

On June 27, 2008, the Supreme Court of Canada issued its decision in *R. v. Kapp*. An important judgment, *Kapp* likely will have a profound impact on the interpretation and application of section 15: the equality rights guarantees in the *Charter of Rights and Freedoms*.

## 1. The Facts

The *Kapp* case arose when a group of commercial fishers took issue with a special, one-time 24-hour license granted to members of three aboriginal bands to fish for salmon in the Fraser River in British Columbia. In granting the license, the federal government said that it was both regulating the Canadian fishery (something the Canadian constitution explicitly authorizes it to do), and attempting to improve the situation of a group (aboriginal people) that suffers heavy disadvantage. Nonetheless, some mostly non-aboriginal fishers said that because the exclusive license was limited to aboriginal persons, it constituted discrimination on the basis of race, something prohibited under the *Charter*.

The Court unanimously decided that the special license did *not* breach the *Charter* rights of the claimants. Eight judges decided the case on the basis of section 15(2) of the *Charter*. One judge, Michel Bastarache (who has recently left the Court), took another route, relying on section 25 of the *Charter*. This summary emphasizes the majority decision, and then briefly discusses Justice Bastarache's concurring opinion.

## 2. The Issues

While section 15(1) of the *Charter* guarantees everyone equality under the law without discrimination, section 15(2) says that the equality guarantee does not "preclude" a government program that "has as its object the amelioration of conditions of disadvantaged individuals or groups", including groups that are disadvantaged because of race. In other words, the *Charter* anticipates and encourages the existence of what are often referred to as "affirmative action" programs. However, the relationship between section 15(1) and section 15(2) has been the subject of considerable debate. *Kapp* attempts to clarify that relationship.

In a previous decision called *Lovelace*, the Court was reluctant to give section 15(2) an "independent" role in equality analysis. The fact that a government law or program was "ameliorative" was simply something that a court would consider – along with other factors – in deciding whether the program was discriminatory. In *Kapp*, the Court says that is no longer the case:

The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other....

... But this confirmatory purpose does not preclude an independent role for s. 15(2). [Section 15(2)] tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combating disadvantage to be discriminatory and in breach of s. 15.

Essentially, the Court decides, where a program falls within the definition of an “ameliorative program” it *cannot* be discriminatory. This is an important development in equality law. By confirming an independent role for section 15(2), the Court suggests that so long as the government can show that a particular program falls within the provision’s scope by being “ameliorative” the government program cannot be considered discriminatory. The Court is careful to say that this does not mean that section 15(2) is an “exemption” to the equality guarantee. This is because, according to the Court, the two provisions work together to ensure substantive equality for all. Because substantive equality may require treating groups differently on the basis of personal characteristics, a program that falls under section 15(2) is not “justified discrimination” (as might be the case where an otherwise discriminatory provision is saved under section 1 of the *Charter*) – it is not discriminatory in *any* sense.

The government now has two responsibilities under section 15(2). It must demonstrate, first, that the particular program has an ameliorative or remedial purpose and, second, that the program targets a disadvantaged group identified by a ground listed in, or analogous to those listed in, section 15. The government need not show that the program’s effect is *actually* ameliorative; the court instead looks only at the purpose of the program (and, of course, whether it is targeted at an eligible group.) As long as the ameliorative purpose is genuine, the SCC makes it clear that courts should not probe very deeply into the structure and content of affirmative action programs.

While *Kapp* is chiefly concerned with the relationship between section 15(1) and section 15(2), the case is also important for what it says about section 15(1) itself. The Court takes the opportunity to revisit the decade-long emphasis in equality law on human dignity. In a decision called *Law v. Canada* the Court articulated a framework for claims arising under section 15(1) which mainly looked to the effect of a law or program on a person’s human dignity. In *Kapp* the Court acknowledges that the particular focus on human dignity has been severely criticized:

[S]everal difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee....But as critics have pointed out, human dignity is an abstract and subjective notion that ...cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.

The Court notes, as well, that post-*Law* decisions have appeared to rest on a formal equality analysis, specifically by use of “an artificial comparator analysis focussed on treating likes alike.”

The way to overcome these difficulties, the Court says, is to examine the various factors that may demonstrate discrimination, and to reiterate the original approach articulated in *Andrews v. Law Society of British Columbia* that section 15's central concern is "combating discrimination, defined in terms of disadvantage and stereotyping." The Court says that the *Law* case did not impose "a new and distinctive test for discrimination". Instead, equality law is to be guided by the very first section 15 decision – *Andrews* – in which LEAF played an important role.

Although he concurred in the general section 15 analysis put forth by the Chief Justice and Justice Abella (which means that *Kapp* is unanimous on this point), Justice Michel Bastarache thought the case ought to have been decided under section 25 of the *Charter*. Section 25 states that the *Charter*'s rights and freedoms "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to aboriginal peoples in Canada." Justice Bastarache took section 25 to mean three things. First, section 25 is not simply an interpretative provision, but rather carries with it specific constitutional protection vis-à-vis aboriginal rights. Section 25 creates a "priority"; it protects the rights of aboriginal people in situations where "the application of the *Charter* rights of individuals would diminish the distinctive, collective and cultural identity of an aboriginal group." Second, section 25 does not protect only aboriginal rights *already* found in the constitution, but other, non-constitutional rights which arise through ordinary laws that recognize aboriginal persons' "special status". In Bastarache J.'s words, "interests associated with aboriginal culture, territory, sovereignty or the treaty process [deserve] to be shielded from *Charter* scrutiny." (It should be noted that while the majority decided not to deal with section 25, it strongly disagreed with Bastarache J. on this point.) Third, section 25 is a "threshold issue", meaning that its application is considered at the outset of a *Charter* claim. If recognizing the primary *Charter* would derogate from the rights included within section 25, then the primary claim cannot proceed.

### **3. The Implications**

The Supreme Court's decision to confront the criticism of *Law* is welcome. The Court appears to have accepted that *Law*'s confusing and complex equality "test" – with its primary focus on human dignity – too often led courts away from section 15's primary purpose. However, the Court's discussion of *Law*'s weaknesses is very brief. Secondary literature is cited in two large footnotes; individual critiques are not engaged. While the Court's attempt to simplify section 15's framework is helpful, because of the interplay between section 15(1) and (2) the Court did not actually apply its restatement of section 15(1). Until such a decision is issued, lower courts must puzzle out as best they can what the Court means when it says that "[the] factors cited in *Law* should not be read literally as if they were legislative dispositions." In fact, this caution appears in *Law* itself – as well as in subsequent caselaw – but lower courts have remained unmoved and, for the most part, quite happy to engage in the "mechanical" analysis the Court now says is inappropriate. (Indeed, the Supreme Court itself has done so.) It remains to be seen

whether the Court's general call – minus a clear framework – will prove any more persuasive.

The decision to give independent force to section 15(2) is, on balance, a positive development. The *Charter* clearly means to protect affirmative action programs from frivolous or bad faith charges of discrimination. Where a program is truly ameliorative, it should not be vulnerable to an equality rights challenge. That said, the Court's "hands-off" approach to the question of when a program falls under section 15(2) bears closer attention. The idea that an ameliorative program can be determined largely by looking at the government's purpose in enacting that program is extremely deferential. The Court essentially says that so long as the government can point to some plausible understanding of the program as being at least *intended* to ameliorate the conditions of a disadvantage group, the section 15 analysis ends and the *Charter* claim fails. On one hand, such a robust approach to section 15(2) has the advantage of being clear and definite. On the other hand, many section 15(2) claims have not been made by clearly advantaged parties, but by *other* disadvantaged parties who have felt unfairly excluded from the benefits of a particular program. This is one of the key differences between the affirmative action debate in Canada and in the United States, where white persons routinely challenge "race tended to raise issues of competing interests neither of which enjoys a clear preferences" as a violation of the Fourteenth Amendment. In Canada, the section 15(2) cases have constitutional preference. The Supreme Court's reasoning in *Kapp* could be interpreted to give such groups *no* recourse – under section 15(1) – to challenge affirmative action programs that are under-inclusive or even hostile to them. Because such a result would dramatically depart from previous jurisprudence, and would itself appear to run counter to the overarching purpose of the equality guarantee, the Supreme Court may be forced to revisit the issue.