarkably brief. But it reveals a Court that continues to neglect thinking deeply about the concepts and terms it engages to structure equality analysis. The nub of the section 15 issue is dealt with primarily in one paragraph, the opening sentence of which is the following: “Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any *demeaning stereotype* but from a *neutral and rationally defensible policy choice*.”<sup>191</sup> Now the problem appears to be stereotypes that are “demeaning” and unconnected to a “neutral and rational” government policy. The test from *Kapp* seems a bit of a “loose cannon”, at best not conducive to a disciplined and rigorous equality analysis.

---

<sup>185</sup> [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.).

<sup>186</sup> [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181 (S.C.C.) [hereinafter “*C. (A.)*”].

<sup>187</sup> [2009] S.C.J. No. 37, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter “*Hutterian*”].

*Brethren*”].

<sup>188</sup> See *C. (A.)*, *supra*, note 186, at paras. 150-152 and *Hutterian Brethren*, *id.*, at para. 108.

<sup>189</sup> *Hamilton & Koshan*, *supra*, note 183.

<sup>190</sup> *Hutterian Brethren*, *supra*, note 187.

<sup>191</sup> *Id.*, at para. 108 (emphasis added).

## VI. CONCLUSION

It has been this paper's argument that *Kapp* throws up a set of doctrinal impediments to use of section 15 for social justice purposes. If we understand substantive equality as the form of equality social justice aspirations demand, equality law under section 15 of our Charter has yet to live up to progressive hopes for its implementation. The Supreme Court of Canada gave doctrinal elaboration under section 15 another try in *Kapp*. Again, the Court's formulation of what is at stake in equality rights and how the Court should go about adjudicating equality claims is consistent with formal, not substantive, equality.

This should concern us. It should concern us not because constitutional litigation is necessarily or even possibly singularly important in social justice struggles. It is not. The complexity of inequality and injustice in Canada set problems beyond what even the best equality rights law can fix.<sup>192</sup> Injustice and inequality flow from a dispersed but interwoven array of policy, laws and programs difficult to isolate and challenge under constitutional equality litigation.<sup>193</sup> The pigeonholing of complaints that a comparative equality analysis demands reduces the range of experiences that can be examined.<sup>194</sup> And it streamlines what judges can fix even when they acknowledge an unjustified section 15 infringement. It is never a single rule or practice that sets up and maintains a system of oppression, subordination or disadvantage. Fixing that single rule or changing an isolated state practice can lessen individual experience of disadvantage but it cannot alone alter the course of larger, systemic discrimination. As Mary Becker writes:

... abstract rights enforced by judges, regardless of their wording, are unlikely to make radical changes in the distribution of power and resources. The less powerful need many concrete, positive rights. These rights require detailed implementation schemes and the expenditure of funds. Judges are not likely to order either when enforcing abstract clauses. For example, no matter how a constitution *states its equality provision*, it is unlikely that the provision would lead judges to restructure the social security system so as to provide equivalent old-age security to breadwinners and homemakers.<sup>195</sup>

---

<sup>192</sup> Lessard, "Substantive Universality", *supra*, note 22, at 298.

<sup>193</sup> *Id.*

<sup>194</sup> Razack, *supra*, note 11, at 24.

<sup>195</sup> Mary E. Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective" (1992) 59 U. Chi. L. Rev. 453.

Clearly, the intensity and complexity of modern inequality in a neo-liberal state demand coordinated engagement of a wide and creative range of mechanisms for holding the government accountable to social justice ideals and for altering dominant political, social and economic structuring.

Rather, we should care about the inadequacy of constitutional equality law because Charter equality litigation that fails to advance or to even articulate an understanding of substantive equality makes all the more difficult the kind of political sea change that is needed to reaffirm the importance of the “social” to our justice commitments. Levels of inequality and injustice in Canada are such that no one should be complacent about the failure of even one portal — however constrained — for progressive change. Weak equality law — in a political and legal culture such as ours that foregrounds and privileges judicial discourse — breeds and legitimates “intellectual and political complacency”<sup>196</sup> about social injustice across a range of spheres of power and influence.

It is not my intention to place much faith in the nuances and intricacies of doctrinal formulation as the answer to section 15’s troubles. Experience shows that doctrinal shadings are poor bulwarks against dominant ideologies and frames. But, what we say section 15 asks us to do, and how we formulate the questions and perspectives a section 15 enquiry requires, matters. It matters because such detail offers some chance of moving judges to challenge their own ideological comfort zones, to be introspective about their own privilege, to reach beyond their own experiences to attempt comprehension of a litigant’s unfamiliar story, and to look critically at who, at the end of the day, ends up with what.

The Supreme Court has already committed itself to substantive equality. Its adherence to that commitment and a humility in acknowledging that it continues to struggle to realize that commitment need encouragement. But it is also time to hold the Court to account for maintaining the pretence of substantive equality while neglecting its substance.

---

<sup>196</sup> McIntyre, “Siren”, *supra*, note 71, at 108.