

AMELIORATIVE PROGRAMS AND THE CHARTER: REFLECTIONS ON THE SECTION 15(2) LANDSCAPE SINCE *R V KAPP*

Jena McGill*

*Section 15(2) of the Canadian Charter of Rights and Freedoms affirms the importance of ameliorative laws and programs in the pursuit of substantive equality. In its 2008 decision in *R v Kapp*, the Supreme Court of Canada interpreted section 15(2) as having independent force to “save” suspect distinctions in government laws, programs or activities that have an ameliorative purpose from scrutiny under section 15(1) or section 1 of the Charter when certain conditions are met. Following *Kapp*, advocates and commentators expressed various concerns about the new framework for section 15(2) of the Charter. This paper reflects on four of these concerns in light of the small, but growing, body of jurisprudence on section 15(2) that has emerged in the years since the *Kapp* decision: (1) the application of the *Kapp* analysis in cases alleging a law or program with an ameliorative purpose is underinclusive; (2) the lack of guidance on what constitutes an “ameliorative law, program or activity” for the purposes of section 15(2); (3) the proper relationship between the section 15(2) analysis and consideration of ameliorative purpose and effects at the section 15(1) stage; and, (4) deference and justification under section 15(2). The paper concludes that there are significant ongoing uncertainties with the *Kapp* framework for section 15(2), and suggests that section 15(1) of the Charter can protect ameliorative laws and programs in a more principled and equality-enhancing manner than the *Kapp* framework.*

*Le paragraphe 15(2) de la Charte canadienne des droits et libertés affirme l'importance des lois et des programmes dits « améliorateurs » dans la quête d'égalité fondamentale d'une égalité de principe. Selon l'interprétation qu'a donnée à cette disposition la Cour suprême du Canada en 2008, dans l'arrêt *R c Kapp*, le paragraphe 15(2) permettrait, de façon autonome, de « valider » des distinctions suspectes dans les lois, programmes ou activités du gouvernement ayant un effet améliorateur. Ils échapperaient ainsi à un examen approfondi au regard du paragraphe 15(1) ou de l'article premier de la Charte lorsque certaines conditions sont réunies. Suite à cette décision des défenseurs et commentateurs ont exprimé certaines préoccupations quant à ce*

* Assistant Professor, Faculty of Law, University of Ottawa. An earlier version of this paper was presented at a symposium entitled “Thirty+ Years of Section 15 of the *Charter*”, hosted by Osgoode Hall Law School in May 2016. I am grateful to the attendees of that event, to my colleague Vanessa MacDonnell and to two anonymous reviewers, for helpful feedback. Ani Mamikon provided excellent research assistance.

nouveau cadre d'analyse applicable au paragraphe 15(2) de la Charte. L'auteure se penche sur quatre de ces inquiétudes à la lumière de la jurisprudence peu nombreuse, quoique croissante, rendue sur le paragraphe 15(2) depuis l'arrêt Kapp : (1) dans les affaires discutant que l'objectif d'une loi ou d'un programme est améliorateur, l'analyse de l'arrêt Kapp est d'application restreinte; (2) il n'y a aucune ligne directrice quant à ce qui constitue des « lois, programmes et activités améliorateurs » aux fins du paragraphe 15(2); (3) il est difficile d'établir le lien approprié entre l'analyse faite en fonction du paragraphe 15(2) et la prise en considération de l'objectif et des effets améliorateurs à l'étape de l'analyse au regard du paragraphe 15(1); (4) la déférence et la justification accordées aux fins de l'analyse en vertu du paragraphe 15(2). L'auteure conclut que de nombreuses préoccupations persistent en ce qui concerne le cadre d'analyse applicable au paragraphe 15(2), tel qu'il est énoncé dans l'arrêt Kapp. Elle est d'avis que le paragraphe 15(1) de la Charte fournirait un meilleur cadre pour protéger les lois et programmes améliorateurs, et ce, de façon plus raisonnée, tout en rehaussant le principe de l'égalité.

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I. Introduction

Section 15(2) of the *Canadian Charter of Rights and Freedoms*¹ affirms that ameliorative laws and programs are important tools in the pursuit of substantive equality. In its 2008 decision in *R v Kapp*,² a unanimous Supreme Court of Canada set down a novel interpretation of section 15(2), giving it independent force to “save” suspect distinctions in government laws, programs or activities that have an ameliorative purpose from full scrutiny under section 15(1) or section 1 of the *Charter* when certain conditions are met. Following *Kapp*, and the Supreme Court’s 2011 judgment in *Alberta v Cunningham*,³ advocates and commentators expressed various concerns about the new framework for section 15(2) of the *Charter*.⁴ This paper reflects on some of those issues in light of the jurisprudence on section 15(2) that has emerged in the years since the *Kapp* decision. How are Canadian courts interpreting and applying the *Kapp-Cunningham* framework? Have new questions or uncertainties emerged? Is the manner in which the *Kapp-Cunningham* analysis is being applied in practice consistent with the specific purpose of section 15(2) and with the overarching goal of substantive equality promised by section 15?

Part II begins with a brief recounting of the doctrinal change ushered in by the *Kapp* decision, and the refinements to the *Kapp* framework provided in *Cunningham*. Part III then reflects on four significant concerns with the new framework for section 15(2) raised in the aftermath of *Kapp*. This Part also surveys the small, but growing, body of section 15(2) case law reported between 2008–2016, with a view to discerning how the *Kapp-Cunningham* framework is being applied in practice, and identifying sources of ongoing uncertainty in the current approach to section 15(2). While many of these observations are doctrinal, the overarching concern is whether the framework for section 15(2) is consistent with the goal of substantive equality promised by section 15 of the *Charter*. This issue is revisited in the conclusion, where it is suggested that section 15(1) of the *Charter* can protect ameliorative laws

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

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

³ 2011 SCC 37, [2011] 2 SCR 670 [*Cunningham*].

⁴ See e.g. [Women’s Legal Education and Action Fund \(LEAF\)](http://www.leaf.ca/cunningham-v-alberta/), Intervener Factum in *Cunningham*, *supra* note 3, online: <www.leaf.ca/cunningham-v-alberta/> [LEAF Factum]; Jonnette Watson Hamilton & Jennifer Koshan, “Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp” (2009–2010) 47 *Alta L Rev* 927 [Watson Hamilton & Koshan, “Courting Confusion?”]; Jena McGill, “Section 15(2), Ameliorative Programs and Proportionality Review” (2013) 63 *SCLR* (2d) 521 [McGill]; Michael H Morris & Joseph K Cheng, “*Lovelace* and *Law* Revisited: The Substantive Equality Promise of *Kapp*” (2009) 47 *SCLR* (2d) 281 [Morris & Cheng]; Patricia Hughes, “Resiling from Reconciling? Musing on *R v Kapp*” (2009) 47 *SCLR* (2d) 255.

and programs in a more principled and equality-enhancing manner than the *Kapp-Cunningham* framework for section 15(2).

There is no question that ameliorative laws and programs are critical to the realization of substantive equality, and that many of these programs provide important remedial benefits and opportunities to marginalized groups and communities in Canada. As Professor Peter Hogg notes, “different treatment in the services of equity for disadvantaged groups is an expression of equality, not an exception to it.”⁵ In the development and realization of ameliorative laws and programs “the government should be given some leeway,” making a certain degree of judicial deference appropriate.⁶ The observations offered below are in no way intended to undermine the importance of ameliorative laws and programs, but instead, to raise questions about the operation of the new framework for section 15(2) across a variety of kinds of equality claims in light of recent jurisprudence.

II. The *Kapp-Cunningham* Test: A New Role for Section 15(2)⁷

A) Pre-*Kapp*

The equality guarantee in the *Charter* provides:

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁸

Section 15(2) was incorporated into the *Charter* in response to concerns that the inclusion of a general principle of equality could render governments subject to “reverse discrimination” claims similar to those underway in the United States at the time the *Charter* was drafted.⁹ “Reverse discrimination”

⁵ Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf) at 53–55.

⁶ *Kapp*, *supra* note 2 at para 47.

⁷ This background section draws substantially from a similar portion of an earlier paper: McGill, *supra* note 4.

⁸ *Charter*, *supra* note 1 at s 15.

⁹ Morris & Cheng, *supra* note 4 at 283. See also Walter Tarnopolsky, “The Equality Rights in the Canadian Charter of Rights and Freedoms” (1983) 61 Can Bar Rev 242 at 247, explaining that section 15(2) was added out of “excessive caution” arising from the American

refers broadly to challenges by members of relatively more advantaged or powerful groups to government laws or programs that target historically disadvantaged or less powerful groups for certain benefits or ameliorative treatment.¹⁰ Generally, “reverse discrimination” claims attack the fact of ameliorative targeting, as opposed to the particularities of an impugned law or program. Without express protection for ameliorative laws and programs, the Equal Protection Clause of the United States Constitution¹¹ continues to be relied upon to ground successful claims that ameliorative programs violate the equality rights of relatively more advantaged individuals and groups.¹² The inclusion of section 15(2) in the Canadian *Charter* signaled a rejection of the American approach in favour of a substantive understanding of equality, focused on accommodating difference to ensure equality of results.¹³ The purpose of section 15(2) is thus to “reinforce the important insight that substantive equality requires positive action to ameliorate the conditions of socially disadvantaged groups.”¹⁴ Governments must be free to engage in ameliorative programming without the threat that “reverse discrimination” claims might undermine their efforts.¹⁵

experience. At the time the *Charter* was drafted, the case of *Regents of the University of California v Bakke*, 438 US 265 (USSC 1978), involving a successful challenge to an affirmative action admissions program at Davis Medical School that reserved 16 of every 100 entrance spots for “economically and/or educationally disadvantaged and minority” applicants, was likely fresh in the minds of the *Charter* framers.

¹⁰ Tess Sheldon, *The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities* (Law Commission of Ontario & ARCH Disability Law Centre, 2010) at 13, online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2010/11/disabilities_sheldon.pdf> [Sheldon].

¹¹ US Const, Amend V & XIV. In *Plessy v Ferguson*, 163 US 537 (USSC 1896), Justice Harlan (dissenting on the constitutionality of racial segregation) gave perhaps the most notorious explanation of this approach, stating “Our constitution is colorblind, and neither knows nor tolerates classes among citizens.” See e.g. Roozbeh Baker, “Balancing Competing Priorities: Affirmative Action in the United States and Canada” (2009) 18 *Transnational L & Contemporary Problems* 527. The success of “reverse discrimination” claims under the United States Constitution was made possible in part by the interpretation of equality as requiring like treatment for all similarly situated citizens.

¹² See e.g. *Fisher v University of Texas at Austin*, 570 US __ (2013).

¹³ On substantive equality, see generally Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2009) [Faraday, Denike & Stephenson].

¹⁴ Colleen Sheppard, *Litigating the Relationship Between Equity and Equality* (Study Paper) (Toronto: Ontario Law Reform Commission, 1993) at 28. See also Morris & Cheng, *supra* note 4 at 283. Early equality jurisprudence confirmed that in the Canadian context “the interests of true equality may well require differentiation in treatment”, see e.g. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 169, 56 DLR (4th) 1 [Andrews], citing *R v Big M Drug Mart*, [1985] 1 SCR 295 at 344, 18 CCC (3d) 385 [Big M Drug Mart].

¹⁵ Mark A Drumbl & John D R Craig, “Affirmative Action in Question: A Coherent Theory for Section 15(2)” (1997) 4:1 *Rev Const Stud* 80 at 81 (describes the mandate of section 15(2) as “*prima facie* limitless”) [Drumbl & Craig].

Prior to the *Kapp* decision in 2008, the ameliorative purpose or effects of an impugned law or program were part of the analytical framework for section 15(1) established in *Law v Canada (Minister of Employment and Immigration)*.¹⁶ There, a unanimous Supreme Court established human dignity as the touchstone of the constitutional equality guarantee.¹⁷ The ameliorative purpose or effects of an impugned law or program was one of four “contextual factors” relevant to whether differential treatment, on the basis of an enumerated or analogous ground, amounted to an infringement of a claimant’s human dignity contrary to section 15(1).¹⁸ The Supreme Court, in *Law*, acknowledged the possibility that a law or program could have an ameliorative purpose or effect with respect to one historically disadvantaged group, while at the same time discriminating (in the section 15(1) sense of infringing human dignity) against another historically disadvantaged group.¹⁹ The Court suggested that in these situations it would be necessary to “consider justification under s. 1, or the operation of s. 15(2).”²⁰

The leading judgment on section 15(2) prior to *Kapp* was the Supreme Court’s 2000 ruling in *Lovelace v Ontario*.²¹ Although the claim in *Lovelace* was decided under section 15(1),²² the Supreme Court

¹⁶ [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR].

¹⁷ *Ibid* at para 51, the Court concluded: “the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice[.]” The *Law* analysis was subject to extensive critique prior to *Kapp*: see e.g. Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dumps Section 15” (2006) 24:1 Windsor YB Access Just 111; Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13:1 CJWL 37; Christopher D Bredt & Adam M Dodek, “Breaking the *Law*’s Grip on Equality: A New Paradigm for Section 15” (2003) 20 SCLR (2d) 33; Faraday, Denike & Stephenson, *supra* note 13.

¹⁸ *Law*, *supra* note 16 at paras 72–73.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ 2000 SCC 37, [2000] 1 SCR 950 [*Lovelace*]. At issue in *Lovelace* was the Ontario First Nations Fund, a program that restricted profits from on-reserve casinos to bands registered under the *Indian Act* in order to “ameliorate the social, cultural and economic conditions of band communities” (at para 74). The claimants in *Lovelace* were Aboriginal groups and communities not registered under the *Indian Act* that argued they should also be entitled to share in casino profits (at paras 9–10).

²² The Supreme Court applied the newly developed *Law* framework and held that although the claimants in *Lovelace* had demonstrated that they experienced pre-existing disadvantage, stereotype and vulnerability akin to those bands targeted by the Fund, they “failed to establish that the First Nations Fund functioned by device of stereotype.” The Court was of the view that the distinction drawn between registered Indian bands and non-registered groups and communities “corresponded to the actual situation of individuals it affects, and the exclusion did not undermine the ameliorative purpose of the targeted

expounded on the relationship between sections 15(1) and 15(2).²³ The Court acknowledged two possible interpretive approaches to section 15(2): it could be understood as an “interpretive aid” to section 15(1), providing “conceptual depth and clarity on the substantive nature of equality”; or it could be read “as an exemption or a defence to the applicability of the s. 15(1) discrimination analysis.”²⁴ The Court concluded that the former was the correct interpretation, positioning section 15(2) as “confirmatory and supplementary”²⁵ of section 15(1). Understood as an interpretive aid without independent force, section 15(2) was rendered largely insignificant after *Lovelace*.²⁶

B) *R v Kapp*

Both *Law* and *Lovelace* left open the possibility of revisiting the appropriate interpretation of section 15(2) in a future case,²⁷ and in 2008 the Supreme Court did so in its first case of “reverse discrimination”: *R v Kapp*. The claimants in *Kapp* were primarily non-Aboriginal commercial fishers who challenged the federal Aboriginal Fisheries Strategy (the Strategy), a program designed to “enhance aboriginal involvement in the commercial fishery.”²⁸ As part of the Strategy, the government granted a communal fishing license to three Aboriginal bands, permitting only band-designated fishers to fish for salmon during a 24-hour period, and to sell any fish caught. The excluded fishers engaged in a “protest fishery” and were charged with fishing at a prohibited time.²⁹ They argued the communal fishing license was an infringement of their equality rights. In a unanimous decision,³⁰

program.” As a result, the Fund was found not to infringe s. 15(1) and did “not engage the remedial function of the equality right” (*ibid* at para 73).

²³ *Lovelace*, *supra* note 21. The Ontario Court of Appeal, in *Lovelace v Ontario* (1997), 33 OR (3d) 735, 44 CRR (2d) 285 [*Lovelace ONCA*] [*Lovelace ONCA* cited to OR], resolved the case on the basis of section 15(2).

²⁴ *Lovelace*, *supra* note 21 at para 97. For further perspectives on the early debates on the appropriate role of section 15(2) see e.g. Edward M Iacobucci, “Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution” (1998) 36:2 *Osgoode Hall LJ* 293 at 326; Drumbl & Craig, *supra* note 15 at 85; Michael Pierce, “A Progressive Interpretation of Subsection 15(2) of the *Charter*” (1993) 57:2 *Sask L Rev* 263.

²⁵ *Lovelace*, *supra* note 21 at para 105.

²⁶ Morris & Cheng, *supra* note 4 at 299 conclude that after *Lovelace*, equality jurisprudence considering claims related to ameliorative programs reflected the “diminished significance” of section 15(2).

²⁷ See *Lovelace*, *supra* note 21 at para 108; *Law*, *supra* note 16 at para 73.

²⁸ *Kapp*, *supra* note 2 at paras 6–7.

²⁹ *Ibid* at para 9.

³⁰ Eight judges concurred with the majority judgment based on section 15, authored by McLachlin CJC and Abella J. Bastarache J concurred in the result but concluded that section 25 of the *Charter* provided a “complete answer” to the claim so there was no need to engage section 15. However, Bastarache J indicated that he was in “complete agreement with

the Supreme Court agreed that the communal fishing license created a distinction on the enumerated ground of race,³¹ but held that because the objective of the program was “the amelioration of the conditions of a disadvantaged group”—the Aboriginal bands targeted by the Strategy—that the Strategy was constitutional.³² In reaching this conclusion, the Court established a new framework for section 15 of the *Charter*.

The Court confirmed that the purpose of section 15(2) is to preserve “the right of governments to implement ... programs [aimed at helping disadvantaged groups improve their situation], without fear of challenge under section 15(1).”³³ The majority of the decision focused on the operation of the “enabling”³⁴ provision of section 15(2). Here, the Court did a conceptual about-face, for the first time interpreting section 15(2) as having independent force. The Court explained that ameliorative programs would be insulated from scrutiny under section 15(1) of the *Charter* where two conditions are met: “(1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.”³⁵

In order to show that an impugned law or program has an ameliorative purpose the Court found an “intent-based” analysis to be appropriate, making the “legislative goal rather than actual effect ... the paramount consideration.”³⁶ There must be a correlation between the impugned distinction and the particular disadvantage suffered by the target group.³⁷ If an impugned law or program is found to have a genuinely ameliorative purpose, section 15(2) “precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.”³⁸

the restatement of the test for the application of section 15” in the majority judgment (*ibid* at paras 76–77).

³¹ For important insight on the Supreme Court’s reliance on race as the ground of differentiation in *Kapp*, see June McCue, “*Kapp*’s Distinctions: Race-Based Fisheries, the Limits of Affirmative Action for Aboriginal Peoples and Skirting Aboriginal People’s Unique Constitutional Status Once Again” (2008) 5:1 *Directions* 56.

³² *Kapp*, *supra* note 2 at para 3. Commentators have rightly raised the question of whether *Kapp* was properly characterized as an “ameliorative program” given the context of Aboriginal fishing rights: see e.g. Luc Tremblay, “Promoting Equality and Combating Discrimination through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigm” (2012) 60 *Am J Comp L* 181.

³³ *Kapp*, *supra* note 2 at para 16.

³⁴ *Ibid* at para 25 [emphasis in original].

³⁵ *Ibid* at para 41.

³⁶ *Ibid* at paras 49, 44.

³⁷ *Ibid* at para 49.

³⁸ *Ibid* at para 52.

C) Refining *Kapp: Alberta v Cunningham*

In its 2011 judgment in *Cunningham*, the Supreme Court elaborated upon its new formula for section 15(2). Unlike the “reverse discrimination” claim made in *Kapp*, however, *Cunningham* involved a claim that an ameliorative program was underinclusive. The claimants were members of the Peavine Métis community in Alberta who registered under the *Indian Act*³⁹ in order to obtain certain health benefits.⁴⁰ The impugned legislation, the *Métis Settlements Act (MSA)*⁴¹ provides that voluntary registration under the *Indian Act* precludes membership in a Métis settlement, and on that basis the claimants were removed from the membership list of their community. The claimants argued that the provisions of the *MSA* denying them membership in their Métis community infringed their equality rights.⁴²

A unanimous Supreme Court dismissed the claim. Assuming the distinction between Métis registered under the *Indian Act* and Métis who were not to be based on the analogous ground of “registration as a status Indian”,⁴³ the Court determined this distinction was rationally related to the ameliorative goal of the *MSA*.⁴⁴ In the result, the impugned distinction was “saved” by section 15(2) and declared constitutional. In reaching this conclusion, Chief Justice McLachlin, writing for the Court, elaborated on the *Kapp* analysis in several important ways. First, she explained that the determination of purpose under section 15(2) is “a matter of statutory interpretation” to be undertaken with regard to “the words of the enactment, expressions of legislative intent, the legislative history, and the history and social situation of the affected groups.”⁴⁵ A “naked declaration” of

³⁹ *Indian Act*, RSC 1985, c I-5.

⁴⁰ *Cunningham*, *supra* note 3 at para 25. For an important discussion on the role of choice in the *Cunningham* decision, see LEAF Factum, *supra* note 4 at paras 22–25.

⁴¹ RSA 2000, c M-14 [*MSA*].

⁴² The claimants in *Cunningham* also argued infringement of their rights to freedom of association and liberty under sections 2(d) and 7 of the *Charter*; both claims were dismissed (*supra* note 3 at paras 89–95).

⁴³ *Ibid* at paras 56–58. The Chambers judge of the Alberta Queen’s Bench accepted that the exclusion was based on the analogous ground of “registration as a status Indian”, as argued by the claimants in 2007 ABQB 517, 81 Alta LR (4th) 28. The Crown did not contest this finding at the Alberta Court of Appeal or at the Supreme Court of Canada. The Supreme Court did not make an express determination on whether “registration as a status Indian” amounts to an analogous ground of discrimination, but proceeded on the assumption that an analogous ground was made out (*Cunningham*, *supra* note 3 at para 58).

⁴⁴ *Cunningham*, *supra* note 3 at para 73 found that the distinction “is supported by historic distinctions between Métis and Indian culture, by the fact that, without the distinction, achieving the object of the program would be more difficult, and by the role of the Métis settlement in defining its membership”.

⁴⁵ *Ibid* at para 61.

ameliorative purpose will not suffice.⁴⁶ Second, the Chief Justice reiterated a point made in *Kapp*, emphasizing that “[i]t is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others.”⁴⁷ Finally, Chief Justice McLachlin clarified that showing that the impugned distinction “serve[s] and [is] necessary” to the ameliorative purpose of the law or program,⁴⁸ does not require “proof that the exclusion is essential to realizing the object of the ameliorative program.”⁴⁹ Instead, she opined:

What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality. A purposive approach to s. 15(2) focussed on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program. To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s. 15’s purpose of promoting substantive equality.

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* ... 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.⁵⁰

This has become known as the “rational contribution” test under section 15(2), requiring courts to consider whether it was rational for the state to conclude that the impugned distinction would contribute to the ameliorative goal of the legislation.⁵¹

Accordingly, the *Kapp-Cunningham* analysis for section 15(2) requires that the government adduce evidence to show: (1) “that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality”; (2) that there is a “correlation between the program and the disadvantage suffered by the target group”; and (3) that the impugned distinction on an enumerated or analogous ground “in a general sense serves or advances the [ameliorative] object of the program.”⁵² If these requirements are made out, the law or program will not be subject to any further scrutiny. Only where the government fails to meet the burden under section 15(2) does the claimant have the opportunity to show that

⁴⁶ *Ibid* at para 44, citing *Kapp*, *supra* note 2 at para 49.

⁴⁷ *Ibid* at para 40.

⁴⁸ *Kapp*, *supra* note 2 at para 52.

⁴⁹ *Cunningham*, *supra* note 3 at para 45.

⁵⁰ *Ibid* at paras 45–46.

⁵¹ See e.g. *International Association of Fire Fighters, Local 268 v Adekayode*, 2016 NSCA 6 at paras 115–119, 371 NSR (2d) 38 [*Adekayode*].

⁵² *Cunningham*, *supra* note 3 at paras 44–45.

the distinction is discriminatory because it perpetuates prejudice or stereotyping (per the second step of *Andrews*).⁵³ Finally, if discrimination is made out under section 15(1), the government can attempt to justify the law or program under section 1.

III. The Post-*Kapp* Landscape

Following the decisions in *Kapp* and *Cunningham*, advocates and scholars voiced a number of concerns about the new analytical framework for section 15 of the *Charter* and the enhanced interpretive role given to section 15(2). This section reflects on four of these concerns in light of the small but growing body of section 15(2) case law that has emerged since the *Kapp* decision in 2008.⁵⁴ The four issues considered here are: (1) the application of the *Kapp-Cunningham* analysis in cases alleging a law or program with an ameliorative purpose is underinclusive; (2) the lack of guidance on what constitutes an “ameliorative law, program or activity” for the purposes of section 15(2); (3) the proper relationship between the *Kapp-Cunningham* analysis for section 15(2) and consideration of ameliorative purpose and effects under section 15(1); and (4) deference and justification under section 15(2). Each issue will be considered in turn.

A) *Kapp-Cunningham* and Underinclusive Equality Claims

Following *Kapp*, there was much uncertainty about whether the new framework for section 15(2) was intended to operate across all section 15 claims, or whether its application was limited to “reverse discrimination” claims, like that in *Kapp*. For example, in the 2009 decision in *Jean v Canada (Indian Affairs and Northern Development)*, the Federal Court of Appeal considered a decision by the Minister of Indian and Northern Affairs to refuse financial assistance under the Elementary/Secondary Education Program (the Program) to student members of the Micmac Nation of Gespeg because the Program offered funding only for students who were

⁵³ *Kapp*, *supra* note 2 at para 40; *Andrews*, *supra* note 14.

⁵⁴ To identify the relevant case law, I used a date-limited (January 1, 2008–March 1, 2016) keyword search in the CanLII database using the following search terms: *Charter* AND “15(2)” AND ameliorative AND *Kapp*. The search returned 67 results, which I sorted in terms of whether section 15(2) was analyzed or discussed in any significant way, as opposed to mentioned in passing, or quoted as part of a general citation to the section 15 language, which was the case in most of the decisions. Final determinations by provincial and territorial boards or tribunals are not part of the present analysis, although these bodies have grappled with the *Kapp* analysis in the course of interpreting their respective statutory provisions on ameliorative programs, see e.g. *SH v Ontario (Health and Long-Term Care)*, 2012 HRTO 872; *Young v Lynwood Charlton Centre*, 2012 HRTO 1133 at paras 17–23; *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360. For a complete list of section 15(2) cases considered here, see Appendix A, below.

“ordinarily resident on a reserve” and the Micmac Band had no reserve.⁵⁵ On the applicability of a section 15(2) analysis, Justice Trudel opined:

There was considerable debate before this Court as to whether the guidance of *Kapp*, a case of reverse discrimination, could be applied in a case of discrimination owing to the overly restrictive scope of a program. In that regard, two observations must be made: (1) if *Kapp* had been intended to be read in a limited manner, the Supreme Court of Canada would have stated so; and (2) *Kapp* is part of the line of cases of *Andrews* ... and *Law* ... neither of which dealt with a case of reverse discrimination. Therefore, I do not believe that the teachings of *Kapp* should be rejected outright for the purposes of this appeal.⁵⁶

Despite detailed argument about the risks of applying the *Kapp* framework to a claim of underinclusiveness, *Cunningham* confirmed the application of the *Kapp* framework across all kinds of equality claims, including claims of underinclusion and adverse effects.⁵⁷ *Cunningham* raised concerns⁵⁸ that by situating the section 15(2) analysis in advance of the section 15(1) inquiry into discrimination and focusing exclusively on the purpose of an ameliorative program—a deferential analysis according to *Cunningham*—the *Kapp* framework would foreclose arguments that a government law or program is both ameliorative *and* discriminatory at the same time.⁵⁹ This possibility is inconsistent with pre-*Kapp* jurisprudence⁶⁰ and does not advance the goal of substantive equality, which has consistently recognized

⁵⁵ 2009 FCA 377 at paras 1–3, 402 NR 313 [*Jean*], leave to appeal to SCC refused, 33586 (10 June 2010).

⁵⁶ *Ibid* at para 9 [citations omitted]. See also *Pratten v British Columbia (AG)*, 2011 BCSC 656, 22 BCLR (5th) 307 [*Pratten BCSC*] at paras 235, 239 where the Attorney General, relying on *Kapp*, argued that section 15(2) provided a complete defence to the claim. The trial judge, writing before the release of *Cunningham*, rejected the application of section 15(2) on the basis that the claim was not one of “reverse discrimination” but underinclusiveness.

⁵⁷ See e.g. LEAF Factum, *supra* note 4.

⁵⁸ See e.g. McGill, *supra* note 4; Jonnette Watson Hamilton & Jennifer Koshan, “The Supreme Court, Ameliorative Programs and Disability: Not Getting It” (2013) 25:1 CJWL 56 [Watson Hamilton & Koshan, “Not Getting It”].

⁵⁹ For a complete enunciation of the conceptual impossibility of arguing that a program is both ameliorative and discriminatory under the *Kapp* framework, see Watson Hamilton & Koshan, “Not Getting It”, *supra* note 58 and see LEAF Factum, *supra* note 4 at paras 8–18.

⁶⁰ See e.g. *Law*, *supra* note 16 at para 72, where the Supreme Court acknowledged that although the ameliorative character of a law or program is relevant in cases of “reverse discrimination”, it should not defeat a claim of underinclusiveness:

I emphasize that this factor [ameliorative purpose or effects] will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the

that discrimination can occur by virtue of a law's purpose *and* its effects.⁶¹ In the wake of *Cunningham*, Professors Jonnette Watson Hamilton and Jennifer Koshan called for "a framework for reconciling the new role of section 15(2) and claims of under-inclusive ameliorative programs."⁶² While the post-*Kapp* jurisprudence does not offer such a framework, it does reveal some preliminary insights about the operation of the *Kapp-Cunningham* analysis in cases of underinclusion.

First, the post-*Kapp* jurisprudence demonstrates that the *Kapp-Cunningham* framework continues to operate in an equality-enhancing fashion in situations of "reverse discrimination." This is evident in a number of cases that are factually similar to *Kapp*, insofar as they involve a challenge by a non-Aboriginal claimant or claimants to a program or activity designed to ameliorate the situation of Aboriginal peoples. For example, in *R v Frick*, a non-Aboriginal accused who wanted to have an agent represent him in an impaired driving case challenged Alberta's Aboriginal Court Worker Program, which allows agents to appear for Aboriginal accused in certain circumstances.⁶³ Chief Judge Wheatley of the Alberta Provincial Court accepted that the Court Worker Program drew a distinction based on race, but held that it was protected by section 15(2) of the *Charter* because it had a remedial purpose of "bridging the gap" between Aboriginal people—a disadvantaged group recognized by an enumerated ground—and the justice system.⁶⁴ In these kinds of cases,⁶⁵ as in *Kapp*, the application of section 15(2) to save an ameliorative program is consistent with the purpose of section 15(2) and with the overarching goal of substantive equality, which clearly recognizes the importance of ameliorative programming in the pursuit of equality of outcomes.

However, consistent with the general trend in section 15 jurisprudence, much of the post-*Kapp* case law involves claims not of "reverse discrimination" but of underinclusion.⁶⁶ Predictably, the underinclusion

members of a historically disadvantaged group will rarely escape the charge of discrimination.

⁶¹ See e.g. *Big M Drug Mart*, *supra* note 14 at para 80.

⁶² Watson Hamilton & Koshan, "Courting Confusion?", *supra* note 4 at 927.

⁶³ *R v Frick*, 2010 ABPC 280, 34 Alta LR (5th) 50 [*Frick*].

⁶⁴ *Ibid* at paras 70–72.

⁶⁵ See also *R v Marsh*, 2014 BCPC 235, 2014 CarswellBC 3052 (WL Can) [*Marsh*], which involved a similar kind of claim by non-Aboriginal claimants to government decision-making characterized as intended to remediate the relationship between Aboriginal peoples and government. See *Galganov v Russell (Township)*, 2010 ONSC 4566, 325 DLR (4th) 136 [*Galganov*], a "reverse discrimination" claim by Anglophone claimants challenging a law requiring commercial signs to be printed in both official languages.

⁶⁶ The majority of cases adjudicated under section 15 over the past two decades have involved claims that a benefit-conferring law or program is underinclusive. See e.g. *Lovelace*,

cases adjudicated post-*Kapp* where section 15(2) of the *Charter* is live have had varying results: some courts have declined to apply the section 15(2) framework at all, preferring to consider evidence of ameliorative purpose (or effects) under section 15(1);⁶⁷ others have found that the requirements of the *Kapp-Cunningham* framework are not satisfied and section 15(2) does not apply, as in the Alberta Court of Appeal's judgment in *Cunningham*⁶⁸ and the Federal Court decision in *Canadian Doctors for Refugee Care v Canada (Minister of Citizenship and Immigration)*;⁶⁹ and some courts have found section 15(2) is operative and the impugned distinction is saved from further scrutiny, as in *Pratten v British Columbia (AG)*,⁷⁰ *International Association of Firefighters, Local 268 v Adekayode*,⁷¹ and in the Supreme Court's decision in *Cunningham*, above. The first class of cases, where courts opted to consider evidence of ameliorative purpose in section 15(1) instead of section 15(2), will be considered below. The latter collection of cases, where courts either declined or decided to apply section 15(2), will be examined here.

The facts of *Cunningham*, recounted above, gave rise to a different conclusion on section 15(2) at the Alberta Court of Appeal in 2009.⁷² There, Justice Ritter accepted that the purpose of the MSA was "to aid the enhancement and preservation of Métis culture and identity, and enable a degree of self-governance ... [and] ... to preserve a Métis land base."⁷³ Applying the *Kapp* framework, the Court of Appeal recognized that in order for the exclusion of the claimant group—Métis who were also status Indians—to be justified under section 15(2) "that exclusion must have a rational connection to the enhancement and preservation of Métis culture and self-governance, and to the securing of a Métis land base."⁷⁴ Justice Ritter concluded that the exclusion of Métis registered under the *Indian Act*

supra note 21; *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; *Eldridge v British Columbia*, [1997] 3 SCR 624, 151 DLR (4th) 577, *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385, and *M v H*, [1999] 2 SCR 3, 43 OR (3d) 254.

⁶⁷ Including *Jean*, *supra* note 55 and *Cooper v Ontario (Attorney General)* (2009), 99 OR (3d) 25, 311 DLR (4th) 480 [Cooper].

⁶⁸ *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, 310 DLR (4th) 519 [Cunningham ABCA].

⁶⁹ *Canadian Doctors for Refugee Care v Canada (Minister of Citizenship and Immigration)*, 2014 FC 651, 458 FTR 1 [Refugee Care].

⁷⁰ *Pratten v British Columbia (AG)*, 2012 BCCA 480 at para 37, 357 DLR (4th) 660, leave to appeal to SCC refused, 35191 (30 May 2013) [Pratten].

⁷¹ *Adekayode*, *supra* note 51 at para 155.

⁷² For important commentary on the Alberta Court of Appeal decision in *Cunningham*, see Jennifer Koshan, "Another Take on Equality Rights by the Court of Appeal" (13 July 2009) ABLawg.ca, online: <<http://ablawg.ca/2009/07/13/another-take-on-equality-rights-by-the-court-of-appeal/>> [Koshan, "Another Take"].

⁷³ *Cunningham ABCA*, *supra* note 68 at para 24.

⁷⁴ *Ibid.*

was “relatively arbitrary” and thus did “not rationally advance the purported legislative purposes of the *MSA*.”⁷⁵ As a result, section 15(2) did not apply to exempt the *MSA* from scrutiny under section 15(1) of the *Charter*.

The 2014 decision in *Refugee Care*⁷⁶ involved a challenge to two Orders in Council (OIC) that “significantly reduced the level of health care coverage” available to many refugee claimants under the Interim Federal Health Program (IFHP) “and all but eliminated it for others.”⁷⁷ The OICs created a distinction on the enumerated ground of national origin in terms of the level of benefits available between refugee claimants from Designated Countries of Origin (DCO) and those from non-Designated Countries of Origin (non-DCO). The government argued that the object of the IFHP was the “amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need”⁷⁸ and that the tiered system was designed to meet the differing health needs of subgroups of refugees. Justice Mactavish of the Federal Court concluded that the government failed to satisfy the second element of the *Kapp-Cunningham* analysis because there was “no evidence to show that the tiered coverage structure of the IFHP corresponds to the reality of refugee claimants from DCO countries.”⁷⁹ Since the distinction between DCO and non-DCO refugee claimants did not correspond to the disadvantage experienced by the target group, the impugned distinction was not saved under section 15(2).

In the second set of cases, the three requirements of the *Kapp-Cunningham* analysis were satisfied and section 15(2) functioned to insulate the impugned distinctions from further review. *Pratten* involved a challenge to the provisions of the *BC Adoption Act*, and associated regulations⁸⁰ that establish mechanisms whereby adult adopted children can obtain information about their biological parents. The claimant alleged the *BC Adoption Act* was underinclusive because it did not include parallel provisions for the benefit of adults conceived using sperm from an anonymous donor.⁸¹ The British Columbia Court of Appeal framed the purpose of the *Adoption Act* as the amelioration of “the disadvantages created by the state-sanctioned dissociation of adoptees [a disadvantaged group identified by an analogous ground] from their biological parents.”⁸² Given that the law targeted adoptees only, the distinction between adoptees and donor offspring was

⁷⁵ *Ibid* at paras 28, 31.

⁷⁶ *Refugee Care*, *supra* note 69.

⁷⁷ *Ibid* at para 1.

⁷⁸ *Ibid* at para 780.

⁷⁹ *Ibid* at paras 804–06.

⁸⁰ *Adoption Act*, RSBC 1996, c 5 [BC *Adoption Act*]; BC Reg 291/96.

⁸¹ *Pratten* BCSC, *supra* note 56 at para 224.

⁸² *Pratten*, *supra* note 70 at para 37.

rationally related to the purpose and so the distinction was “saved” under section 15(2). Citing the Supreme Court’s opinion in *Cunningham*, Justice Frankel concluded, “it is open to the Legislature to provide adoptees with the means of accessing information about their biological origins without being obligated to provide comparable benefits to other persons seeking such information.”⁸³

The Nova Scotia Court of Appeal applied a similar logic in *Adekayode*.⁸⁴ Mr. Adekayode’s collective agreement provided a top up to the federal Employment Insurance benefits paid to adoptive parents, but not birth parents, who take parental leave. Mr. Adekayode brought a claim under the Nova Scotia *Human Rights Act* (NS HRA), claiming the collective agreement discriminated against him, a birth parent, on the basis of family status.⁸⁵ The union and the employer took the position that adoptive parents are disadvantaged because they “have particular challenges to integrate and bond with their new arrival,” and so the top up for adoptive parents was ameliorative and should be protected under section 6(i) of the NS HRA, which is substantially similar to section 15(2) of the *Charter*.⁸⁶ The Human Rights Board of Inquiry held the top up scheme was not part of a “program or activity” for the purposes of section 6(i) of the NS HRA and went on to find the scheme was discriminatory. The union appealed. The Court of Appeal allowed the appeal in respect of section 6(i) of the NS HRA,⁸⁷ concluding that the adoption leave provisions in the collective agreement had the objective of ameliorating the condition of adoptive parents, a disadvantaged group compared to birth parents.⁸⁸

To be sure, the varying results in these section 15(2) cases are attributable in large part to their differing facts and contexts. However, while these cases may all be characterized as claims of underinclusion, insofar as the claimants challenged their exclusion from ameliorative benefits provided by the impugned laws or programs, there is a further distinction emerging in

⁸³ *Ibid* at para 42.

⁸⁴ *Adekayode*, *supra* note 51 at para 155.

⁸⁵ *Human Rights Act*, RSNS 1989, c 214, section 5(1)(r) [NS HRA].

⁸⁶ *Adekayode*, *supra* note 51 at para 105. Section 6(i) of the NS HRA, *ibid* at s 5, provides an “exception” to the general prohibition on discrimination in the following terms: Subsection (1) of Section 5 does not apply ... (i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section (5).

⁸⁷ In *Adekayode*, *supra* note 51 at para 116, found that “the authorities under s. 15(2) [of the *Charter*] directly pertain to the interpretation of s. 6(i) [of the Nova Scotia Human Rights Act].”

⁸⁸ *Ibid* at paras 105–106, 155.

the case law worthy of consideration: the relative positioning of the claimant vis-à-vis the group targeted by the ameliorative program. Where the claim is one of “insider-underinclusion”—from a claimant who is him or herself a member of the group ostensibly targeted for ameliorative benefits, as in the *Cunningham ABCA* and *Refugee Care* decisions—section 15(2) is less likely to be operative. Justice Mactavish in *Refugee Care* expressly noted this important context in the following terms:

Ameliorative programs are often challenged by those *outside* the group that the program is designed to assist ... That is not the situation here: in this case, the changes to the IFHP brought about through the 2012 OICs are being challenged on behalf of some of the very individuals that the program was purportedly designed to benefit, namely refugee claimants from DCO countries and failed refugee claimants.⁸⁹

That the challenge came from claimants targeted by the ameliorative program was key to Justice Mactavish’s conclusion that section 15(2) should not operate to insulate the impugned OICs from scrutiny under section 15(1) of the *Charter*. This is consistent with the decision of the Ontario Court of Appeal in *Lovelace*, where the Court opined that an ameliorative program “that excludes from its reach disadvantaged individuals or groups that the program is designed to benefit likely infringes s. 15(1).”⁹⁰ This position is in furtherance of substantive equality and speaks to the concern noted above that the *Kapp-Cunningham* analysis could preclude arguments that an ameliorative program is underinclusive in its demarcation of the target group; Justice Mactavish’s judgment in *Refugee Care* appears to be attuned to this risk. Where a claim of underinclusion comes from a sub-class of the group allegedly targeted for benefits under an ameliorative program, that exclusion is most properly assessed for discriminatory effects under section 15(1) of the *Charter* and should not be “saved” under section 15(2).

Conversely, in cases involving claims of “outsider-underinclusion”—from a claimant positioned outside the group targeted for ameliorative benefits—section 15(2) seems significantly more likely to be operative, with the courts relying on the justificatory dicta from *Cunningham*:

[G]overnments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others ... Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally,

⁸⁹ *Refugee Care*, *supra* note 69 at paras 791–92.

⁹⁰ *Lovelace* ONCA, *supra* note 23 at para 67. The Supreme Court of Canada affirmed the Ontario Court of Appeal’s decision in *Lovelace* without specific comment on this part of the decision.

they may be precluded from using targeted programs to achieve specific goals relating to specific groups.

...

Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality. This is so even where the included and excluded groups ... share a similar history of disadvantage and marginalization.⁹¹

The decisions in *Pratten* and *Adekayode*, above, are illustrative of this class of cases: they are claims of underinclusion brought by claimants situated outside the group that the ameliorative program at issue is designed to assist. These are not “reverse discrimination” claims—the claimants in *Pratten* and *Adekayode* sought access to the ameliorative program rather than attacking the program or the provision of remedial benefits to others—yet the claimants in these cases were framed by the courts as more advantaged than the target groups: in *Pratten*, donor offspring were situated as more advantaged than adoptees, and biological parents were framed as not suffering disadvantage like adoptive parents in *Adekayode*.⁹²

This class of “outsider-underinclusion” cases raises three important concerns. First, because section 15(2) provides no opportunity to assess the line-drawing at the heart of ameliorative programs, the *Kapp-Cunningham* analysis leaves open the possibility that a distinction that “serves and advances” the ameliorative goal of a program, but is nonetheless discriminatory, will avoid scrutiny under section 15(1). It is entirely possible that a decision not to include a group or community in an ameliorative program, or to include only certain sub-groups of a larger group, could constitute discrimination within the meaning of section 15.

The quintessential example is *Vriend v Alberta*, where the claimant argued that the exclusion of sexual orientation as a prohibited ground of

⁹¹ *Cunningham*, *supra* note 3 at paras 41, 53 [citation omitted].

⁹² *Pratten*, *supra* note 70 at para 37; *Adekayode*, *supra* note 51 at paras 105–06, 155. See also *Toussaint v Canada (Attorney General)*, 2011 FCA 203, [2013] 1 FCR 374, leave to appeal to SCC refused, 34446 (5 April 2012), which involved a challenge to the exclusion of illegal immigrants from health care coverage under the IFHP. In this context, the Federal Court of Appeal observed that if Ms. Toussaint had successfully demonstrated the existence of a distinction, “subsection 15(2) of the *Charter* might become live[.] If the immigrants, refugees and others who do receive medical care under the Order in Council constitute a disadvantaged group embraced by the enumerated or analogous grounds, and if the Order in Council is aimed at ameliorating or remedying that group’s condition, the Order in Council would be a “law, program or activity” within the meaning of subsection 15(2)” (at para 102).

discrimination in the Alberta *Individual Rights Protection Act* (AB IRPA) constituted a violation of section 15 of the *Charter*.⁹³ The Supreme Court agreed and found that the exclusion could not be justified as a reasonable limit under section 1 of the *Charter*. How might the result in *Vriend* have differed if section 15(2) was in play? Assuming that human rights legislation like the AB IRPA would qualify as an ameliorative law pursuant to section 15(2),⁹⁴ Mr. Vriend's claim could be classified as one of "outsider-underinclusion" since the AB IRPA did not target gays and lesbians for remedial treatment. Could the impugned distinction be "saved" from section 15(1) review by virtue of section 15(2)? Surely such a result would not be consistent with the purpose of section 15(2) of the *Charter*, nor with the goal of substantive equality. Thus, courts must be careful with the deferential justification from *Cunningham*, that "government must be able to set priorities" and ameliorative programs cannot "help all members of a disadvantaged group at the same time."⁹⁵ These truths do not mean that the priority-setting and decision-making of governments in the context of ameliorative programs should be immune from section 15(1) scrutiny, as *Vriend* makes clear.

Second, the comparative positioning of "more" and "less" disadvantaged groups in the section 15(2) jurisprudence is troubling. It risks a "race to the bottom"-type analysis that is clearly inconsistent with substantive equality.⁹⁶ Additionally, given that the Supreme Court has affirmed that the purpose of section 15(2) is specifically to protect ameliorative programs from "reverse discrimination" claims,⁹⁷ one wonders if relying on section 15(2) to save "outsider-underinclusion" claims from further *Charter* scrutiny, in part because the claimants are framed as not sharing the disadvantage experienced by the group targeted by the ameliorative program, amounts to treating these claims as *de facto* "reverse discrimination" claims. In any event, it is futile to try to fit complex equality claims into a tidy taxonomy of type and to do so is inconsistent with the "flexible and contextual inquiry" required under section 15 of the *Charter*.⁹⁸

⁹³ *Vriend*, *supra* note 66; RSA 1980, c I-2 [AB IRPA].

⁹⁴ In *Kapp*, *supra* note 2 at para 55, the Supreme Court opined that "broad societal legislation" may not qualify as ameliorative for the purposes of section 15(2). Watson Hamilton & Koshan, "Courting Confusion?" *supra* note 4 at 948, question whether or not human rights legislation, such as that at issue in *Vriend*, would qualify as an ameliorative law for the purposes of section 15(2), in light of this statement from *Kapp*.

⁹⁵ *Supra* note 3 at para 41.

⁹⁶ See e.g. *Lovelace*, *supra* note 21 at paras 59, 69, where the Supreme Court expressly rejected a "relative disadvantage approach" to section 15.

⁹⁷ *Cunningham*, *supra* note 3 at para 41.

⁹⁸ *Quebec (AG) v A*, 2013 SCC 5 at para 331, [2013] 1 SCR 61, Abella J (dissenting in result) [*Quebec v A*].

The more important point, perhaps, is that ameliorative laws and programs may be based on allegedly discriminatory distinctions within a disadvantaged group (as alleged in *Cunningham*), between disadvantaged groups (as in *Pratten*, if one accepts the claimant's argument that children born of sperm from an anonymous donor experience disadvantage) or may result in discriminatory or disadvantageous effects for some members of the targeted group or for other marginalized groups. As the Supreme Court stated in *Law*: "[t]he fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee."⁹⁹ Section 15 should be capable of recognizing and redressing all these kinds of discrimination, and section 15(2) should not automatically oust claims like those in *Pratten* from section 15(1) review simply because the claimant is not part of the group targeted by the ameliorative law. The result in *Pratten* may have been the same had the court proceeded to section 15(1), however that analysis would have invited much fuller consideration of the purpose, means and effects of the exclusion of donor children from the access to information provisions of the *BC Adoption Act*.

Finally, the importance of ensuring that section 15(2) does not automatically preclude review under section 15(1) of allegedly discriminatory distinctions between disadvantaged groups or within sub-groups of a disadvantaged community is apparent in *Cunningham*. *Cunningham* is the outlier to this preliminary assessment of the post-*Kapp* underinclusion case law. As noted above, *Cunningham* involved a claim of underinclusion from members of the very community that the legislation at issue was intended to benefit—the Métis community—yet the Supreme Court overturned the Court of Appeal's decision not to apply section 15(2) and determined that section 15(2) was dispositive. The Court of Appeal judgment, which declined to apply section 15(2) and instead looked at the effects of the impugned distinction on the claimants under section 15(1), is more consistent with the purpose of section 15(2) and better accords with the goal of substantive equality. Section 15(2) should not operate to "save" an ameliorative program from a claim of "insider-underinclusion" like it did in the Supreme Court's judgment in *Cunningham*. These kinds of claims are most properly dealt with under section 15(1), where a court can assess whether the exclusion of a sub-group of the target community from the program's purpose is itself discriminatory, and under section 1, where the government can justify its decision to exclude a portion of the target community from ameliorative benefits.

⁹⁹ *Law*, *supra* note 16 at para 70.

B) Genuinely Ameliorative Law, Program or Activity¹⁰⁰

As noted above, the first element of the *Kapp-Cunningham* analysis requires the government to demonstrate that the impugned distinction is part of a “genuinely ameliorative law, program or activity.” In *Kapp*, the Supreme Court did not define “ameliorative” although it did state that “broad societal legislation, such as social assistance programs” would not fall within the ambit of section 15(2).¹⁰¹ This led to a second line of critique, in the wake of *Kapp*, focused on the lack of guidance as to when an impugned law, program or activity would be “genuinely ameliorative” for the purposes of section 15(2).¹⁰² In *Lovelace*, when the Supreme Court first considered—and rejected—the idea that section 15(2) might operate to save ameliorative programs from scrutiny under section 15(1), the intervener Council of Canadians with Disabilities warned:

Much of what government does could be described as having as its object the amelioration of disadvantage. It was never intended that such programs as health care, education (including special education), disability and employment insurance, social insurance and pensions plans should be exempted from s. 15(1) review altogether.¹⁰³

Nonetheless, the post-*Kapp* jurisprudence to date suggests a relatively low threshold for a law or program to qualify as ameliorative for the purposes of section 15(2). It also reveals some interesting treatment of the “law, program or activity” element of the first part of the *Kapp-Cunningham* analysis.

i) “Genuinely ameliorative”

The post-*Kapp* case law demonstrates a wide range of laws and programs have been deemed ameliorative pursuant to the first step of section 15(2), including: certain provisions of the *Canada Pension Plan* (in *obiter*);¹⁰⁴ sections of the *BC Adoption Act*;¹⁰⁵ a municipal by-law requiring commercial

¹⁰⁰ *Kapp*, *supra* note 2 at para 47; *Cunningham*, *supra* note 3 at 44.

¹⁰¹ *Kapp*, *supra* note 2 at para 55.

¹⁰² See e.g. Jennifer Koshan, “[Evidence of Amelioration: What does Kapp Require of Governments under Section 15\(2\) of the Charter? What Will Courts Permit?](http://ablawg.ca/2009/03/08/evidence-of-amelioration-what-does-kapp-require-of-governments-under-s152-of-the-charter-what-will-courts-permit/)” (8 March 2009) *ABlawg.ca*, online: <<http://ablawg.ca/2009/03/08/evidence-of-amelioration-what-does-kapp-require-of-governments-under-s152-of-the-charter-what-will-courts-permit/>> [Koshan, “Evidence of Amelioration”].

¹⁰³ *Lovelace*, *supra* note 21 ([Factum of intervener Council of Canadians with Disabilities at para 11](http://www.ccdonline.ca/en/humanrights/promoting/lovelace)), online: <www.ccdonline.ca/en/humanrights/promoting/lovelace>.

¹⁰⁴ *Runchey v Canada* (AG), 2013 FCA 16 at para 113, 443 NR 52 [Runchey]; *Miceli-Riggins v Canada* (AG), 2013 FCA 158, 446 NR 172 [Miceli-Riggins].

¹⁰⁵ *Pratten*, *supra* note 70 at para 37.

signs to be printed in both French and English;¹⁰⁶ Alberta's Aboriginal Court Worker Program;¹⁰⁷ the provision of certain special education services to Ontario private schools;¹⁰⁸ disability benefits provided by the *Ontario Disability Support Program Act*¹⁰⁹ and Statistics Canada's "willingness to forego prosecution of several Aboriginal communities for failure to complete the [Census] Form" under the *Statistics Act* (in *obiter*).¹¹⁰

In many of these decisions, the courts found the remedial character of the impugned law or program to be obvious or uncontroversial and the determination of ameliorative purpose was conducted in the briefest of terms. For example, in *Galganov v Russell (Township)*, the entirety of the Ontario Superior Court of Justice's analysis of whether the impugned bylaw had an ameliorative purpose reads:

The purpose of the By-law is to advance linguistic equality in Russell where a linguistically vulnerable Francophone population resides. It is ameliorative in its purpose.¹¹¹

Where an impugned distinction is part of a broader benefits scheme, the analysis of ameliorative purpose proceeds in a straightforward manner. In *Runchey v Canada (AG)*, Mr. Runchey argued that the interaction of two provisions of the *Canada Pension Plan*—the division of unadjusted pensionable earnings (DUPE) provisions and the child-rearing provisions (CRP)—discriminated against men.¹¹² The Pension Appeals Board disagreed and the Federal Court of Appeal dismissed the application for judicial review. Although Justice Stratas reached this conclusion on the basis of section 15(1), he cited the Supreme Court in *Withler v Canada (AG)*, in holding that "[b]y its nature, benefits legislation, such as the *Plan*, [has] ameliorative objectives and [attempts] to address competing needs of different groups. This context means that distinctions arising under benefits legislation will not lightly be found to be discriminatory."¹¹³ Given the

¹⁰⁶ *Galganov*, *supra* note 65 at paras 1, 197.

¹⁰⁷ *Frick*, *supra* note 63 at paras 71–72.

¹⁰⁸ *Cooper*, *supra* note 67 at paras 1, 14–16.

¹⁰⁹ *Larromana v Director of ODSP*, 2010 ONSC 1243 at para 4, 260 OAC 9 [*Larromana*]; *Ontario Disability Support Program Act*, 1997, SO 1997, c 25, Sched B.

¹¹⁰ *Marsh*, *supra* note 65 at paras 1, 71.

¹¹¹ *Galganov*, *supra* note 65 at para 197. See also *Larromana*, *supra* note 109 at para 4; *Cooper*, *supra* note 67 at para 15; *Frick*, *supra* note 63 at para 72.

¹¹² RSC 1985, c C-8, ss 19, 49(d), 55.1 [CPP].

¹¹³ *Runchey*, *supra* note 104 at para 113, citing *Withler v Canada (AG)*, 2011 SCC 12 at para 38, [2011] 1 SCR 396 [*Withler*], in the context of section 15(1) that "[w]here the impugned law is part of a larger benefits scheme ... the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis".

Supreme Court's assertion that amelioration need not be the only goal of an impugned law, program or activity in order to attract the protection of section 15(2), this stage of the section 15(2) analysis rarely seems to attract much debate or analysis in the post-*Kapp* case law.¹¹⁴

This is not to suggest, however, that courts are uncritically accepting of bare assertions of ameliorative purpose. Courts have rejected government arguments that section 15(2) should insulate an impugned law or program from section 15(1) scrutiny. For example, in *CF v Alberta (Vital Statistics)*, the applicant challenged provincial legislation that required, *inter alia*, that a transgender person have genital surgery in order to obtain a change of sex on their birth certificate.¹¹⁵ The government argued:

If the [impugned] section [of the *Vital Statistics Act*] discriminates against transgendered [*sic*] persons who have not had genital surgery, such as C.F., that discrimination is permitted by s. 15(2), because the section ... has as its object the amelioration of conditions of disadvantaged individuals, i.e. transgendered [*sic*] persons who have had genital surgery.¹¹⁶

Justice Burrows rejected the province's position on ameliorative purpose as misconceiving CF's application and misconstruing the source of the discrimination claimed. Justice Burrows went on to find the impugned provisions of the *Vital Statistics Act* to be a violation of CF's rights "to equal protection and benefit of the law."¹¹⁷

A key issue at this first stage of the *Kapp-Cunningham* analysis is whether a court will accept the claimant's argument on ameliorative purpose or the argument advanced by the government. The question of who determines purpose has long been an issue of concern in the section 15 context. For example, in the context of section 15(1), Professor Sheilah Martin (as she then was, now Justice Martin) made the following comment about *Law* in 2001:

The Court's ability to select the government's purpose allows for a great deal of analytical leeway under both section 15 and section 1. In *Law*, the Court accepted that the government's purpose was to provide for the long term needs of surviving spouses. Had it accepted the plaintiff's characterization that the [*Canada Pension*

¹¹⁴ In *Kapp*, *supra* note 2 at paras 50–52, the Supreme Court confirmed that a satisfactory ameliorative purpose could be one of several objectives pursued by an impugned law or program and still attract the protection of section 15(2).

¹¹⁵ 2014 ABQB 237, 100 Alta LR (5th) 75 [*CF v Alberta*].

¹¹⁶ *Ibid* at para 23.

¹¹⁷ *Ibid* at para 60.

Plan] was meant to provide also for the immediate needs of those who are widowed, the result may have been different.¹¹⁸

Given the exclusive focus on ameliorative purpose under the *Kapp-Cunningham* analysis for section 15(2), the definition of “purpose” is particularly critical. For example, in *Cunningham*, the claimants argued for a broad understanding of the ameliorative purpose of the impugned legislation, the MSA, as “benefiting all Alberta Métis.”¹¹⁹ The Supreme Court disagreed, and recast the legislative purpose more narrowly, in accordance with the government’s submission:

[T]he object of the MSA program is ... the narrower goal of establishing a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province.¹²⁰

In light of this definition of ameliorative purpose, the distinction at issue—between Métis who were and were not registered under the *Indian Act*—was rationally related to the specific ameliorative goal.¹²¹ As in *Law*, one could image a different result had the Court accepted the claimant’s broader characterization of the MSA.¹²²

Indeed, the definition of purpose is relevant not only at the first stage of the *Kapp-Cunningham* analysis, but also at the third stage in determining whether the specific distinction complained of “serves and advances” the ameliorative goal.¹²³ Although the decision was ultimately overturned at the Supreme Court, the Alberta Court of Appeal’s judgment in *Cunningham* is illustrative of an instance where an impugned distinction did not “serve and advance” the ameliorative goal. Justice Ritter held that the distinction between Métis who were and were not registered under the *Indian Act* was:

relatively arbitrary, potentially excluding Métis settlement members like the appellants, who, for a long time, have identified with and lived the Métis culture. It is difficult to imagine that such exclusion is in furtherance of the [ameliorative goal of] enhancement and preservation of Métis culture, identity and self-governance.¹²⁴

¹¹⁸ Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80:2 Can Bar Rev 299 at 332.

¹¹⁹ *Cunningham*, *supra* note 3 at para 62.

¹²⁰ *Ibid.*

¹²¹ *Ibid* at para 73.

¹²² The definition of “ameliorative purpose” followed a similar trajectory in *Pratten*, *supra* note 70.

¹²³ This point was recognized by the Supreme Court in *Cunningham*, *supra* note 3, where the Court opined: “Defining the objective of the ameliorative program too broadly or too narrowly will skew the analysis” (at para 61).

¹²⁴ *Cunningham ABCA*, *supra* note 68 at para 28.

The opposite result was found in *Pratten*.¹²⁵ The claimant argued that the distinction between adoptees and donor offspring did not serve and advance the purpose of the program, which she argued was designed to “remedy harm caused to adoptees from alienation “by whatever means” from a biological parent.”¹²⁶ Although the trial judge accepted the claimant’s enunciation of purpose at first instance,¹²⁷ the British Columbia Court of Appeal disagreed and accepted the purpose of the impugned provisions to be the amelioration of “the disadvantages created by the state-sanctioned dissociation of adoptees from their biological parents.”¹²⁸ Given that this definition of purpose included the targeting of adoptees only, the distinction between adoptees and donor offspring was found to “serve and advance” the goal of the legislation, so the distinction was saved under section 15(2).¹²⁹

The apparent ease with which an array of laws and programs are deemed ameliorative under the section 15(2) speaks to another key concern after *Kapp*: the deference built in to the *Kapp-Cunningham* test by virtue of the focus on purpose only, and not means or effects. Indeed, in many of the cases surveyed here, including *Cunningham* and *Pratten*, the courts deferred to the government’s assertions of purpose.¹³⁰ In light of the fact that the government is best positioned to marshal the requisite evidence on the history and purpose of its impugned law or program, the focus on purpose at the first step of section 15(2) puts equality claimants at a distinct disadvantage. This is not a new problem for section 15 claimants, but it is exacerbated in the section 15(2) context because purpose is determinative of the analysis; if a claimant frames the purpose in a way the court disagrees with the rest of his or her analysis falls apart, as in *Pratten*.

Finally, from a doctrinal perspective, given that the requirement of an ameliorative purpose poses a relatively low threshold at the first stage of the *Kapp-Cunningham* framework, the bulk of the analysis will be downloaded to the related, but distinct, second and third stages of correspondence between the program and the disadvantage; and the question of whether the distinction “serves and advances” the ameliorative goal, respectively.

¹²⁵ *Supra* note 72.

¹²⁶ *Ibid* at para 40 [quotation marks in original] [citation omitted].

¹²⁷ *Pratten* BCSC, *supra* note 56 at para 230.

¹²⁸ *Pratten*, *supra* note 70 at para 37.

¹²⁹ *Ibid* at paras 40, 43.

¹³⁰ See also *Refugee Care*, *supra* note 69, where Justice Mactavish accepted the government’s assertion that the object of the IFHP was the “amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need” (at para 780).

Indeed, it is at these latter two stages that many of the post-*Kapp* section 15(2) cases fail.¹³¹

ii) “Law, program or activity”

There has been little express consideration of this aspect of the first stage of the *Kapp-Cunningham* analysis because the majority of cases have involved government legislation or programming that clearly qualifies as a “law, program or activity.” However, two recent decisions provide some insight into this aspect of the first stage of the analysis.

In *R v Marsh*,¹³² the defendants refused to complete the Census of Population Form and were charged with breaching section 31(b) of the *Statistics Act*, which makes it an offence to refuse or neglect to complete a Census form.¹³³ Relying on newspaper articles, Mr. Marsh argued that his section 15 *Charter* rights were infringed by virtue of the fact that “First Nations people who decide individually or collectively to refuse to complete the [Census] Form are exempted from prosecution due to policy reasons

¹³¹ See e.g. *AT & VT v The General Manager of OHIP*, 2010 ONSC 2398, 102 OR (3d) 767 (failed at second stage) [*AT & VT*]; *Refugee Care*, *supra* note 69 (failed at second stage); *Cunningham ABCA*, *supra* note 68 (failed at third stage). There are lingering uncertainties about the appropriate interpretation of these latter two stages of the *Kapp-Cunningham* analysis. For example, what degree of correspondence between the program and the disadvantage experienced by the target group is required to satisfy the second 15(2) requirement? See *AT & VT*, *ibid* at paras 85–88. In *Law*, *supra* note 16, the Supreme Court said this regarding the context of the second *Law* contextual factor, which requires consideration of the “correspondence [or lack thereof] between a legislative distinction in treatment and the actual situation of different individuals or groups” (at para 105), that where the excluded claimant is a disadvantaged member of society, a high degree of specific correspondence may be required:

Parliament is entitled ... to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the Charter ... I emphasize, though, that under other circumstances a more precise correspondence will undoubtedly be required in order to comply with s. 15(1). In particular, a more precise correspondence will likely be important where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society (at para 106).

¹³² *Marsh*, *supra* note 65.

¹³³ *Statistics Act*, RSC 1985, c S-19, s 31 provides:

Every person who, without lawful excuse ...

(b) refuses or neglects to furnish any information or to fill in to the best of his knowledge and belief any schedule or form that the person has been required to fill in, and to return the same when and as required of him pursuant to this Act... is, for every refusal or neglect ... guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.

adhered to by Statistics Canada whereas [non-Aboriginal] individuals such as himself are singled out for prosecution.”¹³⁴ The Provincial Court of British Columbia found it most appropriate to dispose of this argument using the principles of prosecutorial discretion, but in *obiter* held that if a distinction based on race could be made out, it was “clear ... that s. 15(2) of the *Charter* precludes these practices from violating s. 15 of the *Charter*.”¹³⁵ Judge Brecknell elaborated:

[I]t seems apparent from the case law that Statistics Canada’s actions could be characterized as ameliorative or remedial in nature. Due to the historical disadvantage Aboriginal peoples have suffered, as well as the at times hostile relationship they have endured with the Canadian Government, ‘relationship building’ between the Canadian Government and Aboriginal reserve communities appears to be more pressing than the imposition of penalties for non-compliance with Canadian Census laws.¹³⁶

Implicitly then, the BC Provincial Court accepted that prosecutorial decision-making by Statistics Canada officials could qualify as a “law, program or activity” for the purposes of section 15(2) of the *Charter*.

In the second case, *Adekayode*,¹³⁷ the Nova Scotia Court of Appeal addressed the “law, program or activity” requirement more directly. Mr. Adekayode challenged the provisions of his collective agreement that provided a top up to the federal Employment Insurance benefits paid to adoptive parents, but not to birth parents, who take parental leave. The Human Rights Board of Inquiry (HRBI) concluded that the top up scheme in the collective agreement was not part of a “program or activity” for the purposes of section 6(i) of the NS *HRA* and went on to find the top up scheme was discriminatory. Much of the Court of Appeal’s decision turned on the transference of section 15 *Charter* principles to interpret similar or identical terms in the provincial *HRA*, including “whether the meaning of “law, program or activity” ... under s. 15(2) of the *Charter* should determine the meaning of the identical words in s. 6(i) of the *Human Rights Act*.”¹³⁸ Justice Fichaud held that “the status of the program or activity is governed by the functional principles set out in *Kapp* and *Cunningham*”¹³⁹ and in applying these principles, found the HRBI’s conclusion that there was no “program or activity” at issue in this case to be incorrect. Justice Fichaud reasoned:

¹³⁴ *Marsh*, *supra* note 65 at para 25.

¹³⁵ *Ibid* at para 66.

¹³⁶ *Ibid* at para 71.

¹³⁷ *Adekayode*, *supra* note 51.

¹³⁸ *Ibid* at para 40.

¹³⁹ *Ibid* at para 137.

The Collective Agreement's adoption leave allowance was designed to integrate with the legislated *program or activity* of benefits under the *Employment Insurance Act*. Had the EI legislation directly prescribed this adoption top-up allowance, undoubtedly the top-up would belong to a "program or activity". From the purposive perspective of substantive equality, it does not matter that, instead, the adoption top-up is a supplementary benefit sourced in the Collective Agreement which fills a gap in the EI legislation.¹⁴⁰

The Court allowed the appeal in respect of section 6(i) of the NS *HRA*, concluding that the adoption leave provisions in Mr. Adekayode's collective agreement were protected by virtue of the fact that they constituted an ameliorative program or activity. *Marsh* and *Adekayode* demonstrate the potential of the *Kapp-Cunningham* analysis to have far-reaching implications beyond the simple application of the principles to government legislation.

C) Section 15(2) and the Contextual Analysis of Discrimination

The Supreme Court of Canada's failure in *Kapp* to provide specifics on section 15(1) led many to conclude that the decision revealed a slew of new questions about adjudicating equality under the *Charter*.¹⁴¹ Chief among these questions was the proper relationship between the newly-invigorated section 15(2) and the analysis of discrimination under section 15(1). In *Law*, the Supreme Court identified four contextual factors to be taken into consideration when determining whether an impugned distinction infringed a claimant's dignity contrary to section 15(1). The third contextual factor from *Law* required courts to look to "the ameliorative purpose or effects of impugned legislation or other state action upon a more disadvantaged person or group in society" in assessing whether an impugned distinction is discriminatory.¹⁴² In confirming that the contextual factors from *Law* are "based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination," the Supreme Court in *Kapp* opined:

The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant

¹⁴⁰ *Ibid* at para 133 [emphasis in original].

¹⁴¹ See e.g. Sophia Moreau, "*R v Kapp*: New Directions for Section 15" (2008-2009) 40:2 Ottawa L Rev 283; Diana Majury, "Equality Kapped; Media Unleashed" (2009) 27:1 Windsor YB Access Just 1 at 8-9 [Majury]; Bruce Ryder, "[R v Kapp: Taking Section 15 Back to the Future](http://www.thecourt.ca/r-v-kapp-taking-section-15-back-to-the-future/)" (2 July 2008), online: TheCourt.ca <<http://www.thecourt.ca/r-v-kapp-taking-section-15-back-to-the-future/>>.

¹⁴² *Law*, *supra* note 16 at para 72.

to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)¹⁴³

Since *Kapp*, the Supreme Court has confirmed that the ameliorative purpose of an impugned law or program may operate at two points in the section 15 analysis. In the fractious decision in *Quebec v A*,¹⁴⁴ Justice LeBel, summarized the situation in the following terms:

First, the ameliorative purpose or effect of a law may bring it within the purview of s. 15(2), which preserves the right of governments to implement specific programs aimed at helping disadvantaged groups without fear of challenge under s. 15(1): *Kapp*, at para. 16. Second ... “[w]here the impugned law is part of a larger benefits scheme ... the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis [under s. 15(1)]”: *Withler*, at para. 38.¹⁴⁵

While the Court in *Quebec v A* did not extrapolate on the relationship between the third *Law* factor and section 15(2), the majority affirmed that the contextual factors from *Law* are of ongoing relevance in the discrimination analysis under section 15(1), though they are not determinative.¹⁴⁶

In light of the dual positioning of ameliorative purpose in the section 15 analysis, it remains unclear exactly *where* evidence of ameliorative purpose is most properly considered. This uncertainty is evident in the post-*Kapp* jurisprudence. In 2009, the Alberta Court of Appeal in *Cunningham* concluded that the ameliorative purpose analysis at the section 15(2) stage “parallels that performed in determining discrimination under section 15(1)”¹⁴⁷ and held that while “ameliorative purpose and effect may also be relevant to the question of whether a law perpetuates disadvantage, [it] is most appropriately dealt with under the s. 15(2) analysis.”¹⁴⁸ Also in 2009, the Federal Court of Appeal in *Jean* opted to analyze a decision by the

¹⁴³ *Kapp*, *supra* note 2 at para 23.

¹⁴⁴ *Supra* note 98.

¹⁴⁵ *Ibid* at para 165, LeBel J, writing for the minority on section 15(1) [additions and quotations in original]. This statement itself is evidence of ongoing confusion about the relationship between the *Kapp-Cunningham* analysis and section 15(1), as Justice LeBel’s assertion that ameliorative *effect* might be relevant to section 15(2) is at odds with the Court’s repeated confirmations that only purpose, and not effects, are to be considered in deciding whether section 15(2) is operative in a given context.

¹⁴⁶ *Ibid* at para 331, Abella J, writing for the majority on section 15(1). See also, *ibid* at para 418, McLachlin CJC, concurring on section 15(1) analysis by Abella J, citing *Withler*, *supra* note 113 at para 38 and *Kapp*, *supra* note 2 at para 19.

¹⁴⁷ *Cunningham ABCA*, *supra* note 68 at para 21.

¹⁴⁸ *Ibid* at para 37 [citation omitted].

Minister of Indian and Northern Affairs on the basis of section 15(1).¹⁴⁹ The Minister refused to provide financial assistance under the Elementary/Secondary Education Program to student members of Micmac Nation of Gespeg because the program only offered funding for students who were “ordinarily resident on a reserve” and the Micmac Band had no reserve. Accepting the pre-*Kapp* finding of the trial judge that the program at issue was “a targeted ameliorative program,”¹⁵⁰ Justice Trudel found there was “no need” to adopt the approach to section 15(2) set out in *Kapp* despite “considerable debate” by the parties on the applicability of a 15(2) analysis in the case.¹⁵¹ The Court also held that the exclusion of landless bands from the Elementary/Secondary Education Program did not violate section 15(1) of the *Charter*.¹⁵²

More recently, there is evidence that in some circumstances judges find it more appropriate to deal with evidence of ameliorative purpose as part of the section 15(1) discrimination analysis. For example, in *Miceli-Riggins*,¹⁵³ the Federal Court of Appeal reviewed findings by the Pension Appeals Board that Ms. Miceli-Riggins did not qualify for disability benefits under *CPP*.¹⁵⁴ The Board determined that she did not satisfy the “workforce attachment” requirement because she had not contributed to *CPP* in four of the last six calendar years (the “four-of-six” requirement).¹⁵⁵ She argued that the provisions that offered exceptions to the four-of-six requirement, including the child rearing dropout provisions (CRDO) and the proration provision, infringed her equality rights on the basis of sex. In dismissing the application, Justice Stratas first found: “[f]ar from being detrimental, the impugned provisions are best regarded as ameliorative.”¹⁵⁶ He then concluded, “the ameliorative nature of the CRDO provision and the proration provision ... leads to the conclusion that the applicant has not established the presence of discrimination” pursuant to section 15(1).¹⁵⁷ In *obiter*, Justice Stratas added the following comment on section 15(2):

¹⁴⁹ *Jean*, *supra* note 55.

¹⁵⁰ *Ibid* at para 75.

¹⁵¹ *Ibid* at paras 9, 79. Part of the reason for this conclusion was based on the fact that Justice Trudel did not reach a conclusion on whether the differential treatment was based on an analogous ground, either lack of land base or place of residence.

¹⁵² *Ibid* at paras 74–79.

¹⁵³ *Miceli-Riggins*, *supra* note 104.

¹⁵⁴ *Supra* note 112.

¹⁵⁵ *Ibid* at s 44(2)(a)(i).

¹⁵⁶ *Miceli-Riggins*, *supra* note 104 at para 101.

¹⁵⁷ *Ibid* at para 110. For useful summary and commentary on this decision, see e.g. Mel Cousins, “Pregnancy as a “Personal Circumstance”? *Miceli-Riggins* and Canadian Equality Jurisprudence” (2015) 4:2 Can J HR 237 [Cousins].

Indeed, the fact that the CRDO provisions and the proration provision ... of the *Plan* are ameliorative in nature may have other consequences for the section 15 analysis. To the extent that they are aimed at ameliorating or remedying the condition of women, a subsection 15(1) enumerated group, they may be said to be a “law, program or activity” within the meaning of subsection 15(2). In such a case, they cannot be found to be discriminatory under section 15(1).¹⁵⁸

The Supreme Court’s 2009 judgment in *AC v Manitoba (Director of Family and Child Services)* is also worth noting here, because it is a post-*Kapp* instance where ameliorative purpose was determinative at the section 15(1) stage, even though section 15(2) was not addressed (or even mentioned).¹⁵⁹ The case involved a 14-year-old Jehovah’s Witness who refused a blood transfusion, resulting in the Director of Child and Family Services securing a judicial order mandating the treatment, pursuant to the *Manitoba Child and Family Services Act* (MB CFSA).¹⁶⁰ The child and her family argued that the MB CFSA discriminated on the basis of age, because it drew a distinction between minors over and under the age of 16, providing that for those over 16, the determination of “best interests” in relation to treatment should be informed by the child’s subjective views.¹⁶¹ In three short paragraphs, the majority of the Supreme Court dismissed the equality claim on the basis that the impugned distinction was ameliorative and therefore not discriminatory:

A.C.’s claim must fail because the distinction drawn by the Act between minors under 16 and those 16 and over is ameliorative, not invidious. First, it aims at protecting the interests of minors as a vulnerable group. Second, it protects the members of the targeted group — children under 16 — in a way that gives the individual child a degree of input into the ultimate decision on treatment. In my view, this is sufficient to demonstrate that the distinction drawn by the Act, while based on an enumerated ground, is not discriminatory within the meaning of s. 15.¹⁶²

¹⁵⁸ *Miceli-Riggins*, *supra* note 104 at para 111, citing *Kapp*, *supra* note 2 at para 41 and *Lovelace*, *supra* note 21 at paras 84–87. See also *Runchey*, *supra* note 104 at para 139, where, in a pensions case substantially similar to *Miceli-Riggins*, Justice Stratas followed the same route, considering evidence of ameliorative purpose at the section 15(1) stage and including an identical paragraph on section 15(2) to that found in *Miceli-Riggins*, *above*.

¹⁵⁹ 2009 SCC 30 [*AC v Manitoba*].

¹⁶⁰ The *Manitoba Child and Family Services Act*, CCSM c C80, s 25(8) stipulates that a court may authorize treatment that it considers to be in the child’s best interests [MB CFSA].

¹⁶¹ *Ibid*, s 25(9). This section creates a presumption that if a child is 16 or older, his or her views will be determinative to the question of “best interests” with no similar presumption for a child under the age of 16.

¹⁶² *AC v Manitoba*, *supra* note 159 at para 152.

Could the same conclusion have been reached under section 15(2)? If so, why did the Court opt to proceed on the basis of section 15(1), notwithstanding the existence of the *Kapp* framework?¹⁶³

This uncertainty regarding where to most properly consider evidence that an impugned law or program is ameliorative is not the only issue regarding the interplay of section 15(2) and the third *Law* factor at section 15(1); there is an equally important question about *what* can be considered at each stage. In the *Kapp-Cunningham* analysis for section 15(2), the Supreme Court has been quite clear that only the *purpose* of the impugned law, program or activity is relevant to the analysis,¹⁶⁴ while under section 15(1), the third *Law* factor consistently uses the broader language of ameliorative purpose *or effects* as part of the discrimination analysis.¹⁶⁵ In theory, then, a program without a clear ameliorative purpose but with ameliorative effects (intended or otherwise) could be found not to be discriminatory pursuant to section 15(1), even though it would not qualify for protection under section 15(2). Would such a result be consistent with the intended operation of section 15(2)?

Finally, the section 15(1) analysis and *obiter* comments from Justice Stratas in *Miceli-Riggins*, as well as the Supreme Court's decision in *AC v Manitoba*, raise the question of whether the *Kapp* test under section 15(2) is strictly necessary. Does full consideration of an impugned program's ameliorative purpose or effects as part of the discrimination analysis in section 15(1) render the *Kapp* test superfluous? If evidence of ameliorative purpose leads to a finding that an impugned distinction is not discriminatory under section 15(1), as it did in *Miceli-Riggins* and *AC v Manitoba*, how is that different than finding that the impugned program is saved under section 15(2) (and therefore "cannot" be discriminatory, notwithstanding that no analysis of discrimination is undertaken if section 15(2) is operative)? More guidance on the interaction of the third contextual factor from *Law* as part of the discrimination analysis under section 15(1), and the ameliorative purpose analysis under section 15(2), is clearly warranted.

¹⁶³ For important commentary on the extension of ameliorative purpose in *AC v Manitoba*, see Koshan, "Another Take," *supra* note 72, who writes:

This finding is said to be based on the law's protection of minors as a vulnerable group, but this is the very group to which the claimant A.C. belonged. If ameliorative purpose can be used this way, it means that laws cannot be seen as discriminatory if they are seen to be imposed for the claimant group's own good. This extends the notion of ameliorative purpose even further than it was taken in *Kapp*[.]

¹⁶⁴ *Cunningham*, *supra* note 3 at paras 43–44.

¹⁶⁵ *Law*, *supra* note 16 at para 72.

D) Deference and Justification at Section 15(2)

Given the high degree of deference built in to the section 15(2) analysis, it is unsurprising that following *Kapp*, government respondents began to increasingly rely on section 15(2) “as a shield from claims of discrimination.”¹⁶⁶ The final critique explored here alleges that the *Kapp-Cunningham* analysis allows governments to save programs with an ameliorative purpose via a highly deferential standard that is significantly less onerous than the justification required of government respondents under section 1 of the *Charter*.¹⁶⁷ Writing shortly after *Kapp*, Professor Diana Majury summarized the issue as follows:

The Court’s application of s.15(2), giving it independent force to uphold ameliorative programs, and then subjecting those programs to minimal scrutiny in the assessment of their ameliorativeness, and no scrutiny as to their effectiveness, is by implication a formal equality approach to s.15(1) that defers to government intention under s.15(2). Formal equality and undue deference have consistently been raised as key concerns in the critiques of s.15.¹⁶⁸

The post-*Kapp* jurisprudence confirms Professor Majury’s concerns. First, as explored in Part III B), the case law generally reveals a low level of scrutiny at the “ameliorative purpose” stage of the *Kapp-Cunningham* analysis, which is the critical step in framing the rest of the analysis.

Second is the related issue of justification. The laws exempted from full section 15 review pursuant to section 15(2), in cases like *Pratten* and *Cunningham*, were deemed constitutional on a standard significantly less onerous than that imposed by the test from *R v Oakes* under section 1, intended to be the exclusive location of government justification under the *Charter*.¹⁶⁹ While the *Kapp-Cunningham* analysis focuses on purpose, an *Oakes* analysis requires careful scrutiny of the purpose, means and effects of the law or program at issue.¹⁷⁰ In *McIvor v Canada (Registrar of Indian*

¹⁶⁶ Sheldon, *supra* note 10 at 40.

¹⁶⁷ The language of “saving” was used to describe the purpose of section 15(2) in *Cunningham*, *supra* note 3 at paras 40–41, 44–45, 49.

¹⁶⁸ Majury, *supra* note 141 at 10 [footnotes omitted].

¹⁶⁹ The familiar two-part framework established in *R v Oakes*, [1986] 1 SCR 103 at 135, 24 CCC (3d) 321 [*Oakes*] was intended to represent “the *exclusive justificatory criteria* ... against which limitations on [*Charter*] rights and freedoms must be measured” [emphasis added].

¹⁷⁰ The *Oakes* test, *ibid*, asks first, whether the law or program pursues “an objective relate to concerns which are pressing and substantial in a free and democratic society” (at 138–39); and second, whether the means chosen to pursue the objective are “reasonable and demonstrably justified” (at 139). This second inquiry involves a context-specific proportionality assessment, whereby courts look at whether: 1) the means adopted are

and *Northern Affairs*), the British Columbia Court of Appeal confirmed the importance of reserving the question of justification to section 1 of the *Charter*, in the context of applying the third contextual factor from *Law*:

Part of the difficulty that courts have had in applying the *Law* criteria to the concept of discrimination has been the scope of the third *Law* factor [ameliorative purpose or effects]. The question of whether the impugned law or program has an ameliorative purpose or effect can easily be expanded into an analysis of whether the law, while discriminatory, is nonetheless justifiable. This latter inquiry is not an appropriate one under s. 15 of the *Charter*. It is an inquiry properly undertaken under s. 1.¹⁷¹

However, the *Kapp-Cunningham* analysis imports justification into section 15(2). This situation presents an awkward reality: after *Kapp*, sections 1 and 15(2) of the *Charter* both permit the state to justify an impugned law or program, however the standard of justification is much higher at section 1.¹⁷² The result being that, if the criteria from an *Oakes* or *Kapp-Cunningham* analysis are satisfied, the law or program will be declared constitutional notwithstanding the established infringement of *Charter* rights (in the case of section 1) or the alleged infringement of *Charter* rights (in cases where section 15(2) is operative).

I have previously argued that allowing “declarations of constitutionality to be made by courts pursuant to section 15(2) on a considerably lower justificatory standard [than] that established in *Oakes* violates the spirit of the *Charter*,”¹⁷³ which guarantees constitutional rights “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁷⁴ Indeed, the foundational section 1 jurisprudence repeatedly confirms that in cases of alleged discrimination, the section 1 justification exercise must be conducted with “uncompromising rigour.”¹⁷⁵ To be sure, the context of justification is different in sections 1 and 15(2): in

rationally connected to the objective; 2) the means chosen impair *Charter* rights as minimally as possible; and 3) there is proportionality between the actual salutary and deleterious effects of the rights-infringing measure (at 139).

¹⁷¹ 2009 BCCA 153 at para 109, 306 DLR (4th) 193 [*McIvor*].

¹⁷² Drumbl & Craig, *supra* note 15 at 122–23.

¹⁷³ McGill, *supra* note 4 at 542.

¹⁷⁴ *Charter*, *supra* note 1 at s 1.

¹⁷⁵ *Lavoie v Canada*, 2002 SCC 23 at para 91, [2002] 1 SCR 769, Arbour J (concurring in result). In *Andrews*, *supra* note 14, the Supreme Court divided on the appropriate level of scrutiny under section 1 in equality cases, with the majority rejecting the argument by Justice McIntyre that a relaxed standard was required so as not to unduly hinder the government line-drawing process inherent in equality-enhancing laws or programs (at 184). Justice Wilson confirmed that because “s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one” (at 154).

the former, a violation of a *Charter* right has been demonstrated, while in the latter, only a distinction based on an enumerated or analogous ground has been proven. Nonetheless, the result in both cases is that an impugned law or program is declared constitutional.

The simple fact that section 15(2) has been operative in a number of cases in the post-*Kapp* jurisprudence confirms that governments have been successful in satisfying the requirements of the *Kapp-Cunningham* analysis and justifying allegedly discriminatory distinctions on a lower legal standard than *Oakes*. This is specifically cause for concern in cases of underinclusion, because it means that while the program may be ameliorative in purpose, there is no assessment of the means adopted or actual effects of the ameliorative program. Indeed, in *Cunningham*, the Supreme Court held that the Alberta Court of Appeal had “erred in demanding positive proof” that the distinction at issue would have the effect of enhancing the ameliorative goal of the MSA, concluding that “all the government need[ed to] show [was] that it was “rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to [its ameliorative] purpose”: *Kapp*, at para. 49.”¹⁷⁶ Allowing governments to justify ameliorative laws and programs according to the minimal standards of the *Kapp-Cunningham* analysis is not consistent with an uncompromisingly rigorous approach to substantive equality.

IV. Conclusion

There is no question that substantive equality requires that governments be able to pursue ameliorative initiatives without the threat that they will be defeated by claims of “reverse discrimination,” and that in developing ameliorative laws and programs, governments cannot be expected to assist all disadvantaged groups at once. However, in my view, the *Kapp-Cunningham* analysis for section 15(2) is simply not necessary to ensure that ameliorative programs are sufficiently protected; section 15(1) can do this work in a more principled way. The best evidence for this position is the two decades of section 15 jurisprudence pre-dating *Kapp*. There is no suggestion in the pre-*Kapp* case law that the interpretive approach to section 15(2) adopted in *Lovelace* resulted in a landslide of successful “reverse discrimination” claims invalidating government efforts to implement ameliorative laws or programs. In fact, quite the opposite: it took twenty-three years from the coming-into-force of section 15 for a single “reverse discrimination” claim to make it to the Supreme Court level.¹⁷⁷ This does not mean that ameliorative

¹⁷⁶ *Cunningham*, *supra* note 3 at para 74 [quotations in original].

¹⁷⁷ That case was *Kapp*, *supra* note 2. Although the *Charter* was formally adopted in 1982, section 15 came into force three years later in 1985, so as to provide governments an opportunity to review existing legislation for *Charter* compliance.

programs were not being challenged prior to *Kapp*,¹⁷⁸ of course, but it does suggest that the existing *Charter* mechanisms were sufficient to weed out such claims, either by concluding that an impugned distinction is not discriminatory under section 15(1)—as post-*Kapp* courts did in *Runchey*, *Miceli-Riggins* and *AC*—or by finding that an ameliorative program that discriminates is “reasonable” and “demonstrably justified” according to the *Oakes* criteria in section 1. This is not to imply that the interpretation and application of section 15(1) is free from difficulties of its own.¹⁷⁹ However section 15(1) has the capacity, at least in principle, to address claims related to ameliorative laws and programs in a meaningful way.

Nevertheless, following the *Kapp* decision, section 15(2) is clearly on the rise. The survey of existing section 15(2) case law undertaken here reveals a few preliminary conclusions. First, while courts generally seem attentive to the particularities of the *Kapp-Cunningham* analysis in claims of underinclusion, the underinclusion case law demonstrates the emergence of a troubling delineation between “insider” and “outsider” claims, tending to find in the latter class of cases that section 15(2) is operative. This two-tiered analysis for underinclusion claims risks a scenario where only members of the group targeted for remedial benefits will be able to bring underinclusion claims; arguments by another disadvantaged community that the delineation of the target group is discriminatory will be difficult to make. Second, courts need to develop a principled approach to what constitutes an ameliorative law or program for the purposes of section 15(2), or risk the possibility that virtually all decently-crafted social legislation and programming conferring a benefit on a group identified by enumerated or analogous grounds will be insulated from full scrutiny under section 15. Third, there are lingering doctrinal uncertainties about whether it is most appropriate to consider evidence of ameliorative purpose at the section 15(2) stage or as part of the discrimination analysis under 15(1), that are worthy of further judicial attention and clarification. Finally, perhaps the most significant concern from the perspective of substantive equality, is the differential standards of justification at the section 15(2) and section 1 stages of *Charter* analysis.

¹⁷⁸ Among the first section 15 cases, *Attorney-General of Nova Scotia v Phillips* (1986), [1987] 76 NSR (2d) 240, 34 DLR (4th) 633 (CA), was a challenge to a social welfare benefit available to single mothers but not single fathers. The Court of Appeal found that the benefit scheme violated section 15 because benefits should be conferred on both mothers and fathers or neither (at para 6). The benefit scheme was ultimately struck down in its entirety.

¹⁷⁹ See e.g. Cousins, *supra* note 157 at 239, who concludes that the Supreme Court’s recent attempts to “restate” the law of section 15 of the *Charter* in cases including *Kapp*, *supra* note 2 and *Quebec v A*, *supra* note 98, have resulted in a state of “general confusion” in lower courts and tribunals. See also Jennifer Koshan & Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19.

As in previous cases, the Supreme Court of Canada in *Kapp* left open the possibility that the new analytical framework for section 15(2) could require “some adjustment” in future cases.¹⁸⁰ It has not yet been a decade since *Kapp*, and the section 15(2) case law is still in its infancy. It will be interesting to see how the jurisprudence evolves and develops in future years, and whether we might find ourselves in a situation where—as with the section 15(1) reversion from the complexities of *Law* back to the (theoretically) simpler approach to discrimination established in *Andrews*—the Court eventually returns to the *Lovelace* interpretation of section 15(2). Even if it does not revert to the purely interpretive understanding of section 15(2) in *Lovelace*, however, the Supreme Court could modify the current approach to ameliorative programs to better account for the issues and concerns raised above.

¹⁸⁰ *Kapp*, *supra* note 2 at para 41.

APPENDIX A

Post-Kapp Section 15(2) Case Law: Canadian Courts

AT & VT v The General Manager of OHIP, 2010 ONSC 2398, 102 OR (3d) 767.

Canadian Doctors for Refugee Care v Canada (Minister of Citizenship and Immigration), 2014 FC 651, 458 FTR 1.

CF v Alberta (Vital Statistics), 2014 ABQB 237, 100 Alta LR (5th) 75.

Cooper v Ontario (Attorney General) (2009), 99 OR (3d) 25, 311 DLR (4th) 480.

Cunningham v Alberta (Aboriginal Affairs and Northern Development), 2009 ABCA 239, 310 DLR (4th) 519.

Galganov v Russell (Township), 2010 ONSC 4566, 325 DLR (4th) 136.

International Association of Fire Fighters, Local 268 v Adekayode, 2016 NSCA 6, 371 NSR (2d) 38.

Jean v Canada (Indian Affairs and Northern Development), 2009 FCA 377, 402 NR 313, leave to appeal to SCC refused, 33586 (10 June 2010).

Larromana v Director of ODSP, 2010 ONSC 1243, 260 OAC 9.

Miceli-Riggins v Canada (AG), 2013 FCA 158, 446 NR 172.

Pratten v British Columbia (AG), 2011 BCSC 656, 22 BCLR (5th) 307.

Pratten v British Columbia (AG), 2012 BCCA 480, 357 DLR (4th) 660, leave to appeal to SCC refused, 35191 (30 May 2013).

R v Frick, 2010 ABPC 280, 34 Alta LR (5th) 50.

R v Marsh, 2014 BCPC 235, 2014 CarswellBC 3052 (WL Can).

Runchey v Canada (AG), 2013 FCA 16, 443 NR 52.

Toussaint v Canada (AG), 2011 FCA 2013, [2013] 1 FCR 374, leave to appeal to SCC refused, 34446 (5 April 2012).