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ARTICLE

SOMETIMES HELP HURTS: IMAGINING A NEW APPROACH TO SECTION 15(2)

By Joseph Marcus*

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> *One point is critical. Substantive equality is not necessarily served by legislators taking differences into account in designing their policies. The important question is this: which differences should they take into account?*
>
> *— Donna Greschner*[1]

INTRODUCTION

Broadly put, section 15(1) of the *Canadian Charter of Rights of Freedoms* tells Canadian governments to treat everyone equally.[2] Section 15(2), however, provides a crucial qualification, allowing governments to assist certain disadvantaged groups "without being paralyzed by the necessity to assist all."[3] While the Supreme Court of Canada's longstanding interpretation of these two provisions as operating in unison to promote substantive equality enjoys widespread acceptance, the same level of accord cannot currently be affixed to the precise role that section 15(2) should play within the section 15 analysis as a whole. It is, as such, the aim of this paper to engage in this debate, to explore the Supreme Court's current equality test with a critical eye, and ultimately to propose—or at least to imagine—a more appropriate approach.

Naturally, this paper finds its genesis in the case of *Alberta v Cunningham*, the Supreme Court's recent articulation of its preferred approach to section 15(2). On 21 July 2011, Chief Justice McLachlin, writing for a unanimous bench, rejected a section 15(1) claim brought forth by a group of equality-seeking claimants from Alberta's Peavine Métis Settlement.[4] One day later, Denise Réaume published a pointed blog entry declaring that Chief Justice McLachlin's excessively deferential section 15(2) methodology could essentially give governments a free pass, opening up a "loophole" so gaping that their

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* Joseph Marcus is currently pursuing his JD at Osgoode Hall Law School. He will be articling with Bennett Jones LLP in 2013-14. He would like to thank Professor Bruce Ryder and *Appeal*'s editorial board.

1 Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's LJ 299 at 304.

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

3 *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 49, 2 SCR 670 [*Cunningham*].

4 *Ibid*.

"lawyers could drive a Mack truck through."[5] Just as the authoritative words of Chief Justice McLachlin provide the genesis for this paper, it is the unrepentant sentiments of Denise Réaume that supply the inspiration.

Réaume's basic concern was that the Supreme Court's new affirmative action approach would effectively enable governments, simply by claiming that a program is genuinely aimed at ameliorating the circumstances of a certain disadvantaged group, to "exclude other similarly disadvantaged groups with impunity."[6] It should be made clear that the force and precision with which Réaume articulated this concern were not generated entirely in the single day between the judgment's release and her blog entry's publication; the *Cunningham* decision merely added fuel by way of confirmation, lending authoritative support to the Supreme Court's ruling in *R v Kapp* three years earlier.[7] Though *Kapp* is widely heralded as rectifying the judicial test for section 15(1) claims, it is also recognized for providing section 15(2) with independent analytical force. It is with section 15(2)'s newfound power to cut short the full trajectory of a section 15 analysis that both Réaume and this paper take issue.

It may draw on Réaume's rather inflammatory notion of a truck-sized loophole (read: exemption), but this paper has no intention of mimicking her arguments. Indeed, a fundamental purpose of this paper is to critically assess the true breadth of this supposed loophole; to the extent that it does appear truck-sized, this paper hopes to narrow it and to contribute to the search for a more balanced methodology.

The discussion proceeds in three parts. Part I provides the necessary background, concentrating on the meaning of "substantive equality" as it has been developed in Canada's *Charter*-era equality jurisprudence. Building on Part I's jurisprudential considerations, Part II zeroes in on the current incarnation of the test, as was formed in *Kapp* and reaffirmed in *Cunningham*. It traces the rationale laid out by Chief Justice McLachlin in her two sets of reasons, keeping a critical eye focused on her decision to opt for a distinctly deferential methodology. Compelled by the conceivable dangers of treating underinclusive ameliorative programs with such supreme deference, Part III constructs a more nuanced test, one that at least tries to strike a balance between deference and scrutiny, thereby encouraging governments to create and implement ameliorative programs that do not violate the *Charter*'s equality guarantee through discriminatory underinclusion.

I. SUBSTANTIVE EQUALITY AND THE COURT'S PATH TO *KAPP*

Rarely does the Supreme Court of Canada miss an opportunity to reiterate that "[s]ections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole."[8] It follows that any analysis of section 15 as a whole will necessarily be grounded in its particular vision of substantive equality; similarly, the aptness of an equality test will necessarily be measured by its alignment with the vision of substantive equality to which it subscribes. To provide the proverbial stick, then, against which the efficacy of a section 15 test can be properly measured, this section's aim is to review the conception of substantive equality that has been developed in Canada's *Charter* jurisprudence over the past few decades.

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5 Denise Réaume, "Equality Kapped: Alberta v. Cunningham" *The Women's Court of Canada* (22 July 2011) online: <http://womenscourt.ca/2011/07/equality-kapped-alberta-v-cunningham/>.

6 *Réaume, supra* note 5.

7 *R v Kapp*, 2008 SCC 41, 2 SCR 483 [*Kapp*].

8 See e.g. *ibid* at para 16.

Since its enactment in 1960, the *Canadian Bill of Rights* has preserved "the right of the individual to equality before the law and the protection of the law."[9] By the 1980s, as pre-*Charter* consultations were being conducted, it had long been clear—to equality advocates, at least—that these protections were inadequate and unacceptably formalistic. Accordingly, advocacy groups called for the inclusion in the *Charter* of a much broader equality guarantee that would ensure "not just equal treatment before the law but equal protection and equal benefit of the law as well."[10] These calls were heard, it appears, as the final language of section 15 marked an apparent shift towards a more substantive brand of equality. The provision came into force in the spring of 1985, but it was not until 1989 that the Supreme Court had a chance to weigh in.

The justices in *Andrews v Law Society (British Columbia)* may have differed with respect to section 1, but all were in agreement when it came to ridding equality jurisprudence of the "similarly situated should be similarly treated" approach.[11] Though Justice McIntyre did not actually use the phrase "substantive equality," he did characterize true equality as a "comparative concept" and recognize that "identical treatment may frequently produce serious inequality."[12] Implicit in Justice McIntyre's unanimously supported characterization of the law surrounding section 15(1)[13] was a fear of formal equality's power to spawn a "veneer of consensus" capable of neutralizing underlying inequalities and steepening the path to proof for victims of discrimination.[14] Of course, the contribution of *Andrews* to future discrimination analyses was not limited to its principled rejection of formal equality: Justice McIntyre's reasons also stressed the need to consider both the purpose of an impugned law and its effects. In considering "the ideal of full equality before and under the law," Justice McIntyre wrote, "the main consideration must be the *impact* of the law on the individual or the group concerned."[15] The pursuit of substantive equality for Justice McIntyre thus demanded a purposive view of section 15(1)'s "without discrimination" component that would embrace a law's true impact. He explained that

> [d]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the *effect* of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[16]

It appears, therefore, that Justice McIntyre used an effect-based conception of discrimination to help develop and articulate his vision of "true" or "full" equality.[17]

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9 *Canadian Bill of Rights*, SC 1960, c 44 s 1(b).

10 Fay Faraday, Margaret Denike & M Kate Stephenson, "In Pursuit of Substantive Equality" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 12 [*Making Equality Rights Real*].

11 See generally *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, BCLR (2d) 273 [*Andrews*].

12 *Ibid* at para 8.

13 Though Justice McIntyre dissented in result (with Justice Lamer concurring), his views on "the law regarding the meaning of s. 15(1)" were embraced unanimously. See *ibid* at paras 47, 71.

14 Andrew Petter & Allan C Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) 23 UBC L Rev 531, cited in Diana Majury, "The *Charter,* Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall LJ 297 at 301.

15 *Andrews*, *supra* note 11 at para 8 [emphasis added].

16 *Ibid* at para 19 [emphasis added].

17 *Ibid* at paras 8, 13. For a more robust exploration of the conceptual interaction between discrimination and substantive equality, see Beverley Baines, "Equality, Comparison, Discrimination, Status" in *Making Equality Rights Real*, *supra* note 10 at 73; and J Donald C Galloway, "Three Models of (In)Equality" (1993) 38 McGill LJ 64.

And so, it seemed as though the Supreme Court of Canada had subscribed unanimously to a vision of substantive equality that was focused on impact. Unanimity was short lived, however, as the Court soon splintered three ways in a trilogy of section 15 decisions delivered in 1995.[18] In the first camp sat Chief Justice Lamer, along with Justices Gonthier, Major, and La Forest, arguing that a distinction only amounts to discrimination when it is based on an "irrelevant" personal characteristic.[19] Justices McLachlin, Sopinka, Cory, and Iacobucci, making up the second camp, defended the approach taken in *Andrews* and rejected the introduction of an irrelevancy requirement. The ultimate question, a dissenting Justice Cory noted in *Egan v Canada*, "as to whether or not there is discrimination should be addressed from the perspective of the person claiming a *Charter* violation."[20] Justice L'Heureux-Dubé, unaccompanied in the third and final camp, took this claimant-oriented approach to another level. For a section 15 analysis to accurately identify and address discrimination in all of its varied contexts and forms, she wrote, "it is preferable to focus on *impact* (i.e., discriminatory effect) rather than on *constituent elements* (i.e., the grounds of the distinction)."[21] Justice L'Heureux-Dubé may have been alone in her attempt to look beyond enumerated and analogous grounds entirely, but her focus on those adversely affected by discrimination was a theme common to all camps.

Even at the Supreme Court's most divided point, then, attention to impact remained constant. It is thus unsurprising that when the Supreme Court re-achieved harmony in *Law v Canada*, the human dignity of the claimant was a central aspect of its new section 15 methodology.[22] Viewed this way, it seems somewhat ironic that human dignity came to represent an additional burden on equality-seekers. It was seen not only as a burdensome element but as an imprecise element informed by four similarly imprecise "contextual factors." After considering whether the impugned law (1) imposed differential treatment based on a prohibited ground, Justice Iacobucci's *Law* test asked (2) whether the impugned law had "a purpose or effect that is discriminatory."[23] It was at this all-important second stage that Justice Iacobucci's four contextual factors were supposed to aid in determining whether or not the distinction constituted discrimination within the meaning of section 15(1). These factors are:

1. Pre-existing disadvantage;
2. Relationship between grounds and claimant's characteristics or circumstances;
3. Ameliorative purpose or effects; and
4. Nature of the interest affected.

Although factor number three stands out in the context of this paper's section 15(2) discussion,[24] each factor offers a certain insight into the Court's developing conception of discrimination.

In explaining the first contextual factor, Justice Iacobucci noted that a basic purpose of section 15(1) was to protect Canada's vulnerable and disadvantaged; as such, "[t]he effects

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18 *Egan v Canada*, [1995] 2 SCR 513 [*Egan*]; *Miron v Trudel*, [1995] 2 SCR 418; *Thibaudeau v Canada*, [1995] 2 SCR 627.

19 See e.g. *Egan, ibid* at para 8.

20 *Ibid* at para 188.

21 *Ibid* at para 39 [emphasis in original].

22 *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497 [*Law*].

23 *Ibid* at para 88.

24 The third factor seems closely aligned with section 15(2), however their current relationship with one another remains somewhat unclear. For further discussion on this issue, see footnote 57.

of a law as they relate to this purpose should always be a central consideration."[25] With respect to factor number two, he explained, "it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation."[26] The distinctly claimant-oriented, non-deferential perspective exhibited in the first two factors was even more prominent in the fourth. Justice Iacobucci appealed to Justice L'Heureux-Dubé's lone dissent in *Egan*, where she argued that the "consequences on the affected group" should be paramount.[27] In fact, Justice Iacobucci built on Justice L'Heureux-Dubé's reasoning, stressing the general irrelevance of government intent when it came to establishing an infringement of section 15(1).[28]

Considering the effect-oriented scrutiny present in the three abovementioned factors, Justice Iacobucci could have surely afforded to be more deferential to legislative intent with respect to his "ameliorative purpose or effects" factor. To a certain extent, he was, noting section 15's dual purpose to both prevent future discrimination and ameliorate historic disadvantage. He made it clear, however, that he did not "wish to be taken as foreclosing the possibility that a member of society could be discriminated against by laws aimed at ameliorating the situation of others."[29] In such situations, he went on, a court might need to consider section 1 or section 15(2). From one point of view, he was positioning a law's ameliorative aim and effect as just one factor in a very broad and contextual analysis; from a more interesting angle, he could have been reserving section 15(2) for a sort of post-section 15(1), section 1-esque justification role. If he had meant the latter, it is conceivable that underinclusive ameliorative legislation could first be deemed discriminatory under section 15(1) and then be saved by some then-undetermined section 15(2) test. As per his reasons in *Lovelace v Ontario*, however, which were delivered the following year, he clearly meant the former.[30]

In *Lovelace*, the Supreme Court took its first run at section 15(2). The facts date back to 1993 when the Government of Ontario began negotiating with First Nations bands over the creation of a reserve-based casino as a means of generating cash for social, cultural, and economic development purposes. By the summer of 1996, Casino Rama was open for business. In the spring of that same year, the government informed the future claimants that the casino's proceeds would be "distributed only to Ontario First Nations communities registered as bands under the *Indian Act*."[31] Although they had individual members that qualified as status Indians under the *Indian Act*, the claimant groups were not officially "bands" and were thus ineligible to share in the proceeds.[32] The claimants immediately commenced proceedings, seeking "a declaration that Ontario's refusal to include them in the Casino Rama project was unconstitutional and that they should be allowed to participate in the distribution negotiations."[33]

Operating without the "benefit" of *Law*,[34] the Ontario Court (General Division)'s Justice Cosgrove adopted the approach taken—or at least the language used—by the Ontario Court of Appeal in *Roberts v Ontario* and found in the claimants' favour.[35] The *Roberts* decision dealt with section 14(1) of Ontario's *Human Rights Code*, essentially the statutory

25 *Law*, *supra* note at 22 at para 68.
26 *Law, supra* note 22 at para 70.
27 *Egan*, *supra* note 18 at para 63.
28 See *e.g. Law*, *supra* note 22 at para 80.
29 *Ibid* at para 73.
30 *Lovelace v Ontario*, 2000 SCC 37, 1 SCR 950 [*Lovelace*].
31 *Ibid* at para 1.
32 *Ibid*.
33 *Ibid* at para 32.
34 *Ibid* at para 5.
35 *Lovelace v Ontario*, (1996) 38 CRR (2d) 297 (Ont Gen Div).

equivalent to section 15(2) of the *Charter*, and interpreted the provision's purpose as twofold: (1) to permit affirmative action and (2) to promote substantive equality.[36] An affirmative action program would be protected, but only so long as it was not delivered in a manner contrary to substantive equality. Weiler JA, for the majority in *Roberts*, wrote that a court's inquiry does not end "when 'special programs' status is proven."[37] A court must ask two further questions:

> (1) whether a particular provision or limitation of a special program results in discrimination against a person or group with the disadvantage the program was designed to benefit, and (2) whether the provision or limitation is reasonably related to the scheme of the special program.[38]

Compelled as he was by Weiler JA's more probative approach, Cosgrove J's decision failed to hold up at the Court of Appeal. In overturning Cosgrove J's decision, a unanimous Court of Appeal acknowledged that section 15(2) might not fully immunize affirmative action programs from judicial scrutiny, but the scrutiny it does permit should be so limited as to not discourage governments from establishing such programs.[39]

When *Lovelace* finally reached the Supreme Court of Canada, a line had been drawn. On one side sat Ontario's government and Court of Appeal, fearful that deficient deference would deter governments from creating ameliorative programs; on the other sat the claimants and interveners, unconvinced. For example, the Council of Canadians with Disabilities (CDC) argued in its factum that "[r]ather than encouraging governments to advance the purposes underlying section 15(1) in their programs, immunizing them from review would diminish their incentive to update them and to ensure they further the cause of equality."[40] Though Iacobucci J, for a unanimous Supreme Court, agreed in result with the Court of Appeal, he viewed the *Lovelace* case as "an opportunity for this Court to confirm that the s. 15(1) scrutiny applies just as powerfully to targeted ameliorative programs."[41] Given the four-factored contextual analysis that he had advocated for in *Law*, the approach to section 15(2) that he adopted in *Lovelace* was somewhat predictable. Building on the fundamental premise that ameliorative programs are consistent with the *Charter*'s substantive equality guarantee, Justice Iacobucci characterized section 15(2) as an embedded, confirmatory component of a full section 15(1) analysis. In other words, as per *Law*, a program's ameliorative purpose would serve as one "counter-indicator" of a substantive equality violation.[42] As compelling a counter-indicator as it may have been in *Lovelace*, it was seen not as an exemption, but as an "interpretive aid."[43] Without precluding the need for section 15(2) to play an independent role at some point in the future, Justice Iacobucci defended his interpretive aid approach as "ensur[ing] that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review."[44]

From *Andrews* to *Law* to *Lovelace*, the Supreme Court of Canada's vision of substantive equality remained relatively stable. Integral to this vision, of course, was a recognition that it "requires that the differences between groups and individuals be recognized and

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36 *Roberts v Ontario*, (1994) 19 OR (3d) 387 at para 37 (Ont CA) [*Roberts*].

37 *Roberts, supra* note 36 at para 63.

38 *Ibid*.

39 *Lovelace v Ontario*, (1997) 33 OR (3d) 735 at para 64 (Ont CA).

40 Factum of the Intervener, Council of Canadians with Disabilities, submitted in *Lovelace, supra* note 30 (November 1999), online: <http://www.ccdonline.ca/en/humanrights/promoting/lovelace>.

41 *Lovelace*, *supra* note 30 at para 61.

42 Denise G Réaume, "Discrimination and Dignity" in *Making Equality Rights Real*, *supra* note 10 at 173.

43 *Lovelace*, *supra* note 30 at para 106.

44 *Ibid* at para 108.

accommodated so that a law secures equality in its *effect*."[45] In the words of Colleen Sheppard, writing for the Ontario Law Reform Commission in 1993, substantive equality "demands real, actual equality in the social, political, and economic conditions of different groups in society."[46] By extension, assessing "whether society's commitment to equality is being met" involves "looking at actual social conditions."[47] It follows, as this paper is concerned, that in assessing whether differential treatment (or exclusion) should be enabled in the name of substantive equality, courts must at least look at the actual social conditions that such treatment can serve to (re)produce. Indeed, for all of the differences considered in Part I of this paper, the Supreme Court never fully divorced a law's purpose from its effect—until *Kapp*.

II. THE TEST IN *KAPP* AND *CUNNINGHAM*

In the decade leading up to *Kapp*, the *Law* test endured its fair share of pointed scholarly critique. In the apt phrasing of Peter Hogg, *Law*'s contextual human dignity requirement was "unfortunate" for at least two reasons.[48] Firstly, it was "vague, confusing and burdensome to equality claimants."[49] Secondly, "the inquiry into human dignity [was] highly unstructured compared with the inquiry into s. 1."[50] Viewed together, Hogg's comments shed light on the troubling truth that *Law* had simultaneously enhanced the burden on claimants and alleviated the government's need to defend its actions under the comparatively well-structured scrutiny of the *Oakes* test[51]—in particular, its minimal impairment (or least drastic means) requirement. The proportionality analysis typically left to section 1 had been both collapsed and disorganized. Echoing Hogg's argument, Beverly Baines described *Law*'s second step as "blur[ring] the relationship between section 15(1) and section 1."[52] Lost in that blur was section 15(2).

By the time *Kapp* came along, the criticism being shelled out by the likes of Hogg and Baines had helped set the agenda. The Supreme Court needed to address the human dignity barrier and clarify how the four factors would interact. The facts of the case, however, revolved around an ameliorative initiative; as such, the Court would have to pay particular attention to the proper analytical purpose of section 15(2). Specifically, the claim stemmed from a communal fishing licence that granted "members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours."[53] The claimants were non-Aboriginal commercial fishers and they argued that the licence discriminated against them on the basis of race. The Crown, in response, invoked section 15(2), pointing out that the licence's purpose was to regulate

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45 Fay Faraday, Margaret Denike & M Kate Stephenson, "In Pursuit of Substantive Equality" in *Making Equality Rights Real*, *supra* note 10 at 12 [emphasis added].

46 Colleen Sheppard, *Study Paper on Litigating the Relationship between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993) at 5.

47 *Ibid*.

48 Peter W Hogg, *Constitutional Law of Canada*, 5th ed, (Toronto: Thompson Reuters, 2009) at 1200.

49 *Ibid*.

50 *Ibid* at 1201.

51 See *R v Oakes*, [1986] 1 SCR 103. The three-part *Oakes* test is used by courts to determine whether a *Charter* infringement may be justified as a "reasonable limit" under section 1. First, the limit must be prescribed by law; second, the law's objective must be pressing and substantial; and, third, the government must have adopted proportional means of pursuing its objective. The third branch's proportionality analysis involves three sub-steps: rational connection, minimal impairment, and proportionate effect. For a thorough examination of the *Oakes* test, see Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 Sup Ct L Rev (2d) 501.

52 Beverly Baines, "*Law v Canada*: Formatting Equality", (2000) 11 Const F 65 at 72.

53 *Kapp*, *supra* note 7 at para 1.

the fishery and to ameliorate the conditions of a disadvantaged group.

For the majority, Chief Justice McLachlin and Justice Abella rejected the claimants' argument and accepted the Crown's, seizing the opportunity to rethink the framework adopted in *Law* and *Lovelace*. The joint opinion portrayed *Law* as a mere twist on *Andrews*—a twist that needed untwisting, apparently, as the joint opinion abandoned "human dignity *as a legal test*" and downplayed the formal force of the four factors.[54] Going forward, a distinction based on a prohibited ground would be discriminatory under section 15(1) if it "create[d] a disadvantage by perpetuating prejudice or stereotyping."[55] Deservedly, *Kapp* earned kudos from equality advocates for dropping human dignity; that said, it provided little guidance in terms of navigating the "perpetuating prejudice or stereotyping" stage.[56]

Whereas it had served since *Lovelace* as an interpretive aid, embedded within the expansive contextual phase of the *Law* framework, section 15(2) was now a thoroughly non-contextual threshold question.[57] Once a claimant had shown there to be a distinction based on a prohibited ground, the government would then be able to call on section 15(2); if two specific conditions were satisfied, the claim would be dismissed, no (contextual) questions asked. As articulated by Chief Justice McLachlin and Justice Abella,

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[58]

It is important to note that these two conditions are not particularly onerous. Nor are they the least bit impact-sensitive, which seems rather curious because at paragraph 23 of their judgment, Chief Justice McLachlin and Justice Abella wrote that an equality analysis should employ "factors that identify impact amounting to discrimination."[59] As curious as it might seem, the justices were quite deliberate in their decision to recalibrate the analytical role of section 15(2).

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54 *Kapp, supra* note 7 at para 21.

55 *Ibid* at para 17.

56 Perhaps the closest the joint opinion came to structuring this contextual stage was tentatively linking factors one and four to prejudice, and factor two to stereotyping. See *ibid* at para 23. For a scholarly reaction to the *Kapp* decision, see Bruce Ryder, "*R. v. Kapp*: Taking Section 15 Back to the Future", *TheCourt.ca* (2 July 2008) online: <http://www.thecourt.ca/2008/07/02/r-v-kapp-taking-section-15-back-to-the-future/>.

57 As an interpretive aid, section 15(2) appeared to do much of the same work as the third contextual factor in *Law*. Since *Kapp*, however, the jurisprudence has not clearly equated these two concepts, nor has it ruled out a residual role for the third contextual factor. To meet the section 15(2) threshold test set out in *Kapp*, a program must not only have an ameliorative purpose, but also target a particular disadvantaged group. A certain law or government program could thus fail to meet the section 15(2) threshold because it is not sufficiently targeted yet still have its ameliorative or remedial character taken into consideration by a court as a factor in favour of deference. This was arguably the situation in *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*], where the Supreme Court viewed the impugned legislative provisions, which related to death benefits for widows of civil servants and military officers, as operating within "a much larger employee benefit program which takes into account the need for a continuation of a stream of income and for coverage of medical expenses upon the death of the spouse" (para 78). Ultimately, it is important to appreciate that even where section 15(2) is not at play, the post-*Kapp* jurisprudence seems to indicate that a government will still be able to invoke *Law*'s ameliorative purpose/effect factor to counter an argument that section 15(1)'s substantive equality guarantee has been infringed.

58 *Kapp*, *supra* note 7 at para 41.

59 *Ibid* at para 23.

To explain its decision, the joint opinion appealed immediately to the pre-*Charter* case of *Athabasca Tribal Council v Amoco Canada Petroleum*, where the Supreme Court saw "no reason why the measures proposed by the 'affirmative action' programs for the betterment of the lot of the native peoples in the area in question should be construed as 'discriminating against' other inhabitants."[60] This notion that the inherently exclusionary nature of affirmative action programs did not necessarily amount to discrimination might have been progressive in 1981—when the flaws of formal equality were still being uncovered—but not in 2008. From this principle, however, flowed the decision to award independent, exemptive force to section 15(2). Although they acknowledged Iacobucci J's preference for an interpretative aid approach, Justices McLachlin and Abella chose to focus on his leaving the door open instead of giving real consideration to the underlying reason for his choice: ensuring that an impugned law or government program—ameliorative or otherwise—endures the full scrutiny of a contextual discrimination analysis. Rather than recognize the centrality of effect to the Supreme Court's established conception of substantive equality, they stressed the need for a strictly purpose-based section 15(2) framework to ensure that governments be given the necessary "leeway to adopt innovative [ameliorative] programs, even though some may ultimately prove to be unsuccessful."[61] Implicit in such a statement is the judgment's unsubstantiated assumption that the application of an even remotely impact-sensitive judicial analysis would discourage governments from combating discrimination through ameliorative programs moving forward.

For *Kapp*, a deferential, exemptive, intent-based approach worked just fine. The claim was essentially one of reverse discrimination, much like *Athabasca*, and once again the Supreme Court had no intention of forcing the government to defend its decision to exclude the relatively advantaged from a program aimed at combating disadvantage. Critics were not upset by the result of *Kapp* so much as they were fearful that shifting section 15(2) from "a shield to a sword" could prove dangerous on a different set of facts.[62] One year later, as interveners in the case of *Jean v Minister of Indian and Northern Affairs Canada*, the Women's Legal Education and Action Fund (LEAF) articulated this fear in its factum:

> The consequence of an approach that protects all ameliorative programs from Section 15(1) *Charter* scrutiny would be a two-tiered hierarchy of equality rights that would accord second-class status to members of disadvantaged groups who are excluded from these programs. The particularly vulnerable and marginalized members of disadvantaged groups – those who experience multiple and intersecting grounds of discrimination, including on the basis of sex, race, Aboriginality, disability, poverty, marital status and sexual orientation – would be most likely to suffer from such exclusion and diminished constitutional recognition.[63]

The question became: would a charge of underinclusiveness amounting to discrimination be treated just like a charge of reverse discrimination? According to the Federal Court of Appeal's Justice Trudel, the answer was yes, for "if *Kapp* had been intended to be read in

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60 *Kapp, supra* note 7 at para 31.

61 *Ibid* at para 47.

62 Tess Sheldon, "The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Person with Disabilities" (Toronto, Law Commission of Ontario, 2010) at 93, online: <http://www.lco-cdo.org/disabilities/sheldon.pdf>.

63 Factum of the Intervener, Women's Legal Education and Action Fund (LEAF) submitted in *Linda Jean, Chief of the Micmac Nation of Gespeg, in her own name and in the name of all the other members of her Band, et al v Minister of Indian and Northern Affairs Canada, et al*, [2009] FCA 377 [*Jean*], online: <http://www.leaf.ca/legal/facta/2009-micmac1.pdf>.

a limited manner, the Supreme Court of Canada would have stated so."[64] If the Supreme Court of Canada did, in fact, have an interest in restating its intentions, the facts in *Cunningham* might have presented a reasonable opportunity to do so.

At issue in *Cunningham* was the alleged underinclusivity of the *Metis Settlements Act* ("*MSA*").[65] The roots of the *MSA* trace back to the early 1980s, when the Government of Alberta, anticipating section 35 of the *Constitution Act, 1982* coming into force, established a Joint Métis-Government Committee to review the adequacy of the province's legislative framework as it related to its Métis population.[66] The committee's report was released in 1984, recommending that Alberta's Métis communities be granted the right to self-govern a "secure … land base" in order to preserve their distinct culture.[67] Negotiations ensued. After five years, the government transferred plots of land to Métis communities and passed pieces of legislation aimed at protecting the rights of those communities; among them was the *MSA*. The provision of particular interest in *Cunningham* was section 90, which provides that an individual's official Métis settlement membership may be terminated upon voluntary registration under the *Indian Act*.[68]

Unlike the "outsider" claimants in *Kapp*, these claimants were "insiders," official members of the law's target community. Though they were longstanding members of the Peavine Métis Settlement, they also qualified as status Indians under the *Indian Act*. When they registered as status Indians to obtain medical benefits, however, their Métis settlement memberships were revoked pursuant to the *MSA*. In response, they argued that membership denial due to their Indian status constituted discrimination under section 15(1). After being rejected at trial, their claim found success at the Court of Appeal.[69]

For a unanimous Court of Appeal, Justice Ritter could not believe that the Supreme Court in *Kapp* had truly intended to remove discriminatory effect from the equality analysis altogether:

> If the discriminatory effects of specific provisions could be disregarded in light of an overall ameliorative purpose, cases like *Vriend v. Alberta* … would no longer be good law. In *Vriend*, the Government of Alberta clearly could have made a case that there was an ameliorative purpose to Alberta's human rights legislation, as it then existed. If the respondents' interpretation of s. 15(2) is correct, a finding that the Alberta Legislature's failure to provide human rights protection for homosexuals was discriminatory would have been barred. I doubt that the Supreme Court in *Kapp* intended to take the law relating to the *Charter*'s equality protection to this point.[70]

It is not difficult, Justice Ritter seemed to be saying, to imagine a set of facts upon which the *Kapp* test, applied strictly, could produce a severely irrational outcome. It made sense, as such, to read into the test a certain level of rationality. Having accepted the *MSA*'s aim to preserve Métis culture as legitimately ameliorative, he refused to accept

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64 *Jean*, *ibid* at para 9.

65 *Metis Settlements Act*, RSA 2000, c M-14 [*MSA*].

66 *Cunningham*, *supra* note 3 at para 14. In addition to entrenching existing Aboriginal rights, s. 35 of the *Constitution Act, 1982* explicitly recognized three distinct Aboriginal groups: Indians, Inuit, and Métis.

67 *Ibid* at para 15.

68 *MSA*, *supra* note 65, s 90.

69 *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, 8 Alta LR (5th) 16 [*Cunningham*, Alta CA].

70 *Ibid* at para 23.

the exclusion of status Indians as rationally furthering such an aim. For starters, there was no evidence submitted to show "any attempt by persons with Indian status who did not formerly have a substantial connection with Peavine, or some other Métis settlement, attempting to gain Métis status."[71] Moreover, Métis status actually requires Aboriginal lineage to a certain degree, together with self-identification; in fact, "evidence established that in some settlements, one third of the members also hold Indian status."[72] This point speaks to the fact the *MSA* enables settlement councils to choose on seemingly arbitrary grounds whether or not to revoke membership—in this case, the Peavine Council chose only to revoke the membership of the Cunningham family, leaving the settlements' other status Indian members alone. For these reasons, Justice Ritter found that the "impugned provisions do not rationally advance the purported legislative purposes of the *MSA*. In consequence, section 15(2) of the *Charter* is not a bar to consideration of section 15(1)."[73]

It is important to highlight the difference between the rationality that Justice Ritter read into the *Kapp* test and the rationality that was already there. The *Kapp* judgment asked: "Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose?"[74] Justice Ritter, on the other hand, asked if the impugned exclusion "rationally advanced the purported legislative purposes." Unlike Chief Justice McLachlin and Justice Abella, who ostensibly used the term in the softest possible sense, Justice Ritter stated explicitly that he intended rationality to mean "sensible, or imbued with reason."[75] Justice Ritter's aggressive application of *Kapp* garnered positive feedback from Jennifer Koshan, who argued in her 2009 blog entry that Canadian courts should "not accept the government's argument that because the overall purpose of the *MSA* was ameliorative, this should bar the section 15 claim."[76]

Chief Justice McLachlin was less appreciative of Justice Ritter's interpretation. "In my view," she wrote, "the Court of Appeal erred in demanding positive proof that an impugned distinction will in the future have a particular impact."[77] She really meant what she wrote in *Kapp*, apparently, although she acknowledged Justice Ritter's fear that the test could be taken too far on different facts:

> The fundamental question is this: up to what point does s. 15(2) protect against a claim of discrimination? The tentative answer suggested by *Kapp*, as discussed above, is that the distinction must serve or advance the ameliorative goal. This will not be the case, for instance, if the state chooses irrational means to pursue its ameliorative goal. This criterion may be refined and developed as different cases emerge. But for our purposes, it suffices.[78]

Having decided that these facts were not ones to command refinement to the test that she had helped create, Chief Justice McLachlin answered the two *Kapp* questions in turn.[79]

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71 *Ibid* at para 26.

72 *Cunningham*, Alta CA, *supra* note 69 at para 27.

73 *Ibid* at para 31. After concluding that the government had failed to satisfy the section 15(2) test, Justice Ritter went on to conduct a full section 15(1) analysis, ultimately finding a violation that could not be justified under section 1.

74 *Kapp*, *supra* note 7 at para 49.

75 *Supra* note 69 at para 29.

76 Jenifer Koshan, "Another Take on Equality Rights by the Court of Appeal", *ABlawg.ca* (13 July 2009) online: <http://ablawg.ca/wp-content/uploads/2009/07/blog_jk_cunningham_abca_july-2009.pdf>. For another supportive piece, see Ruth Thompson, "To Be, or Not to Be, Métis?", *SLAW* (8 November 2011) online: <http://www.slaw.ca/2011/11/08/to-be-or-not-to-be-metis/>.

77 *Cunningham*, *supra* note 3 at para 74.

78 *Ibid* at para 46.

79 Indian status as an analogous ground was not in dispute. See *ibid* at paras 56-58.

First, she found the genuineness of the *MSA*'s ameliorative purpose to be "manifest."[80] Second, she determined that this particular exclusion advances the *MSA*'s ameliorative purpose because allowing "membership in the *MSA* communities to Métis who are also status Indians would undermine the object of the program."[81] With respect, such reasoning does a poor job of rebutting the fact that the *MSA* actually does allow such membership. As Ruth Thompson points out, consistent enforcement of this exclusion would actually reduce Métis settlement populations: "Can we really take seriously the claim that the fewer lifelong Métis allowed legal recognition of their Métis identity, the stronger the Métis culture will be?"[82] The Supreme Court of Canada was aware of this argument, of course, as it was adopted by Justice Ritter and advocated for in the factums submitted by LEAF and by the Canadian Association for Community Living (CACL).[83]

To Chief Justice McLachlin's credit, she was not trying to rebut the argument; she was simply dismissing its relevance, saying that "some line drawing will be required" and the line drawn by the *MSA* in this case appears sufficiently non-outlandish to warrant section 15(2) protection.[84] Looking past the question of whether or not the exclusion truly aids in the commendable pursuit of preserving Métis culture, it is the Supreme Court's complete refusal to engage in the debate that frustrates scholars such as Ruth Thompson, Denise Réaume, and Jennifer Koshan. The great irony here is that both teams—captained, for the purposes of this paper, by Chief Justice McLachlin on one side and Denise Réaume on the other—defend their perspective in the name of substantive equality.

For Chief Justice McLachlin, the Court's commitment to substantive equality has, since *Andrews*, been grounded in a rejection of formal equality's endorsement of identical treatment. Her judgments rely heavily on this rejection, stressing Peter Hogg's notion that "different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it."[85] She concludes, in turn, that ameliorative programs do not violate the type of substantive equality that section 15 promotes.[86] With respect, a more logical conclusion would be that ameliorative programs do not *necessarily* violate the type of substantive equality that section 15 promotes. This is essentially the argument being pushed by Réaume and her colleagues—that Chief Justice McLachlin's test for substantive equality rests on *Andrews*' rejection of identical treatment while at the same time ignoring its reason for doing so, namely to unmask the power of a facially neutral law to produce, in effect, "serious inequality."[87] Indeed, if the whole point of a substantive equality guarantee is to peek past a law's purpose to perceive its true effect, how can the inquiry into its violation so unapologetically do the opposite?

The answer is that section 15 does not only prevent governments from discriminating: it also enables governments to combat discrimination.[88] As her appreciation for deference would suggest, Chief Justice McLachlin's use of the word "enabling" in *Kapp* was more likely a synonym for "encouraging," as opposed to "allowing." Encouraging governments to ameliorate disadvantage might seem easy to justify, but refusing to "acknowledge

80 *Ibid* at para 70.

81 *Cunningham, supra* note 3 at para 77.

82 Thompson, *supra* note 76.

83 Factum of the Intervener, Women's Legal Education and Action Fund (LEAF) submitted in *Cunningham*, *supra* note 3, online: <http://ablawg.ca/wp-content/uploads/2010/12/leaf-factum1.pdf>; Factum of the Intervener, Canadian Association for Community Living (CACL) submitted in *Cunningham*, *supra* note 3.

84 *Cunningham*, *supra* note 3 at para 86.

85 *Kapp*, *supra* note 7 at para 49.

86 See e.g. *ibid* at para 3.

87 *Andrews*, *supra* note 11 at para 8.

88 *Kapp*, *supra* note 7 at para 25.

even the possibility of discriminatory ameliorative schemes" most certainly is not, as it runs contrary to the effect-centred conception of substantive equality upon which section 15 is based and to which the pre-*Kapp* Supreme Court had long subscribed.[89] The consequent aim of Part III, building on the scholarship and caselaw considered thus far, is to sketch out an alternative approach, one that balances Chief Justice McLachlin's need for deference with Réaume's call for scrutiny.

III. IMAGINING A NEW APPROACH TO SECTION 15(2)

Make no mistake: the door is ajar. *Lovelace* recognized that "we may well wish to reconsider this matter at a future time in the context of another case,"[90] *Kapp* left "open the possibility for future refinement,"[91] and *Cunningham* foresaw the test being "refined and developed as different cases emerge."[92] A test reconfigured to suit facts is less a test than a malleable method of judicial justification. Leeway is important for courts—just as it is for governments[93]—but the deep-rooted principles of certainty and predictability dictate that a test capable of accommodating all fact patterns is preferable. The *Kapp* framework is ripe for revision, therefore, as there are facts it cannot reasonably accommodate. That being said, this paper has already confessed its apparently incorrect belief that the *Cunningham* facts had the potential to inspire such revision. Even though the claimants evoked sympathy as insiders excluded on a prohibited ground, it is true that the complexity and importance of ameliorating Aboriginal disadvantage demands a certain level of deference. The Albertan government spent years negotiating an ameliorative scheme with Métis leaders and the impugned exclusion came out of those talks; far be it for the courts to interfere. Imagine, though, if the exclusion was tied not to Aboriginal identity, but to gender identity or to sexual orientation. Moreover, to borrow Ritter J's *Vriend* comparison, consider what would happen if a government were to invoke section 15(2) with respect to a piece of human rights legislation that failed to include sexual orientation as a protected ground.[94] Confronted with such issues, Chief Justice McLachlin would surely feel the need to revisit her test.

In restructuring the Court's approach in order to accommodate the understanding that ameliorative schemes can discriminate, the first issue is whether the heavy analytical lifting is well suited for section 15 or best left to section 1. Hogg has long argued for the latter: "[T]he only way to bring clarity and coherence to the law … is to accept that discrimination under s. 15 is nothing more than a disadvantage imposed on a listed or analogous ground."[95] Pre-*Kapp*, Hogg's argument drew strength from the noted ambiguity of the *Law* test, especially as compared to the depth and organization of the *Oakes* test. *Kapp* did not change Hogg's mind; for him, "discrimination" is nearly as vague as "human dignity" and the new "perpetuation of disadvantage or stereotyping" element still rests on the same contextual factors.[96] Respectfully, a significant issue with Hogg's argument is that leaving affirmative action considerations to section 1 would unnecessarily allow reverse discrimination claimants (e.g. those in *Kapp*) to successfully render any ameliorative program an infringement of the *Charter*'s equality guarantee before being justified. As Chief Justice McLachlin mentioned in *Kapp*, there clearly is a "symbolic

89 *Supra* note 83 at para 10.
90 *Lovelace*, *supra* note 30 at para 108.
91 *Kapp*, *supra* note 7 at para 41.
92 *Cunningham*, *supra* note 3 at para 46.
93 See *Kapp*, *supra* note 7 at para 47.
94 See generally *Vriend v Alberta*, [1998] 1 SCR 493 [Vriend].
95 Hogg, *supra* note 48 at 1203.
96 *Ibid* at 1204.

problem" with "finding a program discriminatory before 'saving' it as ameliorative."[97]

In reality, Chief Justice McLachlin was not using this "symbolic problem" simply to justify pushing section 15(2) ahead of section 1. She was using it to push section 15(2) to the forefront of section 15(1), thus highlighting Part III's second issue: whether section 15(2) is more appropriately characterized as an interpretive aid (*Lovelace*) or as a preemptive exemption (*Kapp*).[98] To the purist interpretive aid proponent, the real purpose of section 15(2) is to remind all interested parties that section 15(1) cannot be skewed to support the blind equating of distinction with discrimination; in other words, section 15(2) was not meant as a substantive provision, but was included in an act of "excessive caution."[99] In *Lovelace*, Justice Iacobucci took a compatible, though less extreme, position. He depicted the two provisions as confirmatory in purpose, seeing in section 15(1) the capacity to "embrace ameliorative programs of the kind that are contemplated by s. 15(2)." Depicting the relationship otherwise, as argued in the CDC's factum, "would suggest the sub-sections are mutually antagonistic" because one could override the other.[100] Interestingly, the Supreme Court in *Kapp* accepted Iacobucci J's confirmatory angle, but did not see it as "preclud[ing] an independent role for s. 15(2)."[101] It "is more than a hortatory admonition," the Supreme Court wrote, meaning that section 15(2)'s "simple clear language" called for independent analytical force.[102]

Given this paper's apparent claimant-centred bent, its partiality to Iacobucci J's interpretative aid approach is predictable; substantive equality is a contextual concept, and determining its violation warrants an equally contextual examination. As a legal test, though, such an approach is susceptible to many of the same criticisms that were directed at *Law*; indeed, *Lovelace* was little more than an application of *Law*. Of note, however, is the fact that the four contextual factors, unlike human dignity, have not been altogether abandoned. As the Supreme Court wrote recently in *Withler*, part two of the section 15(1) analysis is inherently contextual and so "[f]actors such as those developed in *Law* … may be helpful."[103] It then confirmed what it had suggested in *Kapp*, namely that factor one (pre-existing disadvantage) and factor four (nature of interest affected) point to the perpetuation of disadvantage or prejudice, while factor two (correspondence with the claimants' actual characteristics or circumstances) points to the operation of stereotype. There is little doubt that, on the facts in *Cunningham*, these factors would have demanded serious consideration. The Court of Appeal's analysis in *Cunningham* of the fourth factor is exemplary:

> The more severe and localized the consequence, or the more significant the interest affected, the more likely that discrimination will be found: *Law* at para. 74, citing *Egan v. Canada* … In this case, settlement membership not only affects the right to meaningfully participate in the community, but also affects housing and transportation services, employment, recreation, land rights, and identity. The appellants are denied voting rights, participation in governance, and the right to maintain their cultural connection. The

97 *Kapp*, *supra* note 7 at para 40.

98 The Court in *Kapp* did not admit to creating an exemption, but its "third approach" literally functions to exempt governments from the full scrutiny of a section 15(1) analysis. Réaume writes: "What's new is that the Court grants such exemptions without actually saying out loud that it is an exemption, indeed, without even looking to see whether the equality rights of those excluded have been violated before deciding whether to permit an exclusionary program to stand." Réaume, *supra* note 5.

99 *Supra* note 39 at para 105.

100 *Ibid* at para 11.

101 *Kapp*, *supra* note 7 at para 38.

102 *Ibid*.

103 *Withler*, *supra* note 57 at para 66.

> denial of voting and participatory rights alone is sufficient to indicate that significant interests are being affected.[104]

This quote is intended to reflect the nuance and persuasive pressure that any one of the *Law* factors can bring to the contextual stage of a section 15(1) analysis; before embarking on such an analysis, therefore, it would be helpful to have already determined whether the impugned law or program was remedial or ameliorative within the meaning of section 15(2). Even though this paper agrees in principle with Iacobucci J's characterization of section 15(2) "as an interpretive aid to s. 15(1), providing conceptual depth and clarity on the substantive nature of equality," affirmative action considerations will inevitably colour the rest of the analysis.[105] In other words, section 15(2) must come first. No matter its name, be it "interpretive aid" or "preemptive exemption," section 15(2)'s inherent contextual influence gives it a distinctly gatekeeper-like function. The real question, which constitutes Part III's third and final issue, thus becomes: What exactly should this gate look like? More specifically, what sorts of exclusion claims should the gate keep out and what sorts should it let through?

As it stands now, the gate keeps out all genuinely ameliorative programs, ensuring their exclusions are not analyzed contextually. It does so by cutting effect out of the equation completely, and it does so because it does not want to deter governments from creating ameliorative programs in the future.[106] If the objective here is to balance Chief Justice McLachlin's appreciation for deference with Réaume's interest in scrutiny, the logical solution is to insert an appropriate amount of effect-oriented scrutiny back into *Kapp*'s two-stage section 15(2) test.[107] In this paper's view, the appropriate amount would be that which blocks cases clearly destined for failure while letting through those with equality issues substantive enough to deserve the same broad and contextual analysis awarded to other section 15(1) claims. Exemplifying the former, of course, is reverse discrimination; as for the latter, the model would be underinclusion on the basis of an enumerated or analogous ground.

For some, it may not be immediately clear how a lack of help can constitute harm amounting to discrimination. In *Vriend*, the Supreme Court acknowledged that "[i]t may at first be difficult to recognize the significance of being excluded from the protection of human rights legislation. However, it imposes a heavy and disabling burden on those excluded."[108] The Supreme Court went on to explain how the consequences of underinclusive legislation may be "just as grave as that resulting from explicit exclusion."[109] The context was quite different in *Vriend*; nonetheless, the Court's reflections on underinclusion bringing about real harm can easily be applied to genuinely ameliorative programs.[110] Indeed, the Ontario Court of Appeal did just that in its aforementioned *Roberts* decision. The *Roberts* case stemmed from a human rights complaint filed by a blind man after he was denied access to the Ministry of Health's Assistive Devices

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104 *Supra* note 69 at para 38.

105 *Cunningham*, *supra* note 3 at para 97.

106 Although, Réaume suggests it may be because "Supreme Court is bored with equality litigation, or finds it too difficult to actually work through the 'elusive concept' of equality … and really doesn't want to see any more equality cases. It has certainly done its utmost to discourage claimants." Réaume, *supra* note 5.

107 Though effect was never part of the *Kapp* test, the word "back" seems appropriate here given the fact that effect had always played in role in equality analyses (including *Lovelace*) until *Kapp* took it out.

108 *Vriend*, *supra* note 94 at para 98.

109 *Ibid*.

110 The Court was addressing the exclusion of same-sex couples from protection under the *Individual's Rights Protection Act*, RSA 1980, c I-2.

Program due to his age.[111] Weiler JA, for a unanimous Court of Appeal, found that the Divisional Court's exemptive focus on section 14(1)'s protection-of-special-programs purpose "constituted an error of law."[112] Much like the *Charter*'s section 15(2), the *Code*'s section 14(1) has a second purpose: promote substantive equality.[113]

> Fairness, and the recognition of substantive equality, require that discrimination, in the provision of a service to a person who is a member of a disadvantaged group for whom a special program is designed, not be tolerated and be subject to review. This interpretation does not second-guess the Legislature. Rather, it fulfils one of the purposes of the Legislature."[114]

To reiterate, where a claim of exclusion or underinclusiveness is brought forth against an ameliorative program by a targeted beneficiary of that program, the claim quite plainly deserves further consideration. This paper supports the insertion of this principle into the section 15(2) analysis in the form of a question, to be positioned directly after the two questions set out in *Kapp*. Doing so would enable the successful deflection of reverse discrimination allegations, while at the same time embracing the established principle that programs designed to ameliorate disadvantage can, in effect, discriminate through underinclusion.[115] It might appear to be balanced, but a threshold question such as this one is likely to invoke a certain amount of critique on both fronts.

First, the principled, pro-scrutiny equality advocate might view such a threshold as unfairly blocking outsider claims. Sophia Moreau, in her paper entitled "The Wrongs of Unequal Treatment," points to a number of ways in which individuals may be wronged by differential treatment.[116] Among them is the perpetuation of oppressive power relations. If one accepts that a law serving to perpetuate oppressive power relations can produce harm, it becomes relatively easy to understand how a government's decision to help out one disadvantaged group and not another can do the same. Without getting carried away, the admittedly philosophical point here is that the familiar isms can be reproduced by governments picking favorites as between disadvantaged groups. For a Court unwilling to look past *bona fide* intent, however, it is unrealistic to expect an argument like this to hold water, especially when accepting it would by extension demand positive government action on a large scale.

This points to the second anticipated criticism of the *Roberts*-inspired proposal above, to come from governments and other members of the deference camp—including Chief Justice McLachlin and her Supreme Court. These deference defenders would obviously approve of weeding out reverse discrimination claims, yet they would remain unsatisfied with the height of the threshold, as it would still allow all insider claims through to the contextual stage, thus forcing governments to endure the full scrutiny of a section 15(1) analysis in cases like *Cunningham*. Interestingly, the seeds of a solution to this problem may also be found in the *Roberts* analysis. In addition to his excluded-beneficiaries-deserve-to-be-heard principle, Justice Weiler saw as relevant the extent to which the

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111 Ro*berts*, *supra* note 36.

112 *Ibid* at para 18. Again, section 14(1) of the *Human Rights Code* mirrors section 15(2). It reads: "A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I."

113 See e.g. *ibid* at para 33.

114 *Ibid* at para 44.

115 See *Vriend*, *supra* note 94; *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360 [*Ball*].

116 See generally Sophia Moreau, "The Wrongs of Unequal Treatment" in *Making Equality Rights Real*, *supra* note 10 at 31.

"limitation is reasonably related to the scheme of the special program."[117] Introducing a "reasonably related" test might seem at first glance like the opposite of deference. In light of Weiler J's first principle having already been accepted, however, a rationality-type stage would actually provide governments and deferential courts with another chance to prevent the analysis from reaching stage two.

The challenge is deciding how deep this rationality requirement should cut. It is helpful to step back in this respect and to remember that this paper's goal is to imagine a section 15(2) framework that will make it easy for governments to defend ameliorative programs that are well intentioned and well thought-through, while making it difficult for them to defend those ameliorative programs that discriminate through arbitrary underinclusion. It is difficult to imagine how such an objective could be realized without some exploration of the process and rationale behind the decision as to how and why the program's limits were set. Accordingly, this paper would recommend the inclusion of an objective, pseudo proportionality question. While this question is inspired in part by Weiler J's "reasonably related" test, it is perhaps more aptly described as a less probative variation of the *Oakes* test's minimal impairment stage. It is a simple question, but one that will hopefully hold governments accountable without requiring positive proof of a law's effect and without neglecting the uniquely challenging and multi-faceted nature of public policy decisions. The final component of the proposed section 15(2) threshold test would read: Has the government acted reasonably in deciding how and where to establish the limits of the program? The idea here is that governments will have to earn the deference that Chief Justice Mclachlin simply awards them by showing that they took reasonable steps in making their decision. To be clear, the question asks not whether the limit itself is reasonable, but whether the government acted reasonably in establishing it. Did they seek advice from experts? Did they consult key public stakeholders? Can they show that they made an effort to weigh the salutary effects of the limit against the deleterious ones, or that they opted for what they determined to be the least drastic means?

These are all questions that reasonable government departments work through when creating a public program and, in all likelihood, the government in *Cunningham* would have been able to easily satisfy this portion of the test—thus ending the analysis—by reference to the extensive negotiations that went into the detailed formulation of the impugned limit in the *MSA*. As noted earlier, the CDC has expressed a concern that "immunizing [laws] from review would diminish [governments'] incentive to update them." This proposed reasonableness query aims to reconcile the government's need for deference with the CDC's fear of immunization by employing a disclosure-based, reflexive approach to the promotion of section 15(1) compliance. Even where, in the name of deference, a court is unwilling to subject an impugned exclusion to the full section 15(1) analysis, the court of public opinion would still have all the information it needs to render judgment. Aside from judicial intervention, few incentives are more powerful than public disapproval.

In an effort to give to practical meaning to the principles discussed above, this paper's proposed test is summarized as follows:

1. Does the law or program create a distinction based on an enumerated or analogous ground? If no, section 15(1) has not been violated. If yes, proceed to question 1(a).

    a. Does the law or program have an ameliorative or remedial purpose and target a disadvantaged group identified on enumerated or analogous grounds? If no, proceed to question 2. If yes, proceed to question 1(b).

117 *Roberts*, *supra* note 36 at para 44.

b. Is the claim of exclusion or underinclusiveness against an ameliorative program being brought by a targeted beneficiary of that program? If no, section 15(1) has not been violated. If yes, proceed to question 1(c).

c. Has the government acted as a reasonable government would in deciding how and where to establish the limits of the program? If yes, section 15(1) has not been violated. If no, proceed to question 2.

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? If no, section 15(1) has not been violated. If yes, section 15(1) has been violated, proceed to section 1.

CONCLUSION

"The crux of a substantive equality analysis," Donna Greschner once wrote, "is critical scrutiny of the criteria that policy-makers use to differentiate."[118] This paper is in full agreement with Greschner's point and, up until *Kapp*, it appeared as though the Supreme Court of Canada was as well. As Part I of this paper explained, the Supreme Court's initial endorsement of substantive equality reflected a fundamental understanding that inequality cannot always be seen at the surface. Often inequality must be uncovered, meaning "[w]e cannot assess whether a policy promotes or impedes substantive equality without examining people's circumstances … independently of the words of the law itself."[119] With Part I having established the centrality of impact to the Supreme Court's vision of substantive equality, Part II showed how the Supreme Court in *Kapp*, fearful of discouraging governments from ameliorating disadvantage, opted in favour of exemptive deference. The Supreme Court was willing to make sure that a law was genuine in its ameliorative intent; however, it was not prepared to force governments to prove (or disprove) the law's precise impact. Part III, accordingly, sought a middle ground. It agreed that section 15(2) operates best in a threshold capacity, but argued that it is possible to insert scrutiny into the test without significantly enhancing the somewhat theoretical risk of deterrence. Drawing on *Roberts*—which remains the leading decision in the statutory realm[120]—Part III advocated for the insertion of a permit-insider-claims component that would weed out reverse discrimination claims and let others through to the contextual stage. It then proposed a reasonableness element. While the wording of this aspect of the test may need to be revised, its underlying aim is to push governments to explain how and why they decided on the impugned exclusion. Such a requirement aligns both with the CDC's call for a test scrutinous enough to serve as an incentive for governments to keep their program in line with modern notions of equality and with the Supreme Court's refusal to "demand positive proof that an impugned distinction will in the future have a particular impact."[121] Without cutting too deep, this last question attempts to employ the power of transparency to promote compliance. After criticizing the Supreme Court's current approach to section 15(2), this paper hopes to have offered a reasonable alternative. As the Supreme Court of Canada has made a habit of saying, however, the door remains open.

118 Greschner, *supra* note 1 at 304.

119 *Ibid*.

120 See *e.g. Ball*, *supra* note 115.

121 *Cunningham*, *supra* note 3 at para 74.