Of Promise and Peril: The Court and Equality Rights

Jena McGill* **and Daphne Gilbert****

I. INTRODUCTION

Equality is among the most important rights guaranteed by the *Canadian Charter of Rights and Freedoms*.[1] As "a bedrock value" for Canadians, equality "fundamentally reflect[s] and shap[es] how Canadians view themselves and their society."[2] Yet adjudicating equality "before and under the law" and the right to "equal protection and equal benefit of the law without discrimination" as promised by section 15 of the Charter has proven a uniquely challenging task.[3] Chief Justice Beverley McLachlin famously described equality as "the most difficult right"[4] and the Supreme Court's jurisprudence has labelled equality "an elusive concept",[5] situating section 15 as "the *Charter*'s most conceptually difficult provision".[6] Indeed, the story of section 15 so far is marked by potential and promise, but is also characterized by divisiveness, uncertainty and disappointing outcomes for equality litigants.

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* Assistant Professor, University of Ottawa, Faculty of Law.

** Associate Professor, University of Ottawa, Faculty of Law. The authors are grateful for helpful feedback provided by two reviewers.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

2 Fay Faraday, Margaret Denike & M. Kate Stephenson, "In Pursuit of Substantive Equality" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 9, at 9.

3 Charter, *supra*, note 1, at s. 15 states: "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."

4 Chief Justice Beverley McLachlin, "Equality: The Most Difficult Right" (2001) 14 S.C.L.R. (2d) 17, at 20.

5 *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 164 (S.C.C.).

6 *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 2 (S.C.C.).

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In this brief reflection, we look back on 32 years of equality advocacy and outcomes at the Supreme Court of Canada. In Part II we recount the fraught trajectory of the Supreme Court of Canada's section 15 jurisprudence over the past decades, tracing the evolution of three distinct approaches to equality rights.[7] We also highlight the unique role that the Women's Legal Education and Action Fund (LEAF) and its feminist equality advocacy has played in shaping the Court's jurisprudence at each stage of section 15's life. As a regular intervener in equality cases at the Supreme Court,[8] LEAF has consistently argued for a robust, generous interpretation of section 15 in the name of advancing the equality rights of women and girls, and its successes and failures are an essential part of the story of section 15.[9]

In Part III, we look to the future of section 15, suggesting that recent jurisprudence indicates the emergence of a new era in equality rights at the Supreme Court characterized by a distinct turning away from section 15 arguments. We offer some preliminary comments on what this trend might mean for the future of equality rights and for the future of feminist litigation strategies under the Charter, arguing that some of LEAF's ideas about how to pursue substantive equality under section 15 that have not been acknowledged by the Court offer promising new directions for the next chapter of section 15 jurisprudence. We conclude that while under the current state of section 15 jurisprudence equality rights may be imperilled, the promise of section 15 remains.

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[7] Section 15 of the Charter came into force on April 17, 1985, three years after the rest of the Charter. The delay was intended to give governments the opportunity to bring their statutes into compliance with the equality guarantee.

[8] Since its inception in 1985, LEAF has intervened in over 90 equality cases at Canadian courts of appeal. For a useful history of LEAF and its early work in advancing equality under the Charter, see Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991).

[9] LEAF describes itself as focused "on litigation, law reform and public education, primarily the *Canadian Charter of Rights and Freedoms*, most notably sections 15 and 28, to challenge laws, policies and practices that discriminate against women." See Women's Legal Education and Action Fund, online: <www.leaf.ca>. Many organizations have made significant intervener contributions to section 15 jurisprudence at the Supreme Court. We have chosen to highlight LEAF's work because of its unique position as a feminist organization, born at the same time as section 15 came into force, with the express purpose of using section 15 for the betterment of women and girls. This short overview cannot do justice to LEAF's impact, nor do we mean to suggest that the Court only came to define section 15 as it did because of LEAF. Instead, the point of including LEAF's contributions in this retrospective is to demonstrate that section 15, the Supreme Court and LEAF are undeniably intertwined.

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II. THE PROMISE OF SECTION 15: THREE ERAS OF EQUALITY ADVOCACY AND JURISPRUDENCE

1. The *Andrews* Era

The Supreme Court's first opportunity to interpret section 15 was the 1989 case of *Andrews v. Law Society of British Columbia*, which involved a challenge by a British lawyer to the citizenship requirement for admission to the Law Society of British Columbia.[10] LEAF intervened and laid out a comprehensive approach to equality analysis, including a framework to structure future challenges under section 15.[11] In declaring that the impugned citizenship requirement infringed section 15, the Court established the conceptual foundations of the equality guarantee, accepting many aspects of LEAF's proposal.

First, McIntyre J. rejected a formal equality approach to section 15, preferring a substantive vision of equality under the Charter.[12] This was, perhaps, LEAF's most important success in *Andrews*.[13] LEAF forcefully denounced the British Columbia Court of Appeal decision in *Andrews* that used a "similarly situated" test for assessing discrimination.[14] The similarly situated test framed equality in the Aristotelean manner, requiring that likes be treated alike and "unalikes" be treated differently.[15] LEAF argued that the similarly situated rule might be helpful in claims of process equality, but says nothing about human rights to dignity and respect, the essence of a substantive equality approach to section 15.[16] This argument, adopted in *Andrews* by the Supreme Court, has had enduring impact: since *Andrews*, the Court's rhetorical commitment to substantive equality has remained steadfast.

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[10] *Andrews*, *supra*, note 5.

[11] The depth and breadth of LEAF's argument was aided by a factum page limit that allowed interveners a full 36 pages for legal argument at the time *Andrews* was heard. The Court has since dramatically curtailed the length of intervener *facta*, which are now capped at 10 pages. See Women's Legal Education and Action Fund, Intervenor Factum in *Andrews v. Law Society of British Columbia*, online: <http://www.leaf.ca/wp-content/uploads/1989/1989-andrews.pdf> [hereinafter LEAF *Andrews* Factum].

[12] *Andrews*, *supra*, note 5, at 168. Although McIntyre J. never used the specific language of substantive equality in the decision, *Andrews* is cited as the first case confirming the substantive approach to section 15 because of the Court's express rejection of the formalist, "similarly situated" approach to equality rights: see *Andrews*, at 163-71.

[13] LEAF *Andrews* Factum, *supra*, note 11, at para. 21.

[14] *Id.*, at para. 68.

[15] *Andrews v. Law Society of British Columbia*, [1986] B.C.J. No. 338, 2 B.C.L.R. (2d) 305 (B.C.C.A.).

[16] LEAF *Andrews* Factum, *supra*, note 11, at para. 64.

Second, the Court confirmed that in order to invoke section 15, a litigant must demonstrate differential treatment on the basis of an enumerated or analogous ground.[17] As a result, section 15 cannot be used to review every instance of differential treatment or legislative distinction. In *Andrews*, LEAF proposed a method to analyse analogous grounds (referred to in this early case as "grounds akin to those enumerated") that focused on the similarities of the proffered group to the enumerated groups in section 15 and the historical disadvantage experienced by the proffered group on the basis of an immutable or constructively immutable characteristic.[18] This approach was formally adopted by the Supreme Court a decade after *Andrews* in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.[19]

Third, McIntyre J. identified the purpose of section 15 to be the protection of vulnerable groups from discrimination. Acknowledging LEAF's argument that section 15 should offer the same protections for adverse effect or "indirect" discrimination claims as for directly distinctive treatment,[20] McIntyre J. settled on this way of defining discrimination:

> … a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages … or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[21]

Despite these significant contributions to the groundwork of section 15 laid in *Andrews*, LEAF was unsuccessful in persuading the Court on other aspects of its foundational approach. For example, while LEAF focused its equality analysis in *Andrews* on those who are "powerless,

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[17] *Andrews*, *supra*, note 5, at 175. In the decade following *Andrews*, most unsuccessful s. 15 claims failed because they were not based on an enumerated or analogous ground: see Bruce Ryder, Cidalia C. Faria & Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 S.C.L.R. (2d) 103, at 116.

[18] LEAF *Andrews* Factum, *supra*, note 11, at paras. 46 and 50.

[19] [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.).

[20] LEAF *Andrews* Factum, *supra*, note 11, at paras. 38 and 39. The Court formally adopted this position in *British Columbia (Public Servants Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.) [hereinafter "*BCGSEU*"].

[21] *Andrews*, *supra*, note 5, at 175. In reaching this formulation, McIntyre J. relied specifically on the human rights case of *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.). For an important analysis of the *Andrews* approach, see *e.g.*, Sheila McIntyre & Sanda Rodgers, "Introduction: High Expectations, Diminishing Returns – Section 15 at Twenty" in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis Canada, 2006), at 1.

excluded and disadvantaged" and urged the Court to pay special attention to disadvantaged groups within the "neutral" grounds, like race or sex,[22] the Court later insisted that section 15 claimants could come from any walk of life and need not show a history of disadvantage.[23] LEAF was also unsuccessful in getting the Court to recognize the "social interest in access to justice" as essential in understanding claims of procedural inequality.[24] LEAF's insights in this regard were prescient: access to justice has recently become something of a buzzword in the legal community and at the Supreme Court that is exceedingly difficult to put into practice.[25] Finally, although LEAF's important argument that government justifications for disparate treatment be clearly confined to the section 1 analysis was acknowledged by the *Andrews* Court, the bleed between sections 15 and 1 of the Charter has continuously proven difficult to control.[26]

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[22] LEAF *Andrews* Factum, *supra*, note 11, at paras. 23, 24, 33.

[23] For example, see *R. v. Hess*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.). In *Hess*, McLachlin J. (as she then was), writing in dissent, rejected the idea that men (a historically advantaged group) could not bring claims of sex discrimination under s. 15, concluding at 943-44, "[t]here is no suggestion … that men should be excluded from protection under s. 15 because they do not constitute a 'discrete and insular minority' disadvantaged independently of the legislation under consideration." The year prior to *Hess*, in *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1331 (S.C.C.), Wilson J. for a unanimous Court held that for the purposes of s. 15, "[a] finding that there is discrimination will … in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged". In *Hess*, McLachlin J. acknowledged this passage from *Turpin* but concluded at para. 79 that the language "suggests that the Court viewed the so-called requirement of independent disadvantage not as an absolute requirement for a finding of discrimination, but rather as an element which would be found in many of the cases where discrimination is found". Justice Wilson, who wrote for the majority in *Hess*, based her decision on s. 7 of the Charter and concluded that the impugned provision did not trigger s. 15 at all. See Diana Majury, "The *Charter*, Equality Rights and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297.

[24] LEAF *Andrews* Factum, *supra*, note 11, at para. 30.

[25] For example, while LEAF did not intervene in this case, *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, 2007 SCC 2 (S.C.C.) concerned an unsuccessful claim for an advance costs award from an LGBTQ bookstore targeted by Canadian Customs agents for importing allegedly "obscene material". Little Sisters Bookstore won its first case at the Supreme Court of Canada in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.), and the Court issued a declaration that the behaviour of Customs agents in targeting LGBTQ imports was a violation of Charter rights, but little changed in terms of how Customs agents actually behaved. The Supreme Court's 2007 decision to refuse advance costs to Little Sisters to pursue a second round of litigation against the Commissioner of Customs and Revenue was denounced by equality advocates who bemoaned the inaccessibility of Charter litigation for marginalized equality-seeking groups.

[26] LEAF *Andrews* Factum, *supra*, note 11, at paras. 59 and 75; *Andrews*, *supra*, note 5, at 177. See *e.g.*, *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37, at para. 108 (S.C.C.) where the Court relied on its assessment that the impugned distinction arose

After *Andrews*, LEAF worked in coalition with the Charter Committee on Poverty Issues, the Federated Anti-Poverty Groups of B.C. and the National Action Committee on the Status of Women to intervene in *Thibaudeau v. Canada*,[27] one of the cases that became part of a trilogy of equality decisions released in 1995 that saw a divided Court grappling with the question of discrimination in the *Andrews* framework. In *Thibaudeau*, *Egan v. Canada*,[28] and *Miron v. Trudel*,[29] the Court fractured in three distinct directions on the question of when a distinction based on an enumerated or analogous ground would be discriminatory for the purposes of section 15.[30]

Thibaudeau was a challenge by a single mother to provisions in the *Income Tax Act* that required her to pay tax on child support payments, while making those payments deductible by her ex-spouse.[31] She argued that this system disproportionately burdened women, who are more likely than men to be the custodial parent of a child. The Coalition asked the Court to take a sophisticated approach to section 15, urging an intersectional analysis that recognized multiple sources of oppression.[32] Specifically, the interveners encouraged the Court to recognize that

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from a "defensible policy choice" to ground the conclusion that there was no discrimination in the case. On the Court's ongoing difficulty with the relationship between sections 15 and 1, see *e.g.*, Denise Reaume, "The Relevance of Relevance to Equality Rights" (2006) 31 Queen's L.J. 696; and Sheila McIntyre, "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2006) 31 Queen's L.J. 731.

[27] [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.).

[28] [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) addressed a challenge to the opposite-sex definition of "spouse" governing the provision of spousal benefits in the *Old Age Security Act*, R.S.C. 1985, c. O-9.

[29] [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.) involved a challenge to a provision of the Ontario *Insurance Act*, R.S.O. 1980, c. 218, which gave certain benefits to married spouses involved in accidents against uninsured motorists but did not extend the same benefits to common law spouses.

[30] Four judges adopted an approach based on the premise that if the distinction at issue is relevant "to the functional values underlying" the impugned legislation, there is no discrimination for the purposes of s. 15: see *e.g.*, *Miron*, *supra*, note 29, at para. 15 (*per* Gonthier J.). Four other judges reasoned that a distinction would be discriminatory for the purposes of s. 15 where that distinction was found to "violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual": see *e.g.*, *Miron*, *supra*, note 29, at para. 149 (*per* McLachlin J.). Finally, L'Heureux-Dubé J. adopted her own view, finding that the s. 15 inquiry should focus on the nature of the group adversely affected by an impugned distinction and the nature of the interest at stake. See Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 McGill L.J. 627 for a review of the trilogy and especially L'Heureux-Dubé J.'s approach.

[31] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[32] Women's Legal Education and Action Fund, Intervenor Factum in *Thibaudeau v. Canada*, at para. 20, online: <http://www.leaf.ca/wp-content/uploads/1995/1995-thibaudeau.pdf> [hereinafter LEAF *Thibaudeau* Factum].

women are most adversely affected by childcare responsibilities, and that poor and racialized women experience even greater burdens in this regard, arguing that poverty should be recognized as an analogous ground under section 15.[33] In concluding that the status of a separated or divorced custodial parent is an analogous ground, McLachlin J. (as she then was) recognized its link to the enumerated ground of sex, noting "the great majority of the members of this group are women".[34] Still, a majority of the Court did not recognize the treatment as discriminatory nor adopt LEAF's more layered approach to defining the nature of the impact. While the Court recognizes multiple grounds of discrimination, it has yet to truly appreciate intersectionality as an interpretive theory for section 15.

2. The *Law* Era

The unanimous decision in the 1999 judgment in *Law v. Canada* marks the start of the second chapter in the life of Charter equality rights.[35] The claimant in *Law* argued that the *Canada Pension Plan* discriminated on the basis of age because she, a 30-year-old widow without dependent children, did not qualify for survivor benefits until the age of 65.[36] In concluding that although the *Canada Pension Plan* imposed differential treatment on the basis of the enumerated ground of age it did not discriminate against the claimant, the Court set out a new analytical framework for section 15. After *Law*, a section 15 violation required proof of differential treatment on an enumerated or analogous ground and proof that the differential treatment amounted to substantive discrimination because it violated the claimant's "essential human dignity".[37]

Justice Iacobucci, for the Court, opined that "[h]uman dignity within the meaning of the equality guarantee … concerns the manner in which a person legitimately feels when confronted with a particular law".[38] The Court identified four contextual factors relevant to assessing whether an

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[33] *Id*., at para. 44. The Supreme Court has displayed continual reluctance to recognize poverty either as an analogous ground for the purposes of s. 15, or as a matter of life, liberty and security of the person under s. 7 of the Charter. See *e.g.*, *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, 2002 SCC 84 (S.C.C.).

[34] *Thibaudeau*, *supra*, note 27, at 724.

[35] *Law*, *supra*, note 6.

[36] *Canada Pension Plan*, R.S.C. 1985 c. C-8.

[37] *Law*, *supra*, note 6, at para. 51.

[38] *Id*., at para. 53.

impugned law harmed human dignity: (1) whether the claimant experienced pre-existing disadvantage; (2) correspondence between the ground upon which the claim is based and the actual needs, capacities and circumstances of the claimant; (3) whether the impugned law had an ameliorative purpose or effects; and (4) the nature and scope of the interest affected by the impugned law.[39] Finally, the Court confirmed that assessing equality was an inherently comparative exercise that required the identification of a specific comparator group against which the claimant's differential treatment could be measured.[40]

There were no interveners in *Law* and LEAF did not seek leave to present argument in the case. It was a shock to many in the equality advocacy community when the Supreme Court used *Law* to fashion a new test for section 15 focusing on comparator groups and human dignity. The decision in *Law* was widely condemned by equality scholars and ushered in nearly a decade of sustained critique.[41] The *Law* analysis was criticized for placing an unduly heavy burden on section 15 claimants; for importing contextual factors from the section 1 justification stage into the section 15 analysis;[42] for conflating "the different conceptions of the wrong of unequal treatment";[43] for using comparison to reinstate a formal equality analysis;[44] for the uncertainty resulting from the vague and amorphous concept of human dignity;[45] and for its approach and result — the case was framed as one of age discrimination without any intersectional analysis accounting for the gender or family status dimensions of the claim.

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[39] *Id*., at paras. 62-75.

[40] *Id*., at paras. 56-58.

[41] See *e.g.*, the collection of analyses and critique in Faraday *et al.*, *supra*, note 2; and McIntyre & Rodgers, *supra*, note 21.

[42] See *e.g.*, Reaume, *supra*, note 26; Peter W. Hogg, "What is Equality?" (2005) 29 S.C.L.R. (2d) 39, at 58; and Hon. Lynn Smith & William Black, "The Equality Rights" in Stephen Beaulac & Errol Mendes, eds. in S. Beaulac & E. Mendes, eds. (2013) 62 S.C.L.R. (2d) 301, at 370, who conclude that the trend under the *Law* framework was toward "moving most aspects of the analysis from section 1 to section 15" through the human dignity test and the four contextual factors from *Law*.

[43] Sophia Moreau, "The Wrongs of Unequal Treatment" in Faraday *et al.*, *supra*, note 2, at 31.

[44] See *e.g.*, Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24:1 Windsor Y.B. Access J.; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" (2006) 33 S.C.L.R. (2d) 135-50.

[45] See *e.g.*, Denise G. Reaume, "Discrimination and Dignity" in Faraday *et al.*, *supra*, note 2, at 123; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 Sask. L. Rev. 1.

These critiques of the *Law* framework for section 15 were more than academic; outcomes for equality claimants in the era following the *Law* decision were generally poor.[46] Equality claims adjudicated under the *Law* framework failed most often because courts were not convinced, upon consideration of the four contextual factors in comparative context, that a claimant's human dignity had in fact been violated.[47] Yet the criticisms of *Law* went largely unacknowledged by the Supreme Court until its 2008 judgment in *R. v. Kapp*.[48]

In the years between *Law* and *Kapp*, LEAF intervened in 21 Supreme Court cases, striving to advance and improve equality doctrine and outcomes. For example, in *British Columbia (Public Servants Employee Relations Commission) v. B.C.G.S.E.U.*,[49] LEAF, in coalition with the Disabled Women's Network of Canada (DAWN) and the Canadian Labour Congress, asked the Court to harmonize human rights jurisprudence with its evolving section 15 case law and focus both on substantive discrimination. *BCGSEU* involved a claim by a female forest firefighter that the imposition by the British Columbia government of a single aerobic capacity test for firefighters was discriminatory because the standard was based on male subjects.[50] The intervener Coalition urged the Court to acknowledge that both direct and indirect (or adverse effects) discrimination amounted to violations of substantive equality.[51] This position was accepted by the Court, which stated, "[i]n the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the effect of the impugned law, it has little legal importance".[52]

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[46] Ryder *et al.*, *supra*, note 17, at 115.

[47] *Id*., at 116.

[48] [2008] S.C.J. No. 42, 2008 SCC 41 (S.C.C.) [hereinafter "*Kapp*"].

[49] *BCGSEU*, *supra*, note 20.

[50] *Id*.

[51] Women's Legal Education and Action Fund, Intervenor Factum in *British Columbia (Public Servants Employee Relations Commission) v. B.C.G.S.E.U.*, at para. 47, online: <http://www.leaf.ca/bcgseu-v-pserc-1999/> [hereinafter LEAF *BCGSEU* Factum].

[52] *BCGSEU*, *supra*, note 20, at para. 47. Justice McLachlin (as she then was) went on to say at para. 48: "Where s. 15(1) of the Charter is concerned, therefore, this Court has recognized that the negative effect on the individual complainant's dignity does not substantially vary depending on whether the discrimination is overt or covert." The Court recognized adverse effects discrimination in *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at paras. 60-64 (S.C.C.). LEAF intervened in *Eldridge* and urged the Court to focus on the effects of discriminatory treatment. See Women's Legal Education and Action Fund, Intervenor Factum in *Eldridge v. British Columbia*, at paras. 40-43, online: <http://www.leaf.ca/wp-content/uploads/1997/ 1997-eldridge.pdf>. On the Court's recent treatment of adverse effects cases, see Jennifer Koshan & Jonette Watson Hamilton,

In *Auton v. British Columbia*,[53] LEAF again worked in coalition with DAWN to offer the Court a model for assessing disability claims under section 15. LEAF and DAWN argued that it was a mistake to treat every condition requiring medical services as a disability as that would cement a bio-medical approach to equality analysis.[54] It encouraged the Court to adopt a social model of disability analysis focused on the exclusion of people from mainstream opportunities. While *Auton* marked a failure for LEAF, as the Court did not see a section 15 breach in a provincial decision not to fund a specific treatment for children with autism,[55] LEAF and DAWN put sophisticated arguments to the Court about ableist prejudices and again emphasized the importance of an intersectional analysis, concluding "gendered disability discrimination is not the additive experience of sex plus disability discrimination; it is a distinct experience, more than the sum of its parts".[56] The Court has decided relatively few disability rights claims under section 15 of the Charter but the work of LEAF and DAWN offers a model for intersectional analysis of disability, gender, race, sexual orientation and class that could be used in future cases.

Finally, the Court's decision in *N.A.P.E. (Newfoundland Association of Public Employees) v. Newfoundland*, a pay equity case, illustrates the often bittersweet edge of LEAF's work at the Supreme Court of Canada.[57] As LEAF announced on its website following the decision in *NAPE*, "[i]n October 2004, the importance of LEAF's work became abundantly clear when the Supreme Court of Canada unanimously

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"Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination Under Section 15 of the Charter" (2014), 19:2 *Review of Constitutional Studies* 191-235.

[53] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, 2004 SCC 78 (S.C.C.) [hereinafter "*Auton*"].

[54] Women's Legal Education and Action Fund, Intervenor Factum in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, at para. 12, online: <http://www.leaf.ca/wp-content/uploads/2004/2004-auton.pdf> [hereinafter LEAF *Auton* Factum].

[55] *Auton*, *supra*, note 53, at para. 2. The decision in *Auton* exemplified the significant burden of the comparator group requirement under the *Law* analysis. The Supreme Court disagreed with the comparator advanced by the *Auton* claimants and, in substituting its own comparator, the Court "compared the claimants right out of the health care benefit they sought, by juxtaposing them with a group that was also excluded from health care coverage". See Daphne Gilbert, "The Silence of Section 15: Searching for Equality at the Supreme Court of Canada in 2007" (2008) 42 S.C.L.R. (2d) 497, at note 8. *Auton* attracted significant analysis and critique; see *e.g.*, Gilbert & Majury, *supra*, note 44; Dianne Pothier, "The Conundrum of Comparators" in Sheila McIntyre & Sanda Rodgers eds., *Strategizing Systemic Inequality* (Toronto: Irwin Law, 2006); Laura Patie & Lorne Sossin, "Demystifiying the Boundaries of Public Law: Policy, Discretion and Social Welfare" (2005) 38 U.B.C. L. Rev. 147.

[56] LEAF *Auton* Factum, *supra*, note 54, at para. 15.

[57] *Newfoundland (Treasury Board) v. NAPE*, [2004] S.C.J. No. 61, 2004 SCC 66 (S.C.C.).

accepted LEAF's arguments in *NAPE* ... that the Newfoundland government discriminated against female workers by paying them unequal wages".[58] A proud moment for LEAF and a brilliant success for pay equity claims, LEAF's impact in *NAPE* was eclipsed by the overall result in the case: the Court ultimately viewed the breach of the claimants' equality rights as justified under section 1 because of financial urgencies in Newfoundland at the time the case arose.[59]

3. The *Kapp* Era

As in 1999 when LEAF was not a part of the Court's major restructuring of section 15 doctrine in *Law*, LEAF was absent in 2007 when the Court heard *Kapp*, and was thus not part of the seismic shift in section 15 doctrine ushered in by that decision. The claimants in *Kapp* were primarily non-Aboriginal commercial fishers who challenged a federal program that granted a communal fishing licence to three Aboriginal bands in British Columbia, permitting only band-designated fishers to fish for salmon at the mouth of the Fraser River during a certain 24-hour period.[60] In a unanimous section 15 decision,[61] the Supreme Court agreed that the fishing licence created a distinction on the ground of race,[62] but held that because the objective of the program was "the amelioration of the conditions of a disadvantaged group" – the Aboriginal fishers — the program was constitutional pursuant to a novel

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[58] Women's Legal Education and Action Fund, Intervenor Factum in *Newfoundland (Treasury Board) v. NAPE*, online: <http://www.leaf.ca/newfoundland-association-of-public-employees-v-newfoundland-2004/> [hereinafter LEAF *NAPE* Factum].

[59] See also the imagined "re-write" of the *NAPE* decision by Jennifer Koshan, "Newfoundland (Treasury Board) v. NAPE" (2006) 18(1) C.J.W.L. 321, which re-envisions the *NAPE* case as proceeding from the premise that women cannot be asked to bear egregious sex discrimination in unequal pay simply to balance the books, a ledger that should be tackled by non-discriminatory means. The volume contains feminist re-writes of other key equality decisions from the Supreme Court, including *Law*, *supra*, note 6 and *Gosselin*, *supra*, note 33.

[60] The purpose of the challenged program was to "enhance aboriginal involvement in the commercial fishery": see *Kapp*, *supra*, note 48, at paras. 6-7.

[61] Eight judges concurred with the majority judgment based on s. 15 authored by McLachlin C.J.C. and Abella J. Justice Bastarache concurred in the result but concluded that s. 25 of the Charter provided a "complete answer" to the claim so there was no need to engage s. 15, however Bastarache J. indicated that he was in "complete agreement with the restatement of the test for the application of s. 15" in the majority judgment: *id*., at paras. 76-77.

[62] For important insight on the 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 *Directions* 56; Sébastien Grammond, "Disentangling Race and Indigenous Status: The Role of Ethnicity" (2008) 33 Queen's L.J. 487.

interpretation of section 15(2).[63] In reaching this conclusion, the Court established a new analytical framework for analyzing equality claims, ushering in the third chapter in the life of section 15.

First, the Court fleetingly acknowledged the bevy of critiques of *Law* mentioned above, and, in brief comments, suggested a shift away from the *Law* framework for section 15(1) and back toward the broader language of *Andrews.*[64] The Court described the section 15(1) analysis as asking (1) whether the law creates a distinction based on an enumerated or analogous ground, and (2) whether that distinction creates a discriminatory disadvantage by perpetuating prejudice or stereotyping.[65] That *Kapp* indeed marked the end of the *Law* era was confirmed in subsequent cases. For example, in *Ermineskin Indian Band and Nation v. Canada*, the Court summarized the section 15 analysis relying exclusively on *Andrews* and *Kapp*, with no mention of *Law.*[66]

Second, the majority of the *Kapp* decision focused on the Court's novel interpretation of section 15(2) which affirms that ameliorative laws and programs are important tools in the pursuit of substantive equality.[67] Previously, the Court had construed section 15(2) as an interpretive provision confirmatory of the substantive approach to equality under the Charter, but without any independent force.[68] In *Kapp*, the Court held for the first time that section 15(2) could be used to insulate distinctions on enumerated or analogous grounds from scrutiny under section 15(1) of the Charter where: "(1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by

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[63] *Kapp*, *supra*, note 48, 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.

[64] *Kapp*, *supra*, note 48, at para. 22, note 1.

[65] *Id*., at paras. 17-22.

[66] *Ermineskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, 2009 SCC 9, at para. 188 (S.C.C.).

[67] Charter, *supra*, note 1, at s. 15(2), provides that that equality guarantee in s. 15(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".

[68] See *Lovelace v. Ontario*, [2000] S.C.J. No. 36, 2000 SCC 37, at para. 105 (S.C.C.). For further perspectives on the early debates on the appropriate role of s. 15(2) see *e.g.*, Mark A. Drumbl & John D.R. Craig, "Affirmative Action in Question: A Coherent Theory for S.15(2)" (1997) 4 Review of Constitutional Studies 80; and Michael Pierce, "A Progressive Interpretation of Section 15(2) of the *Charter*" (1993) 57 Sask. L. Rev. 263.

the enumerated or analogous grounds".[69] The framework for section 15 established in *Kapp* again generated a variety of critique, including uncertainties about the appropriate way forward under section 15(1) and the ongoing relevance of various aspects of the *Law* framework;[70] questions about why the Court opted to embolden section 15(2) for the first time in *Kapp*;[71] and specific concerns about the operation of the new framework for section 15 in cases of underinclusiveness and adverse effects discrimination.[72]

These and other questions about the third chapter of equality rights would not be addressed by the Supreme Court for more than two years. In 2010, LEAF was the only equality rights intervener in *Withler v. Canada (Attorney General)*, the first post-*Kapp* section 15 case. *Withler* marked a significant achievement for LEAF, as the Court formally abandoned the *Law* approach to comparator groups,[73] adopting LEAF's position that rigid comparison too often reduced section 15 to formal equality mechanics.[74] *Withler* further solidified the return to the *Andrews* formulation for section 15(1) and definitively buried *Law* and its focus on human dignity. Once again, however, *Withler* represented a bittersweet

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[69] *Kapp*, *supra*, note 48, at para. 41. The Court confirmed at paras. 44 and 49 that in assessing whether an impugned law or program has an ameliorative purpose, an "intent-based" analysis is appropriate, making the "legislative goal rather than actual effect … the paramount consideration".

[70] The Court's failure to provide further direction on its apparent shift away from *Law* or the proper application of *Andrews* led many to conclude that *Kapp* raised more questions about s. 15(1) than it answered: see *e.g.*, Diana Majury, "Equality *Kapped*; Media Unleashed" (2009) 27 Windsor Y.B. Access Just. 1 at 8-9; and Bruce Ryder, "*R. v. Kapp*: Taking S.15 Back to the Future", online: TheCourt <http://www.thecourt.ca/2008/07/02/r-v-kapp-taking-section-15-back-to-the-future/>; Sophia Moreau, "*R. v. Kapp:* New Directions for S.15" (2008-2009) 40 Ottawa Law Review 283; Patricia Hughes, "Resiling from Reconciling? Musing on *R. v. Kapp*" in J. Cameron, P. Monahan & B. Ryder, eds. (2009) 47 S.C.L.R. (2d) 255.

[71] See *e.g.*, Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" in S. Beaulac & E. Mendes, eds. (2013) 61 S.C.L.R. (2d) 521.

[72] See *e.g.*, Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*" (2009-2010) 47 Alta. L. Rev. 927; and also Jennifer Koshan & Jonette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 U.N.B.L.J. 19.

[73] *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, 2011 SCC 12, at para. 60 (S.C.C.) [hereinafter "*Withler*"], the Court stated: "a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification of — the discrimination at which s. 15 is aimed". See also Beverley Bains, "Comparing Canadian Women" (2012) 20/2 *Feminist Legal Studies* 89; Jonnette Watson Hamilton & Jennifer Koshan, "Meaningless Mantra: Substantive Equality after *Withler*" (2011-12) 16 Rev. Const. Stud. 31.

[74] Women's Legal Education and Action Fund, Intervenor Factum in *Withler v. Attorney General (Canada)* at para. 9, online: <http://www.leaf.ca/wp-content/uploads/2011/03/LEAF-Intervener-Factum-Withler-SCC.pdf> [hereinafter LEAF *Withler* Factum].

victory, as the applicants, a group of elderly, primarily female widows, were ultimately unsuccessful in their claim. The Court did not accept the intersectional approach urged by LEAF to account for the combined effects of age and sex.[75]

Uncertainty continued to characterize the third chapter of equality jurisprudence after *Kapp*. Among the most pressing issues is ongoing ambiguity and disagreement between members of the Court about how to define and identify discrimination for the purposes of section 15. For example, in the 2013 decision in *Quebec (Attorney General) v. A*, a challenge to several provisions of the *Civil Code of Quebec*[76] that establish different legal regimes for *de facto* spouses and married spouses, the judges divided sharply on the appropriate approach to identifying discrimination, recalling the divisions on this same question that characterized the 1995 section 15 trilogy almost two decades ago.[77] While LeBel J. concluded "there cannot as a rule be substantive discrimination, despite the existence of a disadvantage, without prejudice or stereotyping",[78] Abella J. for a five-judge majority rejected a "rigid template" of factors relevant to answering the discrimination question, preferring to situate prejudice and stereotyping as simply two indicia that may help answer the core question of whether an impugned law infringes substantive equality.[79]

Many have pointed out that the Supreme Court's recent attempts to "restate" the law of section 15 in cases including *Kapp* and *Quebec v. A* have "muddied the constitutional waters",[80] leading to "general confusion" about the state of the law.[81] Indeed, the three eras of section 15 doctrine defined by the judgments in *Andrews*, *Law* and *Kapp* tell a story

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[75] *Id*., at para. 22.

[76] *Civil Code of Quebec*, CCQ-1991.

[77] *Quebec (Attorney General) v. A*, [2013] S.C.J. No. 5, 2013 SCC 5 (S.C.C.).

[78] *Id*., at para. 178.

[79] *Id*., at paras. 331 and 326 citing *Withler*, *supra*, note 73, at para. 66. For further commentary on *Quebec v. A*, see *e.g.*, Jena McGill, "Developments in Constitutional Law: 2013" (2015) 68 S.C.L.R. (2d) 137, at 204-209; and Osgoode Institute for Feminist Legal Studies, *Quebec v. A: An Online Roundtable* (May 2014), online: <http://ifls.osgoode.yorku.ca/category/thinkingabout/roundtable/eric-lola/>.

[80] Cristin Schmitz, "SCC muddies constitutional waters with common-law union ruling" *The Lawyers Weekly* (February 8, 2013), online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=1830>.

[81] Mel Cousins, "Pregnancy as a 'Personal Circumstance?' *Miceli-Riggins* and Canadian Equality Jurisprudence" (2015) 4 Can. J. H.R. 237, at 239. See also Koshan & Watson Hamilton, "Continual Reinvention", *supra*, note 72.

characterized by "doctrinal plasticity"[82] and a troublingly high rate of unsuccessful equality claims under section 15.[83] That this is the case notwithstanding the robust interventions of LEAF and other equality interveners has led some to suggest that the Court is "bored with equality litigation, or finds it too difficult to actually work through the 'elusive concept' of equality".[84]

III. Equality Imperilled? The Future of Section 15

Having reviewed three decades of equality advocacy and outcomes, we turn now to the necessary question of what the next era of equality law under the Charter might look like: how is the fourth chapter in the story of section 15 likely to unfold? A possible answer lies in the fact that Supreme Court jurisprudence in the nearly 10 years since *Kapp* is characterized by a general lack of engagement with equality arguments and analysis. Even in cases with clear equality dimensions where section 15 arguments are advanced by the parties and/or interveners, the Supreme Court has displayed a preference for avoiding equality and resolving cases using other Charter provisions where it is possible to do so. In cases where it is not possible to sidestep equality, the Court tends to offer only cursory analyses that do little to clarify the jurisprudence or advance the goal of substantive equality. This trend suggests that section 15 may be entering a(nother?) period of dormancy at the Supreme Court;[85] the next phase in the life of section 15 may be a particularly quiet one, characterized more by what is not happening than what is.

The Court's failure to issue decisions on the basis of section 15 is not for lack of opportunities to do so. A number of recent cases have included substantial equality dimensions that have simply not featured in

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[82] Bruce Ryder, "Doctrinal Plasticity", *Quebec v. A: An Online Roundtable* (May 7, 2014), online: Osgoode Institute for Feminist Legal Studies <http://ifls.osgoode.yorku.ca/2013/05/eric-lola-1-bruce-ryder-doctrinal-plasticity-continued/>.

[83] See Ryder, Faria & Lawrence, *supra*, note 17; and Bruce Ryder & Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 S.L.C.R. 505. See also Jennifer Koshan, "Redressing the Harms of Government (In)action: A Section 7 versus Section 15 *Charter* Showdown" (2013) 22(1) *Constitutional Forum* 31, at 31, who concludes "the Supreme Court has undertaken new approaches to equality rights under section 15(1) and 15(2) of the *Charter*, with a marked lack of success of claims in spite of (or perhaps because of) these approaches."

[84] Denise Reaume, "Equality *Kapped*: *Alberta v. Cunningham*" (2011), online: <http://womenscourt.ca/2011/07/equality-kapped-alberta-v-cunningham/>.

[85] This is not the first time s. 15 has fallen into a period of relative disuse at the Supreme Court. See Gilbert, *supra*, note 55.

the Court's judgments. For example, the 2009 decision in *Alberta v. Hutterian Brethren of Wilson Colony* involved a challenge to an Alberta regulation mandating all drivers' licences include a photograph.[86] The Hutterian community, who believe that photographs violate the second commandment, argued that the law infringed their religious freedom and right to equality. After finding that the impugned regulation violated religious freedom but could be justified under section 1, the Court spent four short paragraphs on the equality claim, concluding that there was no discrimination because the distinction "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice".[87] With this brief statement "[t]he Court seemed to further narrow the definition of discrimination to include only stereotyping, and its reference to a 'neutral' policy choice ignored adverse effects discrimination and included inappropriate section 1 considerations about the rationality of government policy".[88]

More recently, in *R. v. Kokopenace*[89] the claimant, a member of the Grassy Narrows First Nation, argued that because the jury that convicted him of manslaughter "was derived from a jury roll that did not adequately ensure the inclusion of Aboriginal on-reserve residents" his Charter rights to equality and to a fair trial had been violated.[90] In partnership with the David Asper Centre for Constitutional Rights, LEAF intervened and offered detailed analysis of the equality dimensions of the case and the importance of interpreting criminal law principles in accordance with substantive equality.[91] Yet the Supreme Court determined that this was "not a proper case to determine whether the equality rights of Aboriginal people under s. 15 of the Charter are implicated as a result of th[e] alienation and underrepresentation" of Aboriginal peoples in the

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[86] *Supra*, note 26.

[87] *Id*., at para. 108.

[88] Koshan, "Redressing the Harms", *supra*, note 83, at 33, citing Jennifer Koshan & Jonnette Watson Hamilton, "'Terrorism or Whatever': The Implications of *Alberta v. Hutterian Brethren of Wilson Colony* for Women's Equality and Social Justice", in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2010) 221, at 247-48.

[89] [2015] S.C.J. No. 28, 2015 SCC 28 (S.C.C.).

[90] *Id*., at para. 5. Section 11 of the Charter, *supra*, note 1 guarantees the right to a fair trial by an independent and impartial tribunal and the right to a trial by jury.

[91] Women's Legal Education and Action Fund, Intervenor Factum in *R. v. Kokopenace*, online: <http://files.ctctcdn.com/8dc812c3001/9ed8a1b8-d8f2-4a39-af6d-7c47a0d59fcc.pdf> [hereinafter LEAF *Kokopenace* Factum].

Canadian justice system generally.[92] In other words, the Court declined to engage with the systemic inequalities at the heart of the claim. The case was dismissed on the basis of section 11 alone.

The Court has avoided section 15 even more resolutely in other cases. For example, in *Carter v. Canada (Attorney General)*,[93] the claimants argued that the prohibition on physician-assisted dying in the *Criminal Code*[94] imposed a differential burden on persons with disabilities in violation of their equality rights because while able-bodied people can commit suicide on their own without fear of prosecution, some persons with disabilities may be physically unable to commit suicide themselves, but cannot seek assistance in committing suicide without subjecting that person to prosecution under the impugned provisions. The trial judge agreed and found a violation of section 15.[95] However, after concluding that the impugned provisions violated section 7 rights to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, the Supreme Court held it was simply "unnecessary" to address the section 15 arguments advanced by the claimants and adjudicated at trial, refusing to offer even a cursory assessment of the equality aspects of the case.[96] Again, the Court sidestepped the opportunity to engage with equality.[97]

Even the cases where the Court has been unable to avoid section 15 are not promising in terms of furthering doctrinal clarity or equality outcomes. *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*[98] involved a claim that Alberta's *Métis Settlements Act* is

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[92] *Kokopenace*, *supra*, note 89, at para. 139. For commentary on *Kokopenace*, see *e.g.*, Vanessa MacDonnell, "Truly representative juries matter" *National Post*, 1 June 2015, online: < http://news.nationalpost.com/full-comment/vanessa-macdonnell-truly-representative-juries-matter>.

[93] [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.).

[94] R.S.C. 1985, c. C-46, at ss. 14 and 241(b).

[95] See *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 2012 BCSC 886, at paras. 1009-1077 (B.C.S.C.).

[96] *Carter*, *supra*, note 93, at para. 93.

[97] See also *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, 2009 SCC 30 (S.C.C.), where the Court summarily dismissed the equality claim of a minor who wanted to make her own medical decisions on religious grounds, preferring instead to focus on religious rights under s. 2(a) and life, liberty and security of the person under s. 7 of the Charter; and *R. v. N.S.*, [2012] S.C.J. No. 72, 2012 SCC 72 (S.C.C.), where LEAF intervened to argue that requiring a sexual assault complainant to remove her niqab in order to testify at a preliminary inquiry and trial was a violation of her rights under ss. 7 and 15 of the Charter: Women's Legal Education and Action Fund, Intervenor Factum in *R. v. N.S.*, online: <http://www.leaf.ca/wp-content/uploads/2012/12/NS-SCC.pdf>. The Supreme Court set down a test for balancing the rights of the complainant with those of the accused, but in doing so did not mention equality rights or s. 15 of the Charter at all.

[98] [2011] S.C.J. No. 37, 2011 SCC 37 (S.C.C.).

underinclusive because it provided that voluntary registration under the *Indian Act*[99] precludes membership in a Métis community.[100] The claimants were members of the Peavine Métis community who registered under the *Indian Act* in order to obtain certain health benefits, and were subsequently removed from the membership list of their community.

LEAF intervened in *Cunningham*, emphasizing the critical differences between cases of "reverse discrimination",[101] like *Kapp* and cases of underinclusion, like *Cunningham*, and urging the Court not to extend the *Kapp* framework for section 15(2) to claims of underinclusiveness because the deference to legislative purpose in the section 15(2) analysis will "shield from scrutiny discrimination *within* the [ameliorative] scheme".[102] The Court did not engage with LEAF's argument, dismissing the case on the basis that because the *Métis Settlements Act* had an ameliorative purpose, the *Kapp* framework for section 15(2) insulated the impugned distinction from full scrutiny under section 15(1) of the Charter.[103] In reaching this conclusion, the *Cunningham* Court did little to clarify the section 15(2) framework established in *Kapp*.

The Court's most recent pronouncement on section 15 is *Kahkewistahaw First Nation v. Taypotat*,[104] which involved a challenge to a minimum education level requirement imposed by the Kahkewistahaw First Nation election code for Indigenous people seeking leadership positions in their community.[105] *Taypotat* is the latest in the lineage of cases that perpetuate the doctrinal ambiguities that have long plagued section 15. The entirety of the adverse effects claim in *Taypotat* was

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99 R.S.C. 1985, c. I-5.

100 *Metis Settlements Act*, R.S.A. 2000, c. M-14. The claimants in *Cunningham* also argued infringement of their rights to freedom of association and liberty under ss. 2(d) and 7 of the Charter; both claims were dismissed: *Cunningham*, *supra*, note 98, at paras. 89-95.

101 Women's Legal Education and Action Fund, Intervenor Factum in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* at para. 4, online: <online: LEAF <http://leaf.ca/wordpress/wp-content/uploads/2013/02/Factum_LEAF_Finale_Cunningham.pdf> [hereinafter LEAF *Cunningham* Factum]. LEAF explained that *Kapp* was a case of pure reverse discrimination because a relatively more privileged group challenged the "very fact" of the Aboriginal Fisheries program, seeking to invalidate it in its entirety by "insisting that equality required identical treatment – formal equality – for everyone". LEAF further argued at para. 15 that in cases of underinclusiveness "[w]here the fact of targeting is not challenged, the enabling feature of the s. 15(2) analysis is spent, and the preventive analysis of s. 15(1) is engaged."

102 *Id*., at para. 10.

103 *Cunningham*, *supra*, note 98, at para. 62. For further analysis of s. 15(2) and the *Kapp-Cunningham* framework, see *e.g.*, McGill, *supra*, note 71.

104 [2015] S.C.J. No. 30, 2015 SCC 30 (S.C.C.).

105 *Kahkewistahaw Election Act*, enacted pursuant to the *Order Amending the Indian Bands Council Elections Order (Kahkewistahaw)*, SOR/2011-49, ss. 9.03, 10.01(d) [hereinafter *Election Act*].

premised on section 15, so the Court could not avoid or sidestep the equality issue. While the Federal Court of Appeal concluded "[t]he impugned provisions of the *Kahkewistahaw Election Act* substantially affect the human dignity and self-worth of the affected individuals and perpetuate prejudice or stereotyping towards those members of the community who are elders or who reside on the reserve and who have not had the same opportunities and advantages with respect to education attainment",[106] at the Supreme Court, the claim in *Taypotat* failed. The Court concluded that the requirement that candidates for Chief of the Kahkewistahaw Nation have Grade 12 education did not infringe the equality rights of the claimant, who had been Chief for 30 years but did not have the requisite level of education.

The context and complexities of *Taypotat* are worthy of more detailed consideration than this brief reflection permits;[107] however, Abella J.'s judgment makes clear that equality doctrine is still very much in flux. While the crux of the analysis in *Taypotat* turned on the Court's perceived lack of evidence that the educational requirement had a differential impact on a group identified by an enumerated or analogous ground, Abella J. made some puzzling comments on the question of discrimination, seeming to "use 'abritrary' as a synonym for 'discriminatory' but [failing to] indicate why she thinks this particular word is one that sheds light on identifying which laws violate section 15(1)".[108] Arbitrariness generally relates to the reasonableness of state action, properly an issue for section 1, and carries particular meaning in the section 7 Charter jurisprudence, making its unspecified use in the section 15(1) context confusing and adding yet another question mark to the Court's interpretation of discrimination under the Charter.

Finally, *Taypotat* is the latest in a notable string of unsuccessful equality claims at the Supreme Court in the past nine years. Indeed, "no equality rights claims including or since *Kapp* have been successful at the Supreme Court, even in dissenting judgments".[109] To be sure, every

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[106] *Taypotat v. Kahkewistahaw First Nation*, [2013] F.C.J. No. 938, 2013 FCA 19, at para. 56 (F.C.A.).

[107] In particular, the context of *Taypotat* as a case involving the laws of an Indigenous nation and an Indigenous claimant raises questions about the proper operation of s. 25 of the Charter in this context: see Jennifer Koshan & Jonnette Watson Hamilton, *Kahkewistahaw First Nation v. Taypotat* – Whither Section 25 of the Charter? (2016) 52:2 *Constitutional Forum* 39.

[108] Jonnette Watson Hamilton & Jennifer Koshan, "*Kahkewistahaw First Nation v. Taypotat*: An Arbitrary Approach to Discrimination" (2016) S.C.L.R. (2d) 76 online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847911>, at 19. See *e.g.*, *Taypotat*, *supra*, note 104, at para. 20.

[109] Koshan, "Redressing the Harms", *supra*, note 83, at 34.

case turns on its own particulars, and the high failure rate is not to suggest that the Court's decisions in these cases were necessarily incorrect. However, the long line of poor outcomes for equality litigants calls into question the sufficiency of the doctrinal approach to section 15 and the ongoing utility of section 15 for equality claimants in Canada. If the Court is either going to avoid equality issues altogether or apply an inconsistent body of precedent yielding a high rate of equality denials, how should equality strategists best proceed?

Looking back at LEAF's feminist interventions at the Supreme Court offers some promising directions for the future. Some of LEAF's key arguments about how to interpret and adjudicate section 15 advanced in past equality cases were either rejected or not acted upon by the Court. These analyses represent the careful thought of equality scholars, lawyers and activists and are worthy of reconsideration by the Court in future cases. In our view, there are at least four specific proposals from LEAF that the Supreme Court should revisit in future jurisprudence.

First, the Court should more forcefully commit to focusing section 15 on those groups and communities who have experienced the most significant historical disadvantage within the "neutral" grounds,[110] perhaps considering a Canada-specific version of the tiers of review from Fourteenth Amendment Equal Protection law in the United States.[111] This means that where a claimant falls within a "suspect category",

[110] In *Quebec (Attorney General) v. A*, *supra*, note 77, at para. 419, McLachlin C.J.C. (concurring in the result) adopted the view that the question of discrimination must be assessed from the viewpoint of the "reasonable person" in the circumstances of the claimant. While none of the other judges commented on this aspect of her approach, the insertion of the "reasonable person" is troubling for its suggestion that the focus of the discrimination analysis under s. 15 is individualized and unconnected to the realities of historical oppression. Carissima Mathen, "What Religious Freedom Jurisprudence Reveals about Equality" (2009) 6 J. L. & Equality 163, at 170, explains the effect of the reasonable person in the s. 15 context "is to uncouple the concept of 'discrimination' from the vantage point of the oppressed. Discrimination is instead firmly tethered to the rational individual able to look past personal harm and evaluate a state law or policy within its larger context".

[111] See *United States v. Virginia*, 518 U.S. 515 (1996) for a discussion on tiers of review in gender discrimination cases under the Fourteenth Amendment. Fourteenth Amendment case law is the subject of much critique and analysis in the United States. We are not suggesting that the Supreme Court of Canada recreate that model of analysis without adapting it to the particularities of the s. 15 context. The Constitution of the United States does not have an equality provision, and tiers of review under the Equal Protection clause are a poor substitute. What might be useful is for our Court to more consistently focus on historic disadvantage as an indicative of the need for more stringent review of government reasoning. This could be done within s. 15, or, perhaps most properly at the s. 1 stage of government justification. For an excellent overview of the strengths and weaknesses in the American approach see *e.g.*, Kenji Yoshino, "The New Equal Protection" (2011) 124 Harvard L. Rev. 747, at 755-64.

a heightened or more rigorous standard of review would apply. So for example, within section 15, a claimant who hails from a historically disadvantaged racial, religious or gender category would have government legislation that impacts them more harshly scrutinized than a claimant who has experienced relatively more group privilege. Following LEAF's arguments in *Andrews* on this point would emphasize that section 15 is intended to secure substantive equality for all, a goal that requires particular attention to those groups who have suffered historical disadvantage.

Second, the Court should seek to more fully incorporate the insights of intersectionality into its section 15 jurisprudence. LEAF has provided specific arguments on the intersectionality of grounds in numerous cases, some of which are noted above, yet the Court often prefers to frame equality claims through the lens of a single ground. Equality claims and claimants are increasingly complex and diverse, and section 15 must evolve to truly capture and respond to the complicated realities of injustice and inequality. There is meaningful Supreme Court precedent for the recognition of intersecting grounds of discrimination, including, for example, in *Law*, where the Court acknowledged "[t]here is no reason in principle … why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15 (1)".[112]

Third, the Court should recognize poverty and/or socio-economic status as an analogous ground, or at least ensure it factors into an intersectional, multi-layered discrimination analysis. A good example of how socio-economic status can be a meaningful part of a section 15 analysis is the case of *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, where the Ontario Court of Appeal accepted single mothers receiving social assistance as an analogous ground.[113] Too often, poverty is ignored as a contributing

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[112] *Law*, *supra*, note 6, at para. 94. See also the dissenting judgments of L'Heureux-Dubé J. in *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554, at paras. 53-54 (S.C.C.) and *Egan*, *supra*, note 28, at 563. *Taypotat*, *supra*, note 104 is indicative of the importance of intersectionality in complex s. 15 claims: see Watson Hamilton & Koshan, *supra*, note 108, at 10-13.

[113] [2002] O.J. No. 1771, 212 D.L.R. (4th) 633 (Ont. C.A.). The decision is not a model for intersectional analysis as Laskin J. separates the claimants into their constituent parts: female, single, receiving social assistance (*i.e.*, sex, marital status and his newly recognized analogous ground) and does a separate comparative analysis for each part. He was forced into this methodology by *Law*'s strict requirement for a comparator group, which has since been abandoned in *Withler*, *supra*, note 73. However, *Falkiner* remains a significant precedent for the fact that socio-economic status can be an analogous ground under s. 15.

factor to social injustice and lack of access to justice. In cases of discrimination based on sex, disability and race, for example, claims by those marginalized individuals within the "neutral" grounds would benefit from an added class/socio-economic status analysis that took into account the combined oppressions of being an "outsider".

Fourth and finally, the Court must hold firm the doctrinal distinction between sections 15 and 1. Taking a broad, purposive approach[114] to the scope of substantive rights and then requiring express justification of limits is critical to ensuring the full realization of equality rights and, indeed, is the hallmark of the Canadian approach.[115] The new framework for section 15(2) established in *Kapp* is the latest illustration of the trouble the Court has in maintaining the critical analytical distinction between section 15 and section 1. While the Court has formerly acknowledged that the structure of the Charter situates section 1 as the exclusive site whereby a government can "save" an impugned law or program,[116] the *Kapp* interpretation of section 15(2) as an exemptive provision means that it now plays a parallel role: governments can insulate ameliorative programs from the full discrimination analysis of section 15(1) and section 1 where the deferential, purpose-based test set out in *Kapp* is satisfied.[117]

IV. Conclusion

The story of section 15 of the Charter so far has not been an easy one for the Court, for equality advocates or for equality claimants. While its future course is unclear, there is little doubt that section 15 of the Charter will continue to be a site of contestation and controversy. In part, we must accept this as inherent in the nature of equality itself, for "[w]hen equality claims are really substantive, they should challenge privileged

[114] The "purposive" approach to interpreting Charter rights, first established in *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 156 (S.C.C.), was described in *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at paras. 116-117 (S.C.C.) as requiring that "[t]he meaning of a right or freedom guaranteed by the *Charter* ... be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect".

[115] See *e.g.*, Lorraine Weinrib, "The Supreme Court of Canada and S.1 of the *Charter*" (1988) 10 S.C.L.R. 469, at 472 emphasizing that the Supreme Court has "consistently affirmed the need to keep the two stages of *Charter* argument distinct"; and Christopher P. Manfredi, "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40 Am. J. of Comp. L. 213, at 224.

[116] See *e.g.*, *Lovelace*, *supra*, note 68, at para. 108.

[117] For further argument on the difficulties with this approach see *e.g.*, McGill, *supra*, note 71.

understandings of the world and privileged players' understandings of themselves".[118] Indeed, as a vehicle for the transformation of power relationships and the redistribution of resources in our society, equality does not loan itself to easy solutions. Yet this does not have to mean that equality necessarily "promises more than it can deliver",[119] or that it is a uniquely impossible goal. However, as this brief retrospective makes clear, section 15 doctrine needs to progress past its existing boundaries to fully realize the promise of equality.

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[118] Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in Faraday *et al.*, *supra*, note 2, at 108.

[119] Chief Justice Beverley McLachlin, *supra*, note 4, at 20.