

R. v. Kapp: New Directions for Section 15

SOPHIA MOREAU*

R. v. Kapp offers novel interpretations of both section 15(1) and section 15(2) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court explicitly distances itself from the dignity test developed in *Law v. Canada*, invoking instead an approach based on *Andrews v. Law Society of British Columbia*, which asks simply whether the claimant has suffered disadvantage, prejudice and stereotyping. And for the first time, the Supreme Court reads section 15(2) as more than an interpretive aid to section 15(1), allowing that it can insulate certain ameliorative programs from any kind of scrutiny under section 15(1). The author argues that these two new developments can be seen as promising, provided that the Court offers a more expansive interpretation of the idea of "disadvantage" under section 15(1), and provided that it qualifies its highly deferential approach under section 15(2) in certain key ways. The author also criticizes the majority's reticence to engage with section 25 of the *Charter* in this case, arguing that their reticence stems from a mistaken view of the Court's role in cases that raise politically charged issues.

Dans l'arrêt *R. c. Kapp*, la Cour suprême du Canada donne aux paragraphes 15(1) et 15(2) de la *Charte canadienne des droits et libertés* une nouvelle interprétation. Elle s'écarte en effet expressément du critère de l'atteinte à la dignité qu'elle avait élaboré dans l'arrêt *Law c. Canada*, préférant adopter une approche fondée sur l'arrêt *Andrews c. Law Society of British Columbia*. Dans cette dernière décision, on avait jugé suffisant que le demandeur ait subi un désavantage ou un préjugé, ou qu'on lui ait imposé un désavantage fondé sur l'application de stéréotypes. Pour la première fois, la Cour suprême du Canada interprète le paragraphe 15(2) comme ayant un rôle plus important que celui d'une simple disposition interprétative du paragraphe 15(1), en ce qu'il permet de soustraire certains programmes à caractère améliorateur à l'examen prévu au paragraphe 15(1). Selon l'auteur, on peut considérer qu'il s'agit là de développements prometteurs, sous réserve que la Cour fournisse une interprétation relativement large de la notion de « désavantage » visée au paragraphe 15(1) et qu'elle définisse plus précisément son attitude très déférente aux termes du paragraphe 15(2). L'auteur déplore en outre la réticence des juges majoritaires à analyser l'article 25 de la *Charte* dans le cadre de cette affaire, et soutient que cette réticence découle sans doute d'une vision erronée du rôle de la Cour dans les causes qui soulèvent des questions délicates d'un point de vue politique.

* Sophia Reibetanz Moreau (J.D. Toronto; B.Phil. Oxford; Ph.D., Harvard) is Assistant Professor of Law and Philosophy at the University of Toronto. She is a former clerk to the Right Honourable Chief Justice Beverley McLachlin.

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I. INTRODUCTION: THE SIGNIFICANCE OF *R. v. KAPP*

*R. v. Kapp*¹ is perhaps the most significant equality rights decision from the Supreme Court of Canada since the 1999 case of *Law v. Canada*.² It offers novel interpretations of both section 15(1) and section 15(2) of the *Canadian Charter of Rights and Freedoms*.³ Up until now, section 15(2) has been treated largely as an interpretive aid to section 15(1), a reminder that ameliorative programs targeting disadvantaged groups are often expressions of equality rather than departures from it, and hence a reminder that the ameliorative purpose of such programs should be treated as a factor that weighs against a finding of discrimination under section 15(1).⁴ When understood in this way, section 15(2) simply requires courts to treat such programs more deferentially when they engage in a section 15(1) analysis. But the Supreme Court in *Kapp* reads section 15(2) as an independent guarantee of legitimacy, a provision capable of insulating ameliorative programs from challenges under section 15(1). As long as the government can show that one of the purposes of the program is ameliorative, and that the program targets a disadvantaged group marked out by one of the enumerated or analogous grounds of discrimination, then, according to the Court, no section 15(1) analysis will be necessary and the program will be deemed non-discriminatory. This is so even if the program has other purposes, and regardless of its actual effects. *Kapp* thus gives government very broad discretion in designing and maintaining affirmative action programs. *Kapp* also contains an important discussion of section 15(1). Unexpectedly, the Court explicitly rejects what has come to be known as the “*Law* test” for violations of section 15, which asks whether the claimant’s dignity was demeaned. Instead, the Court suggests that we should adopt something closer to the

1. 2008 SCC 41, [2008] 2 S.C.R. 483, 294 D.L.R. (4th) 1 [*Kapp* cited to S.C.R.].

2. [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law* cited to S.C.R.].

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

4. See *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) [*Lovelace* cited to S.C.R.].

old approach under *Andrews v. Law Society of British Columbia*,⁵ asking simply whether the claimant has suffered “discrimination, defined in terms of [acts] perpetuating disadvantage and stereotyping.”⁶

These new interpretations of section 15(1) and section 15(2) are all the more significant given that they have the endorsement of all nine judges on the Supreme Court. Eight judges signed onto the majority judgment, co-authored by Justice Abella and Chief Justice McLachlin, in which the discussions of section 15 take place. The remaining judge, Justice Bastarache, explicitly notes that he is “in complete agreement with the restatement of the test for the application of s. 15 . . . ,”⁷ differing from the majority only in that he would have decided the case based on section 25 of the *Charter*.

In what follows, I shall lay out the facts of the case and the lower court judgments and then present the two Supreme Court judgments in more detail. I shall argue that the new interpretations of section 15(1) and section 15(2) can be seen as largely promising developments—provided that the Court qualifies its remarks in certain key ways in subsequent cases. The Court will need, at a minimum, to reduce the broad discretion that it has given to governments under section 15(2) in cases where the group that objects to an ameliorative program is itself disadvantaged or stigmatized. For the mere fact that a program is ameliorative and targets a group marked out by a recognized ground of discrimination is compatible with the program’s highly discriminatory effects, either on some minority group within the larger disadvantaged group, or on some other disadvantaged group. Consequently, in cases where the claimant is from a disadvantaged group, courts will need to consider at least some of the factors that normally play a role in section 15(1) analysis, such as whether the program stereotypes the claimants, or whether it in some other way objectionably perpetuates their disadvantaged position. With respect to its return to *Andrews* in the interpretation of section 15(1), the Court must clarify how we are to understand the references to “prejudice,” “stereotyping” and “disadvantage.” In particular, the Court must ensure that it does not give an overly restrictive interpretation to these ideas, one which would narrow our understanding of discrimination to cover only those distinctions that are actually motivated by, or have the effect of, perpetuating prejudice or stereotyping. Such a narrow interpretation would blind us to the other ways in which individuals and groups can suffer serious and long-standing disadvantage of a kind that we think of as “discriminatory”—cases, for instance, that do not involve either overt prejudice or false stereotyping, but do involve persistent disadvantage rooted in social oppression, or involve a denial of goods that seem

5. [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews* cited to S.C.R.].

6. *Kapp*, *supra* note 1 at para. 24.

7. *Ibid.* at para. 77.

basic or necessary for full participation in Canadian society. Any approach that blinds us to these other forms of discrimination would be problematic in some of the same ways that the *Law* test was problematic: it would make it harder for courts to recognize and address many cases of genuine discrimination.

The majority's judgment in *Kapp* is also important by virtue of what it does *not* say about one section of the *Charter*, namely, section 25. Section 25 states that the rights and freedoms guaranteed by the *Charter* should not be interpreted so as to derogate from "any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."⁸ In his judgment, Justice Bastarache argues that section 25 provides a complete answer to the case, obviating the need for a section 15 analysis; and he engages in a subtle analysis of the role that section 25 could play as a shield in cases involving a potential conflict between certain Aboriginal rights and a *Charter* right.⁹ By contrast, the majority of the Court declines to make any definitive pronouncement on section 25, claiming that although it is likely that section 25 protects only rights of a constitutional character, prudence suggests that such issues should be resolved on a case-by-case basis.¹⁰ This is a puzzling dismissal, in that it is unclear why a fuller discussion of the implications of section 25 for the particular factual circumstances in *Kapp* would not have contributed to just the sort of case-by-case analysis that the Court has in mind. I shall offer some reflections on why the majority may have declined to discuss section 25, and on the problematic assumptions about the judicial role that seem to underlie their reasoning.

II. FACTUAL AND JUDICIAL HISTORY OF THE CASE

At issue in *Kapp* was a fishing licence issued to the Musqueam, Burrard and Tsawwassen First Nations in British Columbia. The licence granted fishers, designated by these bands, exclusive rights to fish for salmon in the mouth of the Fraser River for a period of 24 hours, and the right to sell their catch. The licence was issued under a pilot sales program that formed part of the federal government's Aboriginal Fisheries Strategy. A number of the commercial fishers who were excluded from the fishery during this 24-hour period participated in a protest fishery. As anticipated, they were charged with fishing during a closed time. At trial, they argued that proceedings should be stayed on the grounds that the licence discriminated against them on the basis of race: it drew a race-based distinction and thereby demeaned their dignity, violating their equality rights under section 15(1). They sought declarations that the licence,

8. *Supra* note 3 at s. 25.

9. *Supra* note 1 at para. 76.

10. *Ibid.* at para. 65.

the related regulations and the federal government's Aboriginal Fisheries Strategy were all unconstitutional.

Justice Kitchen of the Provincial Court of British Columbia accepted the arguments of the fishers from the protest fishery.¹¹ He held that the pilot sales program did demean the dignity of the excluded fishers. At first glance, and given the facts as narrated by the majority judgment from the Supreme Court, this might seem implausible. As the majority notes, most of the fishers who engaged in the protest fishery were non-Aboriginal, and their claim appeared on the surface to be exactly the sort of challenge that section 15 was *not* intended to promote, namely, a challenge to a program protecting a disadvantaged group, brought by members of a relatively privileged group. However, the conclusion of Justice Kitchen seems entirely reasonable if one adopts a largely subjective reading of the *Law* test, as he did. He relied heavily on the testimony of the 14 defence witnesses, and noted that these commercial fishers had a "distinctive lifestyle" with "real community" and that they felt that the pilot sales program created a group of "chosen ones" based on a bloodline connection, which they found deeply offensive and demeaning.¹² Although Justice Kitchen recognized that the defence's evidence "may not be based in fact," he felt that "what is more important is the perception."¹³ In other words, whether the fishers' dignity had been demeaned in the sense necessary for a section 15(1) violation depended, in his view, on how the fishers subjectively felt. Justice Kitchen held, in conclusion, that the program was not saved by section 1,¹⁴ largely because no attempt had been made by the government to assess the economic benefits of the licence or the needs of the band and properly calibrate them to each other.¹⁵

In applying a subjective version of the *Law* test, the judgment of Justice Kitchen exemplifies some of the problems inherent in this test, and hence, inadvertently, his decision supports the Supreme Court's ultimate abandonment of this test in their judgment in *Kapp*. The *Law* decision had explicitly stipulated that the test of whether governmental action violated a claimant's dignity was to be applied in an objective fashion as an inquiry into what a reasonable person in the position of the claimant would feel. But in spite of this fact, the test was still presented as a test about *feelings* and this is how it has been interpreted and applied by most lower courts. That is, it has been treated as a test of how the claimant should feel. This has focused our attention in the wrong place, on the claimant's feelings instead of on the fairness of the claimant's *treatment*.

11. *R v. Kapp*, 2003 BCPC 279, [2003] 4 C.N.L.R. 238.

12. *Ibid.* at paras. 161–63.

13. *Ibid.* at para. 168.

14. *Ibid.* at para. 218.

15. *Ibid.* at para. 199.

Upon a summary convictions appeal by the Crown, Chief Justice Brenner of the Supreme Court of British Columbia allowed the appeal and entered convictions against the protest fishers.¹⁶ He held that Justice Kitchen had erroneously accorded more weight to the perceptions of the witnesses than to the objective reality of their situation, and that, when the *Law* test was properly applied in an objective fashion, the claims of the fishers could not succeed. He canvassed each of the four contextual factors identified by Justice Iacobucci in the *Law* decision as relevant to whether a claimant's dignity has been infringed, and argued that each of them weighed against a finding of discrimination.¹⁷ The claimants had themselves suffered no pre-existing disadvantage; on the contrary, it was the bands who were disadvantaged.¹⁸ There was, in his view, a strong correspondence between the pilot sales program and the needs of the bands, in the sense that at least part of its purpose was to facilitate a commercial component to the Aboriginal fishery, in keeping with negotiations between the bands and the government, and with the overall aims of the Aboriginal Fisheries Strategy.¹⁹ The program was in part ameliorative, since it was partly aimed at providing economic opportunities for disadvantaged bands.²⁰ The scope of the interest affected on the part of the excluded fishers was minimal since any reduction in the profitability of their fishing was likely reduced by the licence retirement program introduced by the federal government specifically to offset any impact of the pilot sales fisheries.²¹

A further issue raised before Chief Justice Brenner was whether section 25 of the *Charter* operated to preclude a section 15(1) review in this case. Interveners from several First Nations argued that it did, on the grounds that section 25 is triggered whenever a *Charter* remedy is sought that might threaten a right of the Aboriginal peoples, and functions to shield this Aboriginal right from *Charter* scrutiny.²² Chief Justice Brenner rejected this view, holding that because the communal fishing license was held by the bands for such a brief time, and only at the absolute discretion of the government, it was not the kind of Aboriginal right that section 25 was intended to protect.²³ Hence, in his view, the case was appropriately dealt with under section 15(1), not under section 25.

16. *R. v. Kapp*, 2004 BCSC 958, [2004] 31 B.C.L.R. (4th) 258, 3 C.N.L.R. 269.

17. *Ibid.* at para. 76.

18. *Ibid.* at paras. 77–83.

19. *Ibid.* at paras. 84–96.

20. *Ibid.* at paras. 97–102.

21. *Ibid.* at para. 104.

22. *Ibid.* at paras. 25–27.

23. *Ibid.* at para. 37.

The fishers then appealed to the British Columbia Court of Appeal. The Court of Appeal dismissed the appeal in five sets of reasons concurring with the result but differing in approach.²⁴ Justice Low held that the section 15 challenge must fail because the fishers had not been denied any legal benefit, much less denied one in a discriminatory way: when assessing whether they had been denied a benefit by law, the court ought to look not at the fact that they had no access to salmon in a particular area for a particular 24-hour period, but at the many benefits that the fisheries management scheme did give to them.²⁵ If one adopted this contextual approach, he held, one would see that in fact there was no real denial of a benefit. He then declined to consider section 25 on the grounds that it would have been necessary to do so only if the claimant had made out a *prima facie* case of a *Charter* violation.²⁶ Justice Mackenzie also held that the section 15 challenge must fail, but suggested instead that this was because there was no objective denial of the excluded fishers' dignity.²⁷ He endorsed the arguments of Chief Justice Brenner from the court below, both in support of this conclusion and in support of the view that the Aboriginal rights in this case were not of the kind that were intended to receive constitutional protection under section 25. Chief Justice Finch concurred with both Justices Mackenzie and Low on the question of section 15, and likewise held that section 25 was not engaged.²⁸ Justice Levine concurred with the others on section 15, but declined to discuss section 25 on the grounds that the section 25 arguments had simply been brought by interveners and the Court was obliged to give primary consideration to the arguments of the parties.²⁹

The one judge who did consider section 25 to be engaged and held that it offered a complete answer to the case was Justice Kirkpatrick. In her view, the fishing licence was indeed an Aboriginal right of the kind that could receive protection under section 25.³⁰ She noted that it is the content of a particular Aboriginal right, and not the manner in which a right is held or the duration for which it lasts, that determines whether it is deserving of protection under section 25.³¹ In her view, this section protects any right that relates to a significant aspect of Aboriginal life, culture or heritage; and it operates to insulate that right from *Charter* scrutiny in cases of potential conflict.³²

24. *R. v. Kapp*, 2006 BCCA 277, [2006] 271 D.L.R. (4th) 70, 56 B.C.L.R. (4th) 11.

25. *Ibid.* at paras. 80–82.

26. *Ibid.* at paras. 85–90.

27. *Ibid.* at paras. 107–109.

28. *Ibid.* at paras. 154–158.

29. *Ibid.* at paras. 159–162.

30. *Ibid.* at para. 148.

31. *Ibid.* at para. 138.

32. *Ibid.*

III. THE SUPREME COURT'S JUDGMENTS

The majority judgment (co-authored, as mentioned above, by Chief Justice McLachlin and Justice Abella) begins with an attempt to place section 15(2) in the context of what the Court considers to be the purpose of section 15 as a whole.³³ The majority notes that the two sections of section 15 work in complementary ways: section 15(1) is aimed at preventing distinctions that impact adversely on members of groups marked out by recognized grounds of discrimination, while section 15(2) works to enable governments to combat discrimination by developing programs for the purpose of improving the situation of disadvantaged groups.³⁴ They then discuss each section in detail, beginning with their revisionary discussion of section 15(1).

In presenting section 15(1), the majority returns to the understanding of discrimination set out in its first equality rights case, *Andrews*.³⁵ They argue that section 15(1) should be understood "through the lens of two concepts," namely, "the perpetuation of prejudice or disadvantage to members of a group" on the basis of the grounds of discrimination, and "stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's actual circumstances and characteristics."³⁶ This characterization actually seems to involve *three* concepts, not two: prejudice, stereotyping, and disadvantage. It is not entirely clear from the majority's remarks what role each of these ideas is supposed to have in our understanding of discrimination or our application of section 15(1). Are we only to be concerned with cases where the disadvantage *involves* prejudice or stereotyping? Or are there other ways of being disadvantaged that do not now involve overt prejudice or inaccurate stereotyping, but nevertheless seem to be discriminatory? The Court goes on to speak of "discrimination, defined in terms of perpetuating disadvantage and stereotyping."³⁷ Here, prejudice seems to have disappeared altogether from the formulation, and disadvantage is allowed to stand on its own as an indicator of discrimination in certain cases.

Clearly, this formulation needs to be made more precise in future cases. And one can envision at least three directions in which the Supreme Court might take this reading of section 15. First, the Court might adopt a quite restrictive understanding of discrimination as involving only those instances of disadvantage that stem from, or

33. *Supra* note 1.

34. *Ibid.* at para. 16.

35. *Ibid.* at para. 18.

36. *Ibid.*

37. *Ibid.* at para. 24.

in turn perpetuate, false stereotyping or overt prejudice. Such a narrow interpretation of discrimination is not unprecedented by the Court—indeed, it underlies some of the Court's most recent judgments, such as *Gosselin v. Quebec (A.G.)*, in which the Court denied that the treatment of the claimant amounted to discrimination largely because it had not, in their view, involved any stereotyping.³⁸ Moreover, in two decisions released shortly after *R. v. Kapp—Ermineskin Indian Band and Nation v. Canada* and *A.C. v. Manitoba*—the Supreme Court simply dropped all reference to disadvantage as an independent element, focusing only on prejudice and stereotyping and the burdens that result from them.³⁹ Such a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against. This would include cases, for instance, that do not involve either overt prejudice or false stereotyping, but do involve oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society.⁴⁰

If we are to leave open the possibility of recognizing such other instances of discrimination, we must be careful to treat the three ideas in *Andrews*, “disadvantage,” “prejudice” and “stereotyping,” as related but *distinct* ideas, rather than collapsing disadvantage into prejudice and stereotyping. This is the second approach that the Supreme Court might take. It might argue that some kinds of disadvantage amount to discrimination even if they do not involve prejudice or stereotyping. As such, rather than adopting a simple test or a single criterion of when this is so, the Court could instead leave it to a detailed, contextual analysis. Thus, this second, broader interpretive approach to the ideas in *Andrews* could be combined with a third approach—namely, a highly contextual approach which aims not to set out a single definition of the kind of disadvantage that amounts to discrimination, but simply to treat the assessment of when discrimination occurs as a contextual one that depends on the facts of each case. This is an approach that has been taken by the South African Constitutional Court in its interpretation of equality rights provisions that are very similar to ours (in part, because they were influenced by them). As Dwight Newman has argued, it might behoove the Supreme Court to examine and invoke some of the relevant South African equality jurisprudence as it moves ahead with its new understanding of section 15.⁴¹

38. 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257 [*Gosselin* cited to S.C.R.].

39. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, 302 D.L.R. (4th) 577, [2009] 2 C.N.L.R. 102; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] W.D.F.L. 2957.

40. I discuss such cases in more detail in my article on s.15, “The Wrongs of Unequal Treatment” (2004) 54:3 U.T.L.J. 291 [Moreau, “The Wrongs of Unequal Treatment”].

41. Dwight Newman, “I Stumbled When I Saw: Two Tragic Scenes in the Supreme Court of Canada’s Newly Revised Equality Rights Jurisprudence” (Lecture delivered to the Wits School of Law, University of the Witwatersrand, Johannesburg, 2008) [unpublished].

After presenting the new approach to section 15, rooted in *Andrews*, the majority notes that we can make sense of the four “contextual factors” identified in the earlier *Law* test as really relating to whether disadvantage, prejudice and stereotyping are present.⁴² In other words, these contextual factors (pre-existing disadvantage, correspondence with the claimant’s actual characteristics, ameliorative purpose, and the nature and significance of the claimant’s affected interest) should now be understood as relevant to the *Andrews* question of whether the claimant has suffered the right sort of disadvantage, prejudice or stereotyping, rather than to the *Law* question of whether the claimant’s dignity has been demeaned.

Curiously, in spite of rejecting the *Law* test, the majority nowhere explicitly acknowledges that it had endorsed this test. The majority speaks of the *Law* test as though it were a misreading of what the *Law* case actually said, rather than a formulation that the Court itself, and moreover, some of these very judges, had proposed. This is a disappointing feature of its judgment. It does not make the Court seem infallible to pretend that this reading of *Law* was not its own; it just makes it seem somewhat dishonest.

A further feature of the majority’s rejection of the *Law* test that is disappointing—though more deeply significant in what it says about the Court’s view of its own role—is its failure to engage with any of the academic criticisms of the test. The majority is commendably aware of the relevant academic writing: it does mention that it exists, and it footnotes it. But it does not engage with it. Instead, the majority mentions the practical difficulties that have arisen in applying the test: it is confusing and abstract; it imposes an increased burden on claimants to prove that their dignity has been infringed; and it has led courts to revert to a formalistic analysis of equality. The overall impression that this gives is that the Court regards the academic criticism as yet another practical difficulty with the *Law* test that it must surmount, rather than as part of a theoretical dialogue between academics, lawyers and the courts about how the law should be interpreted. This, in turn, suggests that the Court sees its role as that of interpreting rights in the manner that gives rise to the least practical difficulty and the least political tension. This picture of the Court’s role may also help explain the majority’s reticence to engage with section 25 in this case; I shall say more about it below.

Interestingly, the majority’s discussion of section 15(1) is *obiter dicta*: given their position that the fishing licence is protected by section 15(2) and that programs protected by section 15(2) do not need to be scrutinized under section 15(1), no discussion of section 15(1) is actually required in order to resolve the case at bar. However,

42. *Supra* note 1 at para. 23.

it may be that part of what motivated the majority to revise its approach to section 15(1) in this case was the need to ensure consistency between the very broad approach that they wished to take to section 15(2), granting governments wide discretion in implementing affirmative action policies, and the apparently narrower approach that the dignity-based *Law* test forced courts to take to section 15(1). It would be a great burden on governments to have to prove that, in order to be protected under section 15(2), their ameliorative programs actually had to be aimed at groups whose dignity had been denied. But if this qualification were not a part of section 15(2), then this section would seem to invoke a much broader understanding of what qualifies as discrimination than would its counterpart, section 15(1). Hence, the majority had a strong reason to revisit the *Law* test, quite apart from the further reasons provided by the practical difficulties that the Court notes have been caused by that test. This strong reason seems to have been provided by the need to give a broad discretion to governments under section 15(2).

As I noted earlier, the majority's analysis of section 15(2) constitutes the first attempt by the Supreme Court to give this section more than an ancillary, interpretive role. The majority begins its discussion of section 15(2) by noting that the interpretive aid approach which the Supreme Court had adopted towards section 15(2) in *Lovelace* is consistent with the independent role which this section also plays. The majority argues that the purpose of section 15 as a whole—which it had earlier identified as both preventing discrimination and enabling governments to combat it proactively—would best be furthered by allowing section 15(2) an additional, independent role. This role, they suggest, is that of shielding governmental programs from scrutiny under section 15(1), provided these programs meet two criteria. First, the program must have “an ameliorative or remedial purpose,” and second, it must target “a disadvantaged group identified by the enumerated or analogous grounds.”⁴³

The majority provides a number of important glosses on this new analysis of section 15(2). They note that a program cannot qualify as having an “ameliorative” purpose if its object is to restrict or punish behaviour: in other words, governments cannot try to rationalize punitive or harsh measures under section 15(2) by stating that they are really for the good of the individuals involved. The majority also states quite explicitly that the new test requires only that the governmental program have an ameliorative purpose as *one* of its purposes, not that this be the sole or even the most important purpose of the program. Indeed, they have to allow this if the fishing licence at issue in *Kapp* is to qualify for protection under section 15(2); for much of the evi-

43. *Ibid.* at para. 41.

dence before the trial judge in *Kapp* suggested that ameliorating the conditions of the Aboriginal bands was not the primary purpose of the communal fishing licence. Its main purpose was to manage the fishery, and it was only an ancillary purpose of the scheme to improve the economic situation of the bands. The majority also points out that, in assessing the purposes of a given law, courts are not obliged to take the government's assertions at face value. The majority seems thus to be trying to give governments a wide latitude in the creation of ameliorative programs, but yet to be reserving for courts, quite rightly, the role of scrutinizing the government's statements about its purposes.

However, some might argue that the majority ought to have adopted an effects-based approach here. Why allow a program to escape section 15 scrutiny just because one of its purposes is ameliorative, when it may turn out in its effects to impose disadvantage upon other groups, or minorities within the group that it targets, that is of a particularly stigmatizing or problematic kind? The majority anticipates this criticism and responds that the purpose-based approach best enables governments to "pro-actively combat discrimination."⁴⁴ But it is not clear that this is so. It is true that a purpose-based approach best leaves governments alone to do whatever they wish in order to combat discrimination because it makes it more difficult for courts to interfere with any program that has amelioration of disadvantaged groups as one of its alleged goals. But it is not clear that this approach best helps governments to combat discrimination. If a well-intentioned program nevertheless has discriminatory effects, then interference from a court which required the government to redesign the program would seem to *help* the government achieve its goal of combating discrimination, rather than to hinder it.

While it is encouraging to see the Court attempting to support measures of affirmative action, the test that they have proposed seems incomplete in a serious way—a way that is related to the difficulty that I noted above: with the exclusive focus on the government's purpose, rather than on the program's actual effects. The test seems to give disadvantaged groups no recourse in cases where a program has an ameliorative purpose but is under-inclusive, or where the program indirectly works to stigmatize or disadvantage some other disadvantaged group.⁴⁵ According to the majority, as long as the governmental program has an ameliorative purpose and targets a disadvantaged group marked out by the enumerated or analogous grounds, this is sufficient to obviate the need for section 15(1) analysis, and no additional scrutiny of the program is required. There is then no stage of the test that asks whether the program

44. *Ibid.* at para. 48.

45. For an eloquent statement of this problem see "Kapp Primer," LEAF: Women's Legal Education and Action Fund, online: LEAF <<http://www.leaf.ca/media/articles/Kapp.pdf>>.

is appropriately inclusive, or whether it has deleterious effects on vulnerable members of the targeted group or of other disadvantaged groups. This may prove to be a significant problem with the test. As I have argued elsewhere, the mere fact that a program is ameliorative is compatible with its having significant discriminatory effects, either on some other disadvantaged group, or on the most vulnerable members of the group that the program is designed to protect.⁴⁶ The proposed test for programs under section 15(2) leaves such groups with no recourse.

The majority explicitly leaves open the possibility of revising the test for section 15(2), noting that “we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants’ particular circumstances.”⁴⁷ It may be that the majority simply did not have in mind the particular circumstances of disadvantaged claimants when it formulated the new section 15(2) test because the claimants in *Kapp* were from a privileged group; and the majority is clearly right that in such cases, the correct response is that privileged groups cannot legitimately avail themselves of section 15 in order to take benefits away from stigmatized, disadvantaged groups. But it seems clear that in future cases that involve disadvantaged claimants, the test will have to be modified to allow for at least some scrutiny of the government program. The Court might suggest that a regular section 15(1) analysis will, after all, be necessary in such cases. Or the Court might adopt some lesser form of scrutiny, which might simply involve trying to balance the government’s response to the group targeted by the program against the deleterious effects of the program on the disadvantaged claimants. But some further consideration of the effects of the program upon such disadvantaged claimants will be necessary, if the Court is not to turn section 15(2) into a provision that inappropriately shields discriminatory action from judicial scrutiny.⁴⁸

After finding that the fishing licence did satisfy the two prongs of the new section 15(2) test, the majority notes that this analysis renders unnecessary any consideration of whether section 25 of the *Charter* applies in this case.⁴⁹ One might think that this case would nevertheless provide a helpful opportunity to clarify some of the scope of section 25 (in much the same way that the Court used the case to clarify the new test for section 15(1) even though that discussion, too, was not strictly necessary). Moreover, one might expect, at a minimum, some response from the majority to the contention of Justice Bastarache that section 25 should be treated as a threshold issue,

46. See Moreau, “The Wrongs of Unequal Treatment,” *supra* note 16. See Sophia Moreau, “The Promise of *Law v. Canada*” (2007) 57 U.T.L.J. 415.

47. *Supra* note 1 at para. 41.

48. I am indebted to Jillian Boyd, and to the participants of the L.E.A.F. Roundtable on *R. v. Kapp* held in Toronto (13 September 2008), for discussion of these points.

49. *Supra* note 1 at para. 62.

to be dealt with before the Court has an opportunity to make a final determination of whether section 15 has been violated.⁵⁰ But the majority declined to make any comments on section 25, other than to suggest that it is “likely” that only rights of a constitutional character can be protected by section 25.⁵¹

This approach stands in stark contrast to that of Justice Bastarache, who, though explicitly endorsing the majority’s analyses of section 15(1) and section 15(2), argues that the case can be decided using section 25 alone.⁵² Indeed, he uses the case to open up the possibility of giving “broad and generous application” to Aboriginal rights through section 25.⁵³ Following numerous academic commentators and a number of recent judicial decisions, he suggested that section 25 should be seen as a “shield” which protects certain Aboriginal rights from being adversely affected by the *Charter*, with the goal of ultimately protecting the distinctive position of Aboriginal peoples in Canada.⁵⁴ The Aboriginal rights that section 25 protects, he suggests, are those associated with Aboriginal culture, territory, sovereignty, or the treaty process—in other words, those that seek to protect interests particular to Aboriginal peoples in virtue of their status as Aboriginal peoples.⁵⁵ Hence, they can include governmental programs such as the pilot sales scheme at issue in *Kapp*. Justice Bastarache is careful to note that the general characterization of which rights can receive protection under section 25 is just a guide, and that whether a given governmental program which benefits Aboriginal peoples is of the right sort to receive section 25 protection will depend on a careful contextual analysis. Hence, he attempts to give real force to section 25 while at the same time recognizing that the section 25 jurisprudence must be developed slowly, in an incremental way. On the question of when in the *Charter* analysis section 25 is triggered, Justice Bastarache holds that it is most reasonable to treat section 25 as a threshold issue, which can be invoked whenever there is a *prima facie* case of a *Charter* violation so as to obviate the need for further *Charter* analysis. In other words, it is not necessary to demonstrate an actual *Charter* violation; nor should section 25 be considered as a factor *within* the framework of section 15(1) or section 1 because the kinds of rights it protects cannot be balanced against *Charter* rights. Rather, these rights serve to trump *Charter* rights in cases of potential conflict.

50. *Ibid.* at para. 108.

51. *Ibid.* at para. 63. For helpful criticisms of this position on s. 25, see Dianne Pothier, “Kapp gives affirmative action programs wide margins” *The Lawyers Weekly* 28:19 (19 September 2008).

52. *Ibid.* at para. 76.

53. *Ibid.* at para. 110.

54. *Ibid.* at para. 96.

55. *Ibid.* at para. 103.

When placed beside Justice Bastarache's broad and generous interpretation of section 25, the majority's restrictive suggestion that it pertains only to constitutionalized rights, and their refusal to go into any further details on the nature or scope of section 25, seems quite startling. In a curious but perhaps telling turn of phrase, the majority notes that "prudence suggests" that the scope of section 25 not be discussed in this case, because it raises "complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians."⁵⁶ But precisely because these are questions of the utmost importance for our understanding of Aboriginal rights, it is surely incumbent upon the Court to engage with them: for the Supreme Court is the guarantor and protector of minority rights. The majority's reference to "prudence" suggests that somehow, because the application of section 25 raises difficult and politically charged issues, it is inappropriate for the Court to pronounce on it. But as Justice Bastarache explicitly notes, "it is unreasonable to suggest that a law should not be applied by this Court because it is too difficult."⁵⁷ One might add that it is unreasonable to suggest that a law should not be applied by the Court simply because doing so would amount to taking a stance on a politically controversial matter. It is the job of courts, particularly the highest appellate court of the country, to engage with difficult, politically charged questions when this is necessary in order to protect the rights of minorities. It is not the job of courts to be prudent. Indeed, the majority's relative silence on the question of section 25 is no less a political statement than it would have been for them to make an explicit pronouncement on these issues; for their silence effectively amounts to a decision not to encourage lower courts to give Aboriginal peoples the full use of this section of the Constitution.

I have tried to show that the majority's analyses of section 15(1) and section 15(2) can be promising if they are interpreted broadly and modified in certain ways. But the majority's reticence to engage with section 25, and their appeal to prudence instead of to their role as protectors of minority rights, is worrying. We must hope that, in the future, they acknowledge that judges must make controversial political judgments in order to safeguard the rights of disadvantaged groups. As Ronald Dworkin has argued:

We have no guarantee that the political principles that our judges deploy will be the right or best ones, or that they will articulate those principles consistently or coherently. . . . But the code of their craft promises, at least, that they will try.⁵⁸

56. *Ibid.* at para. 65.

57. *Ibid.* at para. 100.

58. Ronald Dworkin, "The Judge's New Role: Should Personal Convictions Count?" (2003) 1:1: J. Int'l Crim. Just. 4 at 11.

