THE SUPREME COURT OF CANADA'S EVOLVING TESTS FOR SECTION 15(1) OF *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*: A JURISPRUDENTIAL ANALYSIS

By

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Mount Royal University is located in the traditional territories of the Niitsitapi (Blackfoot) and the people of Treaty 7 which includes the Siksika, the Piikani, the Kainai, and the Tsuut'ina, and the Îyârhe Nakoda. We are situated on land where the Bow River meets the Elbow River, and the traditional Blackfoot name of this place is Mohkinstsis, which we now call the City of Calgary. The City of Calgary is also home to the Métis Nation.

Abstract

This thesis explores the Supreme Court of Canada's (SCC) evolving tests for section 15(1) of the *Canadian Charter of Rights and Freedoms,* which guarantees equality rights. It provides a comprehensive overview of the development of the Court's jurisprudence, highlighting key cases that have shaped the current tests for determining whether discrimination has occurred. The SCC has had to understand s.15 by looking at the meaning of discrimination and the need for substantive equality. The test for section 15 has used three landmark cases to get to the place that it is today. Starting with *Andrews v. Law Society of British Columbia* (1989), then moving to *Law v. Canada* (1999), and finally *R. v. Kapp* (2008). The first case sets the stage for acknowledging that distinctions are made in discrimination based on enumerated and analogous grounds and that substantive equality is the most important aspect to consider in an equality case. The next major case introduces the human dignity standard, and the last case moves somewhat back to the first test and explains s.15(2) with ameliorative purposes. This thesis also analyses the criticisms that have been leveled against the Court's approach and suggests potential areas for future development. Ultimately, the paper argues that while the Court's tests have evolved over time, there is still work to be done to fully realize the promise of equality under Section 15 of the *Charter*.

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The Supreme Court of Canada's Evolving Tests for Section 15(1) of the *Canadian Charter of Rights and Freedoms*: A Jurisprudential Analysis

The Supreme Court of Canada's (SCC) interpretation and application of equality rights in Section 15 of the *Canadian Charter of Rights and Freedoms* has a long history of upholding the provision that everyone is guaranteed a "right to equal protection and equal benefit of the law without discrimination". (Mason & Butler, 2021, p. 4). The *Charter's* commitment to strengthening and defending the worth and dignity of every Canadian is only possible thanks to Section 15, and it is a vital provision in the *Charter* to uphold the fundamental principles of equality and fairness for all individuals in Canada. Furthermore, regarding equality, the protection of substantive equality has been the most consistent interpretation of s.15 for reason that, on a fundamental level, substantive equality means that all laws, government initiatives, and policies should not treat people completely equal but rather must consider how a legislation will affect various groups (Mason & Butler, 2021, p. 4). To summarize, substantive equality recognizes and addresses underlying causes of inequality in order to create truly equal opportunities and outcomes.

The Supreme Court of Canada has gone through three major fundamental shifts to determine a test that is best to protect equality rights of Canadians. The first was in *Andrews v. Law* (1989) where the major finding relates to analogous grounds of s.15(1) as well as the desire for substantive equality. In 1999 there was a shift to *Law v. Canada* where the underlying goal was defining human dignity in relation to s.15(1). Lastly, the most recent shift was in 2008 to *R. v. Kapp* where the Court shifted back to a version of the *Andrews* test and s.15(2) was explained in relation to s.15(1). The next decision to be made will be whether the *Kapp* test is the most suitable equality test or if revisions are necessary. If the current test is deemed inadequate, the

possibility of creating a new test for equality should be considered. The process would require extensive research and testing to ensure that the new test is reliable, accurate and fair. Ultimately, the determination of whether to revise the *Kapp* test or create a new test will have significant implications for the assessment and achievement of equality in various domains.

This thesis contributes to the debates around Section 15(1) of the *Charter* and considers the most effective means of putting the equality clause of the *Charter* to test through historical and comparative research. Section 15(1) of the *Charter* which guarantees the right to equality without discrimination has undergone several legal interpretations, called legal tests, in the Supreme Court of Canada, including *Andrews, Law,* and *Kapp*. Each proposed test has represented significant progress towards achieving greater equality and fairness for marginalized and disadvantaged groups in Canadian Society.

Defining Section 15(1) of the *Charter*

Section 15(1) of the Canadian *Charter* of Rights and Freedoms has been a provision since the *Charter's* inception in 1982 although the section did not come into effect until three years after in 1985. The reason for the grace period was to give the government time to change their laws and bring them into line with the guaranteed equality rights (Government of Canada, 2022a). The guaranteed right of section 15 as written in the *Canadian Charter of Rights and Freedoms* states that:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

> (2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantage individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c11 s 7).

Section 15 uses two legal grounds to assess whether a law is unconstitutional, these qualities make it possible to ascertain whether there is further disadvantage to a group as result of their characteristics (Mason & Butler, 2021, p.4). Enumerated grounds are the first set of characteristics that are specified in s.15 such as race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The second section which will be discussed and explained thoroughly throughout the *Andrews* decision is analogous grounds. These are characteristics that have now been recognized by the Court. They are traits that are not specified but cannot be changed, or if they can, it would have an adverse effect on a individual's personal identity (Mason & Butler, 2021, p.4).

A common assumption is that the goal and purpose of s.15 is to have a completely equal society. However, that is not the true purpose of the clause and all conversations surrounding equality rights usually produce controversy on moral, social, and political issues. The reality of equality rights is that the jurisprudence is complex and does not allow for a summary that is quick and accurate (Sharpe & Roach, 2021). One of the most difficult challenges that the courts have faced is defining s.15(1) and providing a purposive analysis. In a democratic society, equality rights are a fundamental value, but the specific definition is elusive in political and legal discourse (Sharpe & Roach, 2021). Equality rights are supposed to be applied in an even-handed manner with every individual being entitled to dignity and respect; however, with the difficulties

in defining the rights there are questions that must be asked. The first question is if absolute equality is needed? What will that mean for the differences between people? Should the differences be considered? Are affirmative action measures acceptable? And lastly should the advantaged group also get equality rights?

Supreme Court of Canada decisions have established precedent for lower courts by continuously interpreting s.15 in a broad and purposive way that requires affirmative action by governments to eliminate discriminatory barriers and perpetuate equal opportunities to individuals. A framework for analyzing claims has been a work in progress throughout the courts and has involved the identification of discriminatory characteristics, the notion of human dignity, assessing whether differential treatment was experienced and also considering the circumstances where differential treatment was justified.

Importance of the Provision

Section 15 is a vital part of Canadian society on account of equality being one of the base structures that holds everyone together. Inequality is something that effects all of society as it is at the core of human dignity and self-worth. Every citizen should know about s.15 because it protects against discrimination while promoting inclusivity and diversity by recognizing that individuals from all backgrounds should have equal access to opportunities and be treated equally with respect and dignity. By understanding equality and section 15, Canadians can learn their rights and responsibilities as citizens and work towards a more just and equal society which is the cornerstone of democracy.

Methodology

The purpose of this thesis is to demonstrate how Section 15(1) of the *Canadian Charter of Rights and Freedoms* has been tested through Supreme Court of Canada decisions over time

and to provide a comprehensive analysis of the case law that brought this evolution of equality. The research will start by looking at *Andrews v. Law Society of British Columbia* to determine how the *Andrews* test was created. Then *Law v. Canada* will be looked at to see how the *Law* test was created as an alternative to the Andrews test. Next, the research is going to look at *R. v. Kapp* and see why the *Kapp* test was another required change to the test. Finally, it will be determined whether *Kapp* is sufficient to keep as the s. 15(1) test or if there are additional changes needed. The rationale for conducting this research is to discover whether there are any loopholes or deficiencies in the current s.15(1) test because according to Sharpe and Roach (2021) "equality is a fundamental value in a democracy" (p. 373). Therefore, we need to have a test for equality that can change with society and be inclusive for all.

There are many Supreme Court of Canada decisions that use s.15(1); therefore, it needs to be ensured that a test is created in order to determine whether or not a violation of an individual's equality has occurred. It is important to make sure people get their guaranteed rights and freedoms interpreted correctly and prevent injustices from happening in our system. Section 15(1) of the *Charter* makes sure that every individual in Canada is treated with respect and dignity no matter what their race, religion, sex, or any other differential traits are. The *Charter* test for Section 15 needs to have flexible guidelines within our changing society. This research is something that will be beneficial to all individuals in Canada because the *Charter* is put in place to protect basic rights and freedoms for Canadians and applies to all levels of government. There is some existing research on this topic in different law reviews, legal databases and papers like the Law Society of Saskatchewan, the Alberta Law Review, and the Parliament of Canada website. Most of the previous research discusses the history of section 15 decisions and why a

new test was needed. Justice Iacobucci in *Law v Canada* even noted that section 15 might be the *Charter's* most conceptually difficult provision.

A descriptive design will be used for some of the research as it will be looking into information on Section 15 (1) of the *Charter* that already exists and the tests that have been created by the Supreme Court of Canada. In between the analysis of the monumental Supreme Court decisions, gaps will be filled by analyzing societal perceptions of equality to reflect the need for a flexible equality test. Descriptive is the best method for this aspect of research because it is based on observation that exists already. In addition to a descriptive design, an exploratory research design will be used to establish a baseline of an issue that is not otherwise clearly defined. *Charter* topics do not necessarily have vast studies done about them and that limits the research to be found. Precedent cases can be looked at but there are few that can be relied on to predict what the future test should be. An exploratory design will start off the research and create an understanding of the details and settings of each Supreme Court case and build familiarity with the laws surrounding section 15 (1). Lastly, a historical research design will be used to collect, verify, and synthesize evidence from the past since all the Supreme Court decisions that are being looked at have already occurred. Using these past cases will determine whether the Section 15(1) test the *Kapp* test is well suited for the courts to use. Furthermore, this research supports a historical design because primary documentary evidence is used such as the authentic written Supreme Court decisions like *Andrews v Law Society of British Columbia* [1989], *Law v Canada* [1999], *R. v Kapp* [2008] as well as some secondary sources from law reviews.

For my primary sources I will be using CanLII and Lexum databases for the cases from the Supreme Court of Canada. The secondary sources will be from google scholar, CanLII, Canadian Law school reviews, Canadian law journals as well as the MRU database. When searching in

these databases, I will be using keywords like *Canadian Charter of Rights and Freedoms, Section 15(1), Equality Provisions in the Charter, Equality before the law, enumerated and analogous grounds, discrimination in the Charter.*

Limitations

Some of the possible limitations of this work is that there is limited research on the topic of section 15(1) and most of the information is from the Supreme Court cases themselves. Another limitation is that there is full reliance on pre-existing data for research as there is no information that can be gathered as primary data collection except for personal opinions. Additionally, there is a disadvantage to an exploratory research design because it is qualitative in nature which means that it is difficult to derive accurate insights from secondary sources because they may be subjective (USC Libraries, 2023.-a). Bias is a variability that may make the process of analyzing and hypothesizing implications of section 15(1) a lengthy process because there will have to be a separation as to what is factual versus what is a bias. With legal research as well, there is always the possibility that individuals are writing without any prior proper legal education and instead, speaking based on opinion.

History of Section 15

Section 15 is a powerful tool to advance equality and human rights in Canada, this section has played a key role in shaping the country's legal landscape and social policies while also attempting to adapt to a society that is always changing and evolving. While s.15 is a very important provision of the *Charter*, it has not always been in place and originally the *Canadian Bill of Rights* guaranteed "the right to equality before the law and the protection of the law" (Sharpe & Roach, 2021, p.374-375). Unfortunately, legal history has shown that the *Canadian Bill of Rights* further allowed systematic racism and discrimination especially on the Indigenous

population of Canada. The *Canadian Bill of Rights* set the precedent and determined the need for the *Charter* but generally was considered a disappointment in the way that it provided justice to society. *R. v. Drybones* was a case under the *Bill of Rights* that did gain praise for eliminating the Indian Act's section that made it illegal for an indigenous person to be intoxicated off of their reserve by using the equality principle (Sharpe & Roach, 2021). *Drybones* was a step in the right direction for equality however in *Canada v. Lavell* the SCC immediately reversed course and took a step back from the progress that was made because it supported an Indian Act provision that denied status to women who married "non-Indian" spouses but did not do the same for men, in spite of its blatantly discriminatory nature (Sharpe & Roach, 2021). The step in the *Lavell* decision dismissed the equality challenge that it faced on the grounds that the law was applied equally to all women and a formal definition of equality was adopted. It is clear that in the cases under the *Canadian Bill of Rights*, the federal purpose was more important in the legal decisions that were enacted, and substantive effect was not taken into consideration when laws were applied (Sharpe & Roach, 2021).

Fortunately, since moving away from the *Bill of Rights*, Canada and the courts have paid special respect to the provisions of human rights legislation and to the jurisprudence created by human rights commissions while developing, interpreting, and enforcing the equality guarantee of the *Charter*. Now since 1985, the courts have evolved their interpretation of s.15 to protect substantive equality and seek out mechanisms to evaluate claims consistently in a fair and uniform manner (Mason & Butler, 2021). Given that it was unclear at the start of the *Charter* how extensively and thoroughly the rights and freedoms would be applied, it was up to the courts to interpret each right and freedom on a case-by-case basis (Millis, 2020). One of the changes that was made in the *Charter* was to fix the injustices of the past and strengthen the provision.

Language was a big part in achieving this goal, specifically adding language such as “equal before and under the law” in order to make sure that the legislation is seen as a powerful instrument that is different from history. Looking at the language in a purposive analysis is a way to understand how important the shift of legislation was to add in meaning and intent behind the legal system. Section 15(2) was also created to ameliorate the conditions of disadvantaged individuals.

Andrews was the first attempt to develop a *Charter* test to assess infringements of s.15(1), the first step identified if there was a distinction between the claimant and others and the next step was to ask if the distinction were based on an enumerated or analogous ground. In 1995 in *Miron v. Trudel,* there was an additional step added to determine if the distinction was irrelevant to the functional values underlying the law in question. In 1999, *Law v Canada* became the next change to look at equality. The *Law* test set out three parts and established the importance of recognizing human dignity. Comparator groups who were similar in circumstances also got introduced into discussion to demonstrate disadvantage (Mason & Butler, 2021). The year 2008 brought *R. v. Kapp* to the Court to acknowledge the barriers of the *Law* test for disadvantaged groups. *Kapp* moved away from comparator groups and human dignity and instead focused on if there is prejudice or stereotyping taking place (Mason & Butler, 2021).

Kapp is still the current equality test in place but from the present day there has been some modifications in *Quebec (Attorney General) v. A (2013)* and *Kahkewistahaw First Nation v. Taypotat (2015).* The discussions have been examined and the Court has made it clear that the second component of the *Kapp* test does not need to prove that prejudice or stereotyping occurred. Instead, the analysis should be flexible and consider the entire context of the issue,

with a focus on whether legal disparities either reinforce, perpetuate, or make disadvantages worse (Mason & Butler, 2021).

Most recently, *Fraser v. Canada (Attorney General) (2020)* was a case that dealt with the issue of whether a pension plan that had gender-based asymmetry was discriminatory under the *Charter*. It had the Court clarify that s.15 protects against differential treatment regardless of whether it is explicitly stated in law or is simply the result of negative effects stemming from the law (Mason & Butler, 2021).

The goal for the future of section 15 is to make sure the equality test is clear with specific guidelines that can be applied in lower courts. Additionally, the test needs to be able to adapt and evolve to a society that is living and changing. Lastly, s.15 needs to be applied in a way that reflects the values and priorities of the Canadian public, specifically those populations who are in minority and historically disadvantaged.

Purposive Analysis

Judges utilize a technique known as the "purposive approach" to determine what statutes (or laws) mean. The purposive approach calls for a court to consider the statute's intent when it was enacted by Parliament (or another legislature), as well as the words contained in the statute itself. The statute's whole context must be used to understand the wording (Millis, 2020). The purposive approach is vital to Canadian law because the SCC recognizes that it is the proper approach to give meaning to the *Charter.* In *Hunter et al. v. Southam, Inc.* (1984) Justice Brian Dickson explained that the *Canadian Charter of Rights and Freedoms* has a purpose to guarantee and protect the rights and freedoms of individuals. The *Charter* as a document protects against actions from the governments and their agents as well as makes sure not to authorize government actions. Lastly, the *Charter* is a proactive protection of our rights and should prevent

infringements from occurring. Seeing as the *Charter* is a purposive document it must be looked at with purposive analysis, this means that there has to be an alignment between *Charter* rights and freedoms and the values of a free and democratic society. One of these values is equality and a purposive analysis for section 15 must interpret and apply the meaning of equality so it is protected to make Canada free and democratic. The *Charter of Rights and Freedoms* is supposed to protect what we have and foster more but broad and generous interpretations must stay within the bounds of the right or freedom's intended use. Courts must consider the proper linguistic, philosophical, and historical backgrounds when interpreting the purpose of a right in order to avoid unreasonably expansive classifications (Millis, 2020).

The broader goals of the *Charter* itself must be considered when determining the purpose of a right. A court can determine what a right means from the language employed in the paragraph that contains the disputed right, the beginnings of the right historically, and its relationship to the intent behind other related rights (Millis, 2020). Additionally, when starting a purposive approach to *Charter* interpretation, the goal of the contested right (or what the right is meant to protect) must be determined by a court. After determining what the right defends, a court must then decide which actions are covered by the right and which ones are not (Millis, 2020).

In the perspective of section 15, the goal is to protect equality and fairness is society. Did a law intend to provide discrimination? Can it be assumed that there was an intention to be inclusive? To explain the wording of s.15 is part of a purposive analysis. “Equal protection under the law” means that the law should leave out no one in its scope. “Benefit under the law” means that many laws have extended a privilege or benefit to the individual, everyone should enjoy the benefit of the law. “Equal before the law” explains that every person is afforded the same due

process before a judge. “Equal under the law” determines that the system should work equally for everyone. As more cases are decided, definitions become developed further and precedent is created. The meaning of enumerated and analogous grounds had to be determined in the *Andrews* test as well as the meaning of discrimination and equality that are constantly being revaluated. The *Charter* is a living document that is capable of evolution and growth and because of this, interpretations of rights and freedoms have to develop to reflect a changing society that could not have been predicted historically (Millis, 2020). The reason that section 15 has been through so many tests is because rights are not frozen, and interpretations change as necessary with previous decisions acting as a guide (Millis, 2020). Nothing is absolute in the *Charter* because of the use of purposive analysis.

Section 1 and *Oakes* Test

Section 15, like all *Charter* provisions is heavily interrelated with section 1 which states that rights are guaranteed “subject only to such reasonable limits… as can be demonstrably justified in a free and democratic society” (*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c11 s 1). The *Oakes* test came to be after the accused Mr. Oakes was caught with hashish oil and cash and charged with possession for the purpose of trafficking (*Oakes* test, 2019). After being presumed guilty the onus was on the accused to prove that he was not guilty otherwise known as a reverse onus (*Oakes* test, 2019). Oakes argued that the law violated the presumption of innocence that is guaranteed by the *Charter* and then it had to be considered whether the government could justify the violation of rights using s.1 (*Oakes* test, 2019). The *Oakes* case determined a test for s.1 of the *Charter* in order to determine if an infringement is justifiable. The test starts with asking if the claimed *Charter* infringement is prescribed in law, if the answer is yes then the Oakes test

can begin. In order for an infringement to be reasonable, it must pass four steps of sub-tests. Refer to the table 1 below for a description of the *Oakes* test.

Table 1

Stages of the Oakes Test

Oakes Test Stage	
Is there a substantive and pressing need for the law/policy/regulation?	If no, *Charter* infringement is unreasonable. If yes, the respondent must defend the next step.
Is there a rational connection between the measures/means adopted in the law/policy/regulation and its articulated objective(s)?	If no, *Charter* infringement is unreasonable. If yes, the respondent must defend the next step.
Does the law/policy/regulation impose a minimal impairment on individual's *Charter* rights?	If no, *Charter* infringement is unreasonable. If yes, the respondent must defend the next step.
Is there a favourable balance between beneficial effects vs. harmful effects of the law/policy/regulation?	If no, the *Charter* infringement is unreasonable. Id yes, the *Charter* infringement is reasonable.

Note. Adapted from "Section 1 – Oakes Test" in King (2022a). Reproduced with permission.

If there is an infringement of a *Charter* right, the *Oakes* test determines whether or not the infringement was reasonable under s.1 by asking questions.

Every time that the government seeks to defend a restriction on Canadian's *Charter* rights, the Oakes test will be applied. Not a lot of legislation has succeeded in passing the test and it is important that *Oakes* is considered in s.15 to make sure there is rigorous analysis of legislation to consider the purpose and impact that legislation has on equality.

***Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143**

Andrews v. Law Society of British Columbia was the first equality case to reach the Supreme Court of Canada and has initiated a discussion on discrimination and how to identify it with a broadened approach. The *Andrews* decision is known for embracing substantive equality

and rejecting formal equality while also paving the way for subsequent decisions through defining what is meant by enumerated and analogous grounds (Mason & Butler, 2021).

Case Facts

The case of *Andrews v. Law Society of British Columbia* began with Mr. Andrews who moved to Canada after graduating with law degree from Oxford University in England. Once in Canada he met the qualifications for being a landed immigrant which is someone who has come to Canada under a work visa of some sort and is not a Canadian citizen. Andrews went to write the bar exam of British Columbia (BC); he put in the application and then was told that he could not write the exam. Apparently, the BC bar exam had a rule that only Canadian citizens could write the bar exam and due to Andrews only being a landed immigrant, he could not write the exam. This was stated in S.42 of the Barristers and Solicitors Act (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143). Andrews then went to court and used s. 15 (1) of the *Charter* to say that the citizens only requirement of the act was an infringement on *Charter* section 15 equality rights. Andrews won at lower court. Taylor J., at trial defined discrimination under s. 15(1) as "the drawing of an irrational distinction between people based on some irrelevant personal characteristic for the purpose, or having the effect, of imposing upon the victim of the discrimination some penalty, disadvantage or indignity, or denying some advantage" (*Andrews v. Law Society of British Columbia*, 1989). Additionally, he adopted a broad view of the concept of citizenship.

McLachlin was the Justice who went on to mention that the real meaning of equal protection and benefit before and under the law is that persons who are "similarly situated be similarly treated" and that persons who are "differently situation be differently treated" (*Andrews v. Law Society of British Columbia*, 1989, p. 605). The Law Society of British Columbia then

went to the Court of Appeal and Andrews won that Court as well with McLachlin writing the decision. McLachlin said that the Barristers and Solicitors Act was discriminatory, but she used different logic to come to that conclusion (*Andrews v. Law Society of British Columbia*, 1989). After losing in the British Columbia Court of Appeal, the Law Society of British Columbia appealed to the Supreme Court of Canada.

Legal Questions

Due to the importance of a case like *Andrews*, there are an abundance of legal questions that will be answered in the analysis and court decisions below. A few of the most important questions include:

- What is the meaning of discrimination?
- What represents analogous grounds?
- What is Equality? Formal Equality versus Substantive Equality
- Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the Barristers and Solicitors Act, infringe or deny the rights guaranteed by s.15(1) of the Canadian *Charter* of Rights and Freedoms? (*Andrews v. Law Society of British Columbia*, 1989).
- If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s.42 on the Barristers and Solicitors Act, infringes or denies the right guaranteed by s. 15(1) of the Canadian *Charter* of Rights and Freedoms, is it justified by s. 1 of the *Charter*? (*Andrews v. Law Society of British Columbia*, 1989).
- What is the test that can be discovered and shared to lower courts?

Defining Discrimination

One of the most important things that came out of the *Andrews* decision was the need to define discrimination. Justice Bertha Wilson writing on behalf of the Majority did explain discrimination as a distinction, whether intentional or unintentional, that is based on factors that are related to personal characteristics and has the effect of placing burdens, obligations, or disadvantages on that person or group that are not placed on others, or that denies or restricts access to opportunities, benefits, and advantages that are available to other members of society (*Andrews v. Law Society of British Columbia*, 1989). In other words, discrimination involves personal characteristics of an individual or group that cannot be changed. Those characteristics impose burdens, obligations, or disadvantaged that are not faced by people without the characteristic. The traits result in withholding or limiting access to opportunities, benefits, and advantages that are available to others.

The characteristics in question also need to be defined because they will rarely be classified as discrimination if it is based on individual merit and capacities. Enumerated and analogous grounds have been created to protect human rights and provide a framework for protecting individuals from discrimination and promoting equality. Enumerated grounds are those that are written and explicitly written in the *Charter* while analogous grounds are the characteristics that are immutable or constructively immutable. The aim in Canadian law is to ensure that all individuals have the opportunity to participate in society without facing barriers, the recognition of analogous grounds allows for the law to evolve and adapt to changing social and cultural contexts and ensure that human rights protections remain relevant and effective.

Analysis

In *Andrews v. Law Society of British Columbia*, the SCC had changed precedent and created the first Section 15(1) test. Citizenship became an analogous ground and paved the way for other analogous grounds like gender identity. According to s.15(1) of the *Charter*, promoting equality involves promoting a society in which everyone is certain that they are treated with care, respect, and regard because they are acknowledged as human beings in the eyes of the law. After reading the SCC decision and understanding that the s.15(1) of the *Charter* had been violated and there was no justification under s.1. There is still one last piece to the decision and that is the concurring opinion from La Forest. He agreed that the Solicitors and Barristers Act failed to meet the proportionality test and emphasized that citizenship also did not ensure the commitment to Canadian society and therefore, the restriction of access to the profession was over inclusive and there were other pathways that were less drastic to achieve the outcome (*Andrews v. Law Society of British Columbia*, 1989). One of the most important concepts that came out of this case was the enumerated and analogous grounds. The analogous grounds are similar in kind to the enumerated grounds. After *Andrews v. Law Society of British Columbia* there was *Miron v Trudel* which laid out how to determine what an analogous ground is under S. 15(1):

1. Is the personal characteristic in question the object of historical stereotyping, prejudice, or disadvantage?
2. Does the group sharing the personal characteristic constitute a “discrete and insular” minority that is lacking in political power or influence?
3. Is the personal characteristic beyond an individual’s control or “changeable only at unacceptable personal costs?”

4. Is the personal characteristic "similar in kind" to any enumerated grounds covered in legislation or in s. 15(1) of the *Charter*?

By looking at these questions there is a pattern that was originally determined by *Andrews. v. Law* by the Court emphasizing that the purpose of s.15 is to protect vulnerable groups from discrimination.

Court Decisions

The SCC held that the appeal was to be dismissed with costs. McIntyre, and Lamer were dissenting. The first constitutional question should be answered in the affirmative and the second in the negative.

This means that Andrews won the case, and it was found that S. 42 of the Barristers and Solicitors Act act infringed on *Charter* rights. The costs were given to the Law Society of British Columbia as a remedy.

Supreme Court of Canada Majority Decision

To first look at the purposive analysis of section 15(1) it needs to be remembered that the goal is to protect what we have and foster more. In section 15 (1) there needs to be analysis on what is the intent as well as if the discrimination was purposeful. It needs to be assumed that discrimination based on citizenship was not intentional and the enumerated grounds were supposed to be analogous and inclusive. Wilson writes that the list of grounds is not complete and makes the decision between enumerated grounds and analogous grounds (*Andrews v. Law Society of British Columbia*, 1989). The Supreme Court of Canada found that the grounds of prohibited discrimination were not exhaustive. The list that was presented in s.15(1) were the enumerated grounds and then it was recognized that the unarticulated grounds are analogous which are not listed specifically. To recognize analogous grounds the Court said that they must

be “similar in kind” to the enumerated grounds (*Andrews v. Law Society of British Columbia*, 1989). Moving on, the equal protection under the law is the notion that the law should leave out no one in its scope. The equal benefit under the law means that many laws have privilege to them, and we all enjoy those benefits. Equal before the law means that we must think about standing before a judge or “before the law” we all are afforded the same due processes. Finally, being equal under the law means that the system works equally for everyone and follows rule of law.

In the SCC decision there are two opposites of what equality is. First there is formal equality which is treating similarly situated people the same and this was McLachlin’s position (*Andrews v. Law Society of British Columbia*, 1989). Second there is substantive equality which is that you should treat everybody the same without discrimination, everybody should have the same starting position. Substantive position was taken by the SCC majority (*Andrews v. Law Society of British Columbia*, 1989). Additionally, the definition of discrimination was looked at and said to be based on grounds relating to personal characteristics of the individual or group that allows disadvantages to said group or limits access of advantages that are available to others. Discriminating against someone's citizenship to become a lawyer is a disadvantage because citizenship is not within control of the individual. To conclude the SCC agreed that s.15(1) was infringed upon (*Andrews v. Law Society of British Columbia*, 1989).

The Majority rational agreed that the legislation at issue was not justified under s.1 of the *Charter*. There was not a pressing and substantial need. It is not mandatory for lawyers to be familiar or committed to Canadian institutions and customs. Additionally, commitment to the country is not ensured by citizenship. Non-citizens have chosen to move here and start a career.

Wilson holds three reasons as to why he agrees with the Court of Appeal on the citizenship requirement. In agreement with McLachlin, Wilson states that the requirement of citizenship is not effective to ensure that someone admitted to the bar are familiar with customs and an examination may be better fitted. Secondly, the agreement is with McLachlin on the conscious choice to participate in Canadian social process compared to natural-born Canadians. Thirdly, reason by Wilson relates to the role that lawyers play in the government. They may have to perform governmental function but just because they are citizens does not mean that they will act any more honourably than anyone else (*Andrews v. Law Society of British Columbia*, 1989). All of this was to confirm that the *Oakes* test is not met meaning there is an infringement.

Finally, the constitutional questions would be answered yes that there is an infringement on S.15(1) and no it is not justified by S.1.

Supreme Court of Canada Dissent

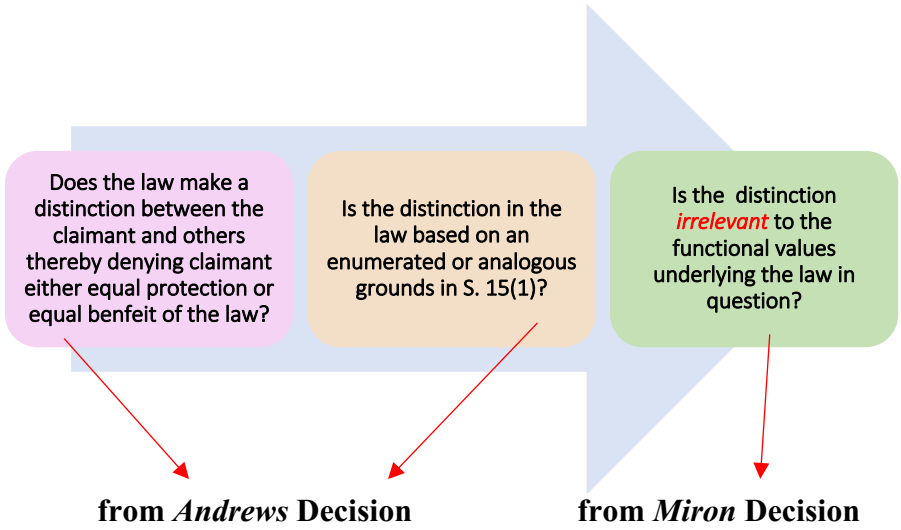
McIntyre's concurring decision agreed with the majority about the analogous ground and that citizenship was a ground under s.15(1). However, the dissenting did not agree with s.1 and thought that the citizenship requirement was reasonable and sustainable because the legal profession is important in government (*Andrews v. Law Society of British Columbia*, 1989). Additionally, it was said that an individual coming to the country should accept citizenship and the obligations as well as the advantages and benefits that come along with it like career opportunities. McIntyre's discussion of equality and discrimination was later adopted by the Court (*Andrews v. Law Society of British Columbia*, 1989).

The *Andrews* Test

The *Andrews* test that was created is summarized and illustrated in figure 1 below..

Figure 1.

Andrews Test



Note. A figure from King (2022b) to visualize the *Andrews* test and how it was modified additionally in the *Miron* decision. Reproduced with permission.

Future Implications

The Court's decision in this case impacted Canadian society greatly because it set the precedent for any other s.15(1) case and tests that have been created. Because of this case there are now more analogous grounds like citizenship, sexual orientation, marital status etc. This impacts the groups who now have proper rights and do not have to face discrimination. Additionally, it demonstrates how the justice system can evolve to the changing world like the recognition that people have different gender orientation. Furthermore, there are problems with the *Andrews* test because it is too broad and virtually everything that the *Charter* does would violate section 15(1) and that is why there are evolving s.15(1) tests like the *Law* test and finally the *Kapp* test.

***Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R 497**

In between *Andrews* and *Law,* there was a trilogy of 1995 cases that left the courts divided on the future steps for section 15. The next fundamental shift in s.15(1) decisions was in

Law v. Canada with a new test for equality infringement being created and the courts being unified. The new test was created because it was clear that human dignity also needs to be considered in a s.15(1) decision.

Case Facts

After her spouse passed away, Nancy Law at the age of 30, was not eligible for the Canada Pension Plan survivor payments because she was five years too young (*Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R 497). The Canada Pension Plan (CPP) survivor payments are a monthly benefit that is paid to a surviving spouse after their partner passes away. To receive the payments the surviving individual must meet the age requirement, have a disability, or be responsible for dependent children (Badri, 2010b). According to Law, the age restriction constituted age discrimination in violation of s.15(1) (MacIvor, 2012). The Canada Pension Plan has a provision that says if an individual's spouse dies that they can get their pension if they're old enough to receive it (*Law v. Canada,* 1999). The provision specified that if the survivor is younger than 35 years of age then they cannot claim it. It was said by the SCC that the distinction based on age is a legitimate distinction so that the decision to deny payments to those under the age of 35 was justified and that there was no age discrimination (MacIvor, 2012). Law went through the federal court system and at this time the *Andrews* test was in place. The answer to the questions was that yes, the law made a distinction and denied benefits to an individual. Additionally, the second question is answered yes because the distinction was based on an enumerated ground. In Federal Court and the Federal Court of Appeal, Law won and then the case was appealed to the SCC. The Supreme Court of Canada developed the new s.15(1) test the *Law Test* and introduced the human dignity standard.

Legal Questions

A couple of the most important legal questions that must be asked in *Law v. Canada* are:

- What is Human Dignity?
- How can human dignity be put into a legal test?
- Is Nancy Law's human dignity on the line?
    - If no, will she have diminished human dignity because of that answer?
    - Is denying her the small amount of money going to be offensive to her?
- Was the enumerated ground of age a discrimination?
- Was the characteristic (age) resulting in withholding or limiting access to opportunities, benefits, and advantaged available to other without the characteristic?
- How should the courts decide whether a difference in treatment amounts to discrimination?

Human Dignity

One of the main reasons for a shift to a new s.15(1) test was to acknowledge human dignity; therefore, human dignity must be defined in terms of the court. The court concluded after reviewing prior equality cases that the purpose of equality rights is to ensure human dignity, and that differential treatment that affects members of recognized disadvantaged groups violates this fundamental purpose by implying that they are less capable or deserving of being recognised or valued (Badri, 2010b). In *R. v. Oakes* (1986) Chief Justice Dickson said that:

> "The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political

> institutions which enhance the participation of individuals and groups in society." [para. 64].

Furthermore, human dignity is concerned with how a person feels when they are confronted with a given law. People and communities must feel respect for the worth of themselves in order to have human dignity. Dignity can get damaged by unfair treatment based on personal traits that are unrelated to a person's needs, abilities, and accomplishments (Badri, 2010b). Promoting human dignity goes hand in hand with preserving all of the rights enshrined in the *Charter*. However, criticism has appeared with the topic of human dignity in s.15 because it is a notion that can be challenging to apply because of confusion and lack of physical proof due to the abstract and subjective nature. Even if there is guidance with contextual factors it is also an additional burden on the claimants trying to achieve equality rather than the enhancement that was intended (*R. v. Kapp,* 2008).

Analysis

Originally the SCC in *Law v. Canada* thought that there was no infringement on s.15 because young widows and widowers are not a "discrete and insular group," nor do they typically experience social discrimination or economic disadvantage that diminishes their dignity and gives them the appearance of being less valuable (MacIvor, 2012). It was made clear that dignity is vital in equality decisions and that is why there was a necessary move from *Andrews* into a new test. Justice Iacobucci tried to make one coherent test for s.15 and compile all aspects of equality together. In Iacobucci's definition of the purpose of equality rights, he used Justice L'Heureux-Dube's emphasis on human dignity as the fundamental purpose of s.15(1) (*Law v. Canada,* 1999, para 48). Iacobucci also tried to bridge the gap between La Forest-Gonthier's approach in the 1995 trilogy which favoured a restricted interpretation of s.15(1), and then the

McLachlin-Cory-Iacobucci argument in favour of a broad and general interpretation of the section (MacIvor, 2012). In *Law*, the Court created four contextual factors that are able to assess the impact of the law or program on the human dignity of members of the claimant group (*R. v. Kapp,* 2008). The first factor is pre-existing disadvantage, stereotyping, prejudice, or vulnerability that may be experienced by the individual or group at issue (MacIvor, 2012). The second factor is the degree of correspondence between the differential treatment and the claimant group's reality (*R. v. Kapp*, 2008). The third contextual factor is the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society (MacIvor, 2012). Lastly, the fourth contextual factor to determine if there has been an infringement is the nature and scope of the interest affected by the impugned law (MacIvor, 2012). The Court held that none of these elements by itself would prove discrimination, and that differential treatment does not need any one of these elements to exist in a particular situation. Instead, each must be considered to provide context for the central question of whether the action in hand constitutes discrimination since it offends the claimant's human dignity (Badri, 2010a).

Discrimination is a comparative idea, the Court emphasised. In other words, the treatment must be distinct from the treatment of a different individual or group of individuals. As a result, courts are required to determine "the comparator group," or the proper group for comparison in each instance (Badri, 2010b). This entails examining the legislation's subject content, intent, and outcomes. The comparison group may also consider additional elements, such as biological, historical, and sociological similarities and contrasts between the claimant and the group (Badri, 2010b).

When applying all the above aspects to the case at hand it is clear that there is a distinction between people under the age of 35 and those over the age of 35 according to the

Canada Pension Plan. This does show differential treatment and because it is drawn upon age it is a protected ground from the *Charter* (Badri, 2010b). Because the first two stages of analysis were satisfied, the contextual factors will be looked at to address human dignity. Adults under the age of 45 are not a historically underprivileged category, the Court emphasised. The Court also disregarded Nancy Law's claim that the rule was based on the fallacious notion that it is simpler for young people to acquire jobs. While acknowledging that surviving spouses of all ages are vulnerable right after losing a spouse, the Court emphasized that the pension plan is intended to ensure that the long-term basic needs of older widows and widowers are met rather than to address the immediate financial needs of widows and widowers (Badri, 2010b). Additionally, the Court noted that the disadvantage that the law places on younger spouses neither reflects nor promotes a belief that younger spouses are less capable or less deserving of respect, concern, and consideration, given the long-term security goals of the pension benefit and the greater opportunity of youth. The Court stated that the law provides a distinction that conforms to the actual condition of the affected individuals rather than making a distinction based on stereotypes (Badri, 2010b). The survivor benefits are meant for people who are economically vulnerable with age, dependent children, or disability, this is a clear ameliorative purpose because young spouses are more able to work and provide for themselves. All of the above factors are why the Court determined that there was no violation of human dignity.

Court Decisions

When Nancy Law first got denied, she appealed to the Minister of National Health and Welfare and then the Pension Plan Review Tribunal and argued that the distinctions discriminated on the grounds of her age according to s.15(1) (*Law v. Canada*, 1999). The Pension Plan Review Tribunal found that the legislation did discriminate against those who were

not 35, had no dependent children and are not disabled but a consensus was not made, and the discrimination was said to be justified under s.1. Then a further appeal was made to the Pension Appeals Board who said that the impugned age distinction did not violate equality rights (*Law v. Canada*, 1999). It was also discussed that even if there was an infringement of s.15(1), it would be justified by s.1 and the Oakes test. Another appeal was made to the Federal Court of Appeal and was dismissed for similar reasons to the Pension Appeals Board. The case was then sent to the SCC (*Law v. Canada*, 1999).

Supreme Court of Canada Decision

The Supreme Court of Canada held that section 15 was not violated by the CPP because there was no violation of the human dignity of those under forty-five and, accordingly did not amount to substantive discrimination (Sharpe & Roach, 2021). Even though there was a formal and unequal distinction of the basis of the enumerated ground of age (*Law v. Canada*, 1999). Unlike some of Canada's isolated and insular communities, adults under the age of 45 have not regularly and habitually been exposed to the same forms of discrimination (Sharpe & Roach, 2021). The Court also pointed out that Nancy Law was not completely excluded from receiving the survivor's benefit; rather, she will receive the benefit when she turns 65, or before then if she becomes disabled (Badri, 2010b).

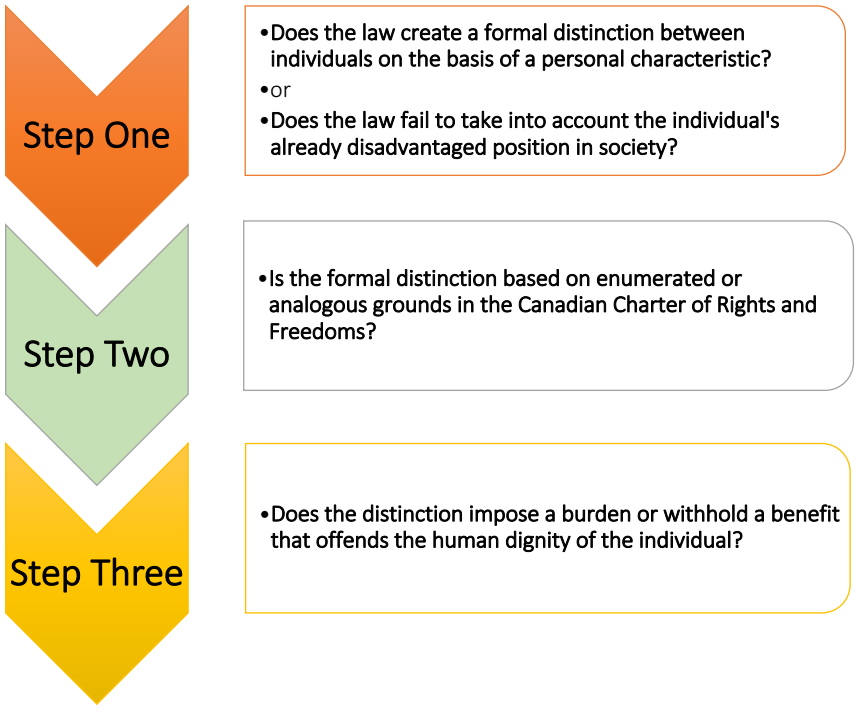
The decision was unanimous in the Court and the appeal was dismissed, there were no costs asked for by the respondent, so no order was made for that (*Law v. Canada*, 1999). In other words, Law was denied benefits under the CPP until a later point in her life. The first constitutional question was answered in the negative which means the second question was not necessary to answer (*Law v. Canada*, 1999).

The Law Test

The *Law* test was created and posed three questions for a court to answer in an equality case. The test can be seen outlined in figure 2.

Figure 2.

Outline of the Law test



Note. A figure from King (2022b) to visualize the *Law* test. Reproduced with permission.

The questions that are presented in *Law* required the plaintiff to establish the comparison group unless the court found a better group to employ in its analysis of issues since establishing differential treatment could only occur if there was a group to compare to (MacIvor, 2012). The discrimination will be looked at from a subjective perspective through eyes of the claimant and an objective perspective with a reasonably cautious and prudent person in circumstances similar to those of the claimant. The claimant can refer to one or more enumerated or analogous grounds

in order to prove that they had diminished dignity. But the ground in itself is not enough to prove discrimination (MacIvor, 2012).

Future Implications

When discussing the law test the main problem was asking the question "how do you decide human dignity?", dignity is a concept that is abundantly subjective because it is almost impossible to measure harm done to an individual's human dignity. In the *Law* test, it is up to the claimant to prove the three steps and have the burden of proof to show that there has been an infringement, this puts a lot of tasks on the claimant especially when trying to prove human dignity. In *R. v. Kapp* (2008) it was acknowledged that *Law* was very successful in unifying a divided Court but unfortunately was not able to stand the test of time. *Law* confirmed *Andrew's* approach of substantive and not just formal equality and made contributions to understanding substantive equality that still holds true in society.

Law v. Canada has had significant future implications for Canadian equality law because it was not the best test to hold up against time. There were many criticisms for its complexity and the ability for consistent interpretation. Additionally, it is quite difficult for the s.15 applicants to prove that there had been a violation of human dignity (Sharpe & Roach, 2021). Contextual factors additionally should be reserved for section 1 analysis, and this prevented a lot of cases from even reaching the *Oakes* test. Furthermore, one of the biggest criticisms was the way the *Law* test had allowed post-*Andrew's* jurisprudence to resurface in the form of artificial comparator analysis focused on treating likes alike (*R. v. Kapp,* 2008, para 22).

***R. v. Kapp,* 2008 SCC 41, [2008] 2 S.C.R. 483**

The current test for Section 15 is the *Kapp test* and it is considered to be more flexible and adaptable than the *Andrews* and *Law* tests. It recognizes that discrimination can take on

many forms, and that the *Charter's* equality protections are meant to address the deep-rooted historical disadvantage, prejudice, and stereotyping that certain groups have faced. This means that the *Kapp* test can consider broader social, political, and historical contexts when determining whether a law or government action is discriminatory.

Case Facts

The case of *R. v. Kapp* began with an agreement related to fishing rights on the Fraser River. In order to fish commercially an individual must possess a licence however, the exception to this rule is that Indigenous individuals do not need a license to fish and can do so wherever and however they would like. On the Fraser River is British Columbia, the Federal government granted the Musqueam, Burrard and Tsawwassen First Nations in British Columbia an exclusive 24-hour fishing license to catch salmon and sell their catches commercially (MacIvor, 2012). Non-aboriginal fisherman like Mr. Kapp opposed the decision by the government and said that their section 15(1) rights were being infringed. The group of non-indigenous fisherman protested by catching salmon anyways during the period of the license (MacIvor, 2012). The group of individuals after being charged with illegal fishing argued that they were being discriminated against on the basis of the enumerated ground of race (MacIvor, 2012). The group argued that it was a raced based distinction, and their dignity was demeaned. In the Provincial Court of BC, the Justice accepted the arguments of the protestors and held that the program did demean dignity and was not saved by section 1 (Moreau, 2018). The Supreme Court of British Columbia allowed an appeal and held that the previous decision was based on an improper s.15 test. They looked at the contextual factors in an objective way and determined that the claims of the fishers could not succeed (Moreau, 2018). The next stage of this case was an appeal to the British Columbia Court

of Appeal where the appeal was dismissed but with a different approach. The Court of Appeal said that the fishers were not denied any legal benefits in a discriminatory way (Moreau, 2018).

Legal Questions

The main legal questions that need to be answered in *R. v. Kapp* are listed below:

- What are ameliorative programs?
- How does s.15(2) work with s.15(1)?
- Are we only to be concerned with cases where the disadvantage involves prejudice or stereotyping?
- Will the new *Kapp* test survive the test of time?

Analysis

Kapp is significant because in assessing section 15 allegations, the Court confirmed its commitment to using a substantive equality analysis (Mason & Butler, 2021). The Court also made a change away from the human dignity component of the *Law* test even though human dignity is necessary for s.15's equality guarantee, applying the test had proven to be challenging. It needed some revision and was not the philosophical advancement that it was intended to be (Mason & Butler, 2021). Additionally, the Court gave s.15(2), which defends ameliorative programmes from charges of discrimination, a more significant role. The "affirmative action" s.15(2) provision was not previously widely discussed, with the exception of Andrews, where McIntyre J. cited its inclusion as evidence that “identical treatment may frequently produce serious inequality” (MacIvor, 2012, p. 321). The suggestion that s.15(2) could be used to support a determination of discrimination under the first clause without reference to s.1 was also made. This idea was reiterated in *Law* by Iacobucci, which discussed the "ameliorative effect" of contested statutes as a contextual factor in determining discrimination (MacIvor, 2012). The

Lovelace decisions, which have the effect of denying section 15(2) of an independent role in *Charter* jurisprudence, was where section 15(2) truly came into its own. Iacobucci did leave this open to future examination, which happened to be in this case *Kapp* (MacIvor, 2012).

The Court discussed the relationship between sections 15(1) and 15(2) and made clear that one method to fight discrimination is to stop making distinctions that have a negative effect on members of particular groups. This is the goal of section 15(1). Yet, the Court emphasised that governments might also aim to fight discrimination by creating initiatives that aid marginalised groups in become better off. In light of this, section 15(2) preserves the freedom of governments to undertake such initiatives, without fear of challenge under s. 15(1) (Badri, 2010a).

Court Decisions

The case of *R. v. Kapp* went through the lower courts of the Provincial Court of British Columbia, British Columbia Supreme Court, and the British Columbia Court of Appeal. The trial judge agreed that the non-indigenous individuals who got charged did have their s.15(1) rights infringed and stayed the charges (*R. v. Kapp*, 2008). The Provincial Court of British Columbia applied a subjective version of the *Law* test which focused more on the claimants' feelings rather that the fairness of the claimant's treatment (Moreau, 2018). The appeal to the next level of court was the Supreme Court of British Columbia which allowed a summary convictions appeal by the crown and held that the program did not have a discriminatory purpose or effect because it did not perpetuate or promote that the individuals who were not able to fish are less capable or worthy of recognition or value as human beings or members of Canadian society (*R. v.* Kapp, 2008, para 11).

The British Columbia Court of Appeal ended up dismissing the appeal for five different reasons. The first was Low, J.A. Who said that the pilot sales program did not constitute denial of a benefit under s.15 when the matter was viewed in a contextual rather than formalistic way. The second reason was by Mackenzie J.A. who determined that discriminatory purpose or effect had not been established. Next, Kirkpatrick J.A. looked at s.25 of the *Charter* which protects the rights and freedoms pertaining to aboriginal peoples of Canada. This section insulated the scheme from the discrimination charge. Finch C.J.B.C. was the third reason and agreed with reason 1 and 2 and determined s.25 was not engaged. Lastly, Levine J.A. agreed with reason 4 but declined an opinion on s.25.

Supreme Court of Canada Decision

The appeal to the SCC was dismissed. The Supreme Court of Canada Decision was joint by McLachlin CJ. And Abella J. who decided to abandon *Law* and return to *Andrews* because it was the simpler test. McLachlin CJ and Abella J. Found no violation of s.15 and focused the discussion on s.15(2). They did not engage with s.25 and decided to leave it for a different discussion in the future (*R. v. Kapp*, 2008). There was an interesting concurring decision by Bastarache, J. who decided to comment on s.25 saying that it provides a complete answer to the claim and does not need to engage with s.15 (Sharpe & Roach, 2021). Bastarache was in complete agreement with the restatement of the test for s.15 and the reasons for the judgement. The constitutional challenge under s.15 is precluded by s.25 of the *Charter*. Since implementing the safeguards of the *Charter* to individuals would lessen an aboriginal group's unique collective identity and cultural identity, it preserves aboriginal rights and reflects the idea of compromise and negotiation used in the negotiating of treaties. When addressing the demands of substantive equality for Aboriginal people, there is ample room for the government to prove that the *Charter*

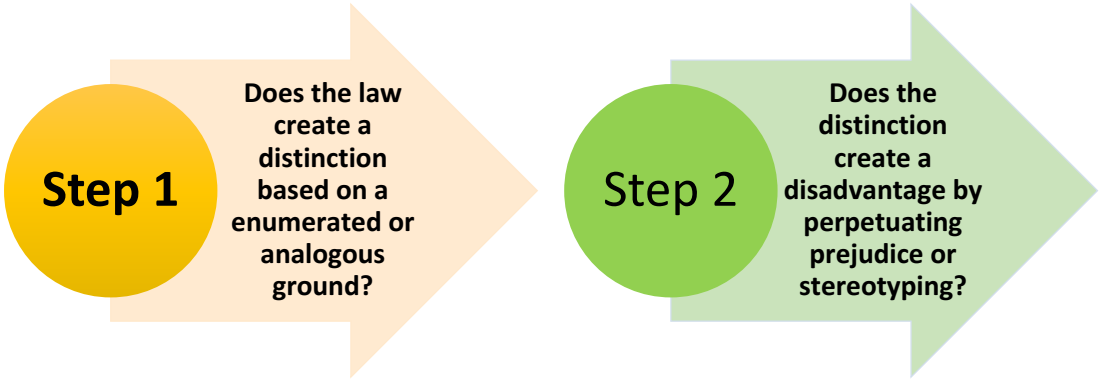
principles should not be overdone (Sharpe & Roach, 2021). Lastly it was acknowledged through contextual factors that the appellants were not denied any benefit of the law, they still had opportunities to fish and catch salmon, the dignity of the appellants is not diminished. They have not had the same historical disadvantage that the indigenous fishers have had (*R. v. Kapp*, 2008).

The *Kapp* Test

The test that was created wanted to move back to *Andrews* which has a simpler formulation and incorporated the *Law* test's idea that Section 15(1) infringements necessarily involve prejudice and/or discrimination and/or stereotypes. Below in figure 3 is the test that is used.

Figure 3.

Visual depiction of the Kapp test which goes back to the roots of Andrews.



Note. A figure from King (2022b) to visualize the *Kapp test*. Reproduced with permission.

Future Implications

The *Kapp* test upon initial thought is not over-complicated and more focused on substantive equality than the *Law* test was (Sharpe & Roach, 2021). S.15(1) and s.15(2) work together harmoniously to further the vision of substantive equality that was created in *Andrews*. *Kapp* gives s.15(2) independent analytical significance and places the burden of establishing an ameliorative program on the government. While the *Kapp* test does still leave considerable debate and disagreement in its application, it has so far been the longest standing s.15 test. Some issues that have come to light with the *Kapp* test more recently is that it has failed to achieve a broad and open-ended concept of equality that was valued in *Andrews* (Puchta, 2018). *Quebec (Attorney General) v. A* (2013) is a case that caused difficulty in the courts using the *Kapp* test and allowed slight modifications to ensure that there is a comprehensive approach to s.15. In that case, Justice Abella untethered the concept of disadvantage from the concept of prejudice and stereotypes (Puchta, 2018). In another decision *Taypotat* there was additional analysis into s.15 and the way that the test should be applied. Currently the *Kapp* test is in place, but it is important to consider other important decisions like *Quebec (Attorney General) v. A and Taypotat* to make sure that there is a contextual and purposive analysis that is able to accommodate for different understandings of equality (Puchta, 2018).

Discussion

After discussing all of the main changes to the s.15 test over time it is clear that the journey has been long and difficult. Is *Kapp* the end of the line? Probably not but each decision that has been and will be made is a step in the right direction. With the complexities of section 15, it might not be possible to ever narrow down a test that can change and adapt with society. The end goal of s.15 has always been to provide substantive equality to Canada. Unfortunately,

one of the largest problems with the *Kapp* test is that it is only concerned with cases where the disadvantage involves prejudice or stereotyping. This needs to be clarified to address as an issue because courts should avoid adopting a narrow definition of discrimination that only includes disadvantage based on overt prejudice or incorrect stereotyping. (Moreau, 2018). Section 15(1) tests have been criticized for being overly complex and difficult to apply consistently so the question is, do we need to clarify the test and provide more specific guidelines to be more accessible and easier for lawyers, judges, and members of the public to understand? A good section 15 test should encompass a substantive equality approach to address systematic discrimination and the root causes of inequality. The test cannot just address the symptoms of discrimination but must actually address the underlying cause. Additionally, the test needs to ensure a broad range of grounds that can change with society like sexual orientation and gender identity. The s.15 test may also want to consider emphasizing remedies to ensure that individuals who have experienced discrimination receive meaningful redress. Courts should want to identify whether a law or policy is discriminatory and be able to remedy the situation. Furthermore, there is the issue of burden of proof because it is difficult to prove discrimination. The issue should be addressed for an equitable system. Lastly, there should be the ability for a stronger role of public participation when dealing with a s.15(1) case and make sure that the section is applied in a way that reflects the values and priorities of the Canadian public, especially those in a minority population. This idea incorporates reconciliation and allows consultation in the application of the test so that it is accessible, relevant, and effective.

Everyone should know about section 15 of the *Charter* because it supports the rule of law and ensures that everyone is held to the same legal standard so justice can be applied fairly. Canada influences other countries around the world as a leading example of constitutional

protection for equality rights so it is important that they are analyzed and interpreted fairly to set precedent. The equality provision in Canada should be used in a way that is a benefit to society. The section needs to acknowledge and address systematic discrimination to ensure true equality. There should be a promotion of inclusivity and diversity through an intersectional lens and institutions should be held accountable when they do not follow the fundamental right.

It is important for legal tests to be able to adapt to changing social norms and values, and to be able to accommodate evolving societal perspectives on issues related to equality and discrimination. A few possible test questions that should be considered in the section 15(1) test in addition to those already stated in *Kapp* are:

- Is the distinction based on an understanding of human difference that reflects modern day social norms and values, or does it rely on outdated or discriminatory assumptions?
- Is the distinction reasonable and justifiably necessary to achieve a pressing and substantial objective, or are there alternative means that are not discriminatory?
- Is the distinction proportionate to the government's objective, meaning that the benefit to the government's objective is not outweighed by the harm cause to the claimant or to the group of individuals subject to the distinction?

The above questions are just suggestions that emphasize the importance of staying up to date with evolving social norms and values and ensuring that legal tests are based on contemporary understandings of human difference and diversity. These questions also highlight the importance of balancing the government's objectives with the harm caused to individuals who are subject to discrimination while considering alternative measures. These questions could be applied across many evolving social issues like discrimination based on gender identity, sexual orientation, or even social status.

Kapp is a sufficient test for section 15 and might be able to adapt to a living and changing society and even evolve with society, however it seems to be too narrow and too simple. The *Kapp* test may need a little help or guidance with more considerations and methods for determining infringements. Other questions might need to be asked due to the equality provision being one of the most difficult of the *Charter* to understand and apply.

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