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Section 15(2), Ameliorative Programs and Proportionality Review

Jena McGill*

I. INTRODUCTION

In its 2008 decision in *R. v. Kapp*,[1] the Supreme Court of Canada staked out new terrain for section 15 of the *Canadian Charter of Rights and Freedoms*.[2] In addition to restating the analytic framework for section 15(1) of the Charter, the Court in *Kapp* concluded for the first time that section 15(2) has independent interpretive force to uphold ameliorative government laws and programs intended to improve the situations of disadvantaged individuals or groups. Sections 15(1) and 15(2) were described by the Court as "working together to promote substantive equality".[3]

In the five years since *Kapp*, the Supreme Court has endorsed and continued to develop its new approach to equality under the Charter. Cases including *Withler v. Canada (Attorney General)*[4] (addressing the role of comparator groups in section 15(1)), *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*[5] (elaborating the scope of the section 15(2) protection for ameliorative programs) and *Eric v. Lola*[6] (considering the foundational concepts of prejudice and stereotyping in

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1 [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "*Kapp*"].

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

3 *Kapp*, *supra*, note 1, at para. 37.

4 [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396 (S.C.C.).

5 [2011] S.C.J. No. 37, [2011] 2 S.C.R. 670 (S.C.C.) [hereinafter "*Cunningham*"].

6 *Quebec (Attorney General) v. A.*, [2013] S.C.J. No. 5, 354 D.L.R. (4th) 191 (S.C.C.)

section 15) have confirmed the *Kapp* framework as the new paradigm for evaluating equality claims under section 15.

The *Kapp* framework has inspired a variety of commentary and critique from Canadian equality scholars, activists and advocates, and increased attention has been devoted to the operation of section 15(2) and the Court's new approach to ameliorative programs since the 2011 decision in *Cunningham*.[7] This article aims to contribute to the growing discussion on section 15(2).[8] In particular, I am motivated by the limits of the *Kapp* analysis for equality claimants arguing that a government law or program with an ameliorative purpose is under-inclusive or has discriminatory effects. In these kinds of equality cases, the *Kapp* framework may give rise to results that are fundamentally inconsistent with the principle of substantive equality. This problem was first recognized immediately following the *Kapp* decision by Professors Jonnette Watson Hamilton and Jennifer Koshan, who identified the need for "a framework for reconciling the new role of s. 15(2) and claims of under-inclusive ameliorative programs".[9] The analysis in this paper proposes that proportionality might be one way of mitigating the risks posed by the *Kapp* framework to claims of under-inclusiveness or adverse effects when an ameliorative program is at issue.

I suggest that because the Supreme Court has situated section 15(2) as an exemptive provision pursuant to which a government law or

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[7] See, *e.g.*, Sophia Moreau, "*R. v. Kapp:* New Directions for Section 15" (2008-2009) 40 Ottawa L. Rev. 283; Diana Majury, "Equality *Kapped*; Media Unleashed" (2009) 27 Windsor Y.B. Access Just. 1 [hereinafter "Majury"]; Michael H. Morris & Joseph K. Cheng, "*Lovelace* and *Law* Revisited: The Substantive Equality Promise of *Kapp*" (2009) 47 S.C.L.R. (2d) 281 [hereinafter "Morris & Cheng"]; Patricia Hughes, "Resiling from Reconciling? Musing on *R. v. Kapp*" (2009) 47 S.C.L.R. (2d) 255 [hereinafter "Hughes"]; Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*" (2009-2010) 47 Alta. L. Rev. 927 [hereinafter "Watson Hamilton & Koshan, 'Courting Confusion?'"]; Jonnette Watson Hamilton & Jennifer Koshan, "Meaningless Mantra: Substantive Equality after *Withler*" (2011-12) 16 Rev. Const. Stud. 31; Beverley Bains, "Comparing Canadian Women" (2012) 20:2 Feminist Legal Studies 89.

[8] 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 [hereinafter "Tremblay"]; Jonnette Watson Hamilton & Jennifer Koshan, "The Supreme Court, Ameliorative Programs and Disability: Not Getting It" (2013) 25 C.J.W.L. 56 [hereinafter "Watson Hamilton & Koshan, 'Not Getting It'"].

[9] Watson Hamilton & Koshan, "Courting Confusion?", *supra*, note 7, at 927.

program may be "saved"[10] from scrutiny under section 15(1) or section 1 of the Charter, section 15(2) is now best understood as an internal limit on the section 15 equality guarantee. Given that section 15(2) effectively supplants section 1, the contours of the section 15(2) limit should be defined according to the general framework of proportionality review — akin to the *Oakes*[11] test undertaken in section 1 of the Charter — requiring a government to justify not only the purpose of an ameliorative program, but also its means and effects. Importing proportionality review into section 15(2) aligns with the purpose of section 15(2) and the principles of Charter adjudication. Most importantly, proportionality review would mitigate the risks that inhere when section 15(2) is used to "save" under-inclusive ameliorative laws or programs or those with discriminatory effects on marginalized groups from full scrutiny under section 15(1) and section 1.

I begin Part II by revisiting the paradigm shift that occurred in *Kapp*, mapping the Supreme Court's path from early jurisprudence on section 15(2) in *Lovelace v. Ontario*[12] to *Cunningham*,[13] the latest decision in which the Supreme Court confirmed and expanded its approach to ameliorative laws and programs under the Charter. Part III highlights the problematic impacts of the *Kapp* framework for section 15 arguments premised on the alleged underinclusiveness or discriminatory effects of an ameliorative law or program. This part concludes that in its application to these kinds of equality claims, the *Kapp* analysis is inconsistent with the principle of substantive equality.

The final section proposes a re-reading of section 15(2) that could mitigate the challenges outlined in Part III, within the general parameters of the *Kapp* framework. Part IV begins with the proposition that after *Cunningham*, section 15(2) is best understood as an internal limit on section 15 that supplants section 1, operative where an ameliorative law or program is at issue. I then make the case that proportionality review similar to that undertaken in section 1 should be expressly incorporated into the section 15(2) framework. I explain why proportionality is the appropriate conceptual tool to define the section 15(2) limit, and consider

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[10] The language of "saving" was used to describe the purpose of s. 15(2) in *Cunningham*, *supra*, note 5, at paras. 40-41, 44-45 and 49.

[11] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

[12] [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.) [hereinafter "*Lovelace*"].

[13] *Supra*, note 5.

in brief how the various elements of proportionality at the section 15(2) stage might be similar or different from the *Oakes* test under section 1 of the Charter.

1. Shifting Frameworks: From *Lovelace* to *Cunningham*

(a) History and Purpose of Section 15(2)

Equality is widely considered the most "conceptually difficult" provision in the Charter.[14] In the seminal case of *Andrews v. Law Society of British Columbia*, McIntyre J., for a unanimous Supreme Court, suggested that part of the difficulty in interpreting equality lies in the fact that the idea itself "lacks precise definition".[15] The language of section 15 of the Charter reflects the definitional ambiguity of the protected ideal:

> 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.[16]

Section 15(2) was incorporated into the Charter as a direct response to concerns that the inclusion of the general principle of equality in section 15(1) could make governments susceptible to "reverse discrimination" claims similar to those underway in the United States at the time the Charter was drafted.[17] "Reverse discrimination" refers

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[14] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at 507 (S.C.C.) [hereinafter "*Law*"]. See also Chief Justice Beverley McLachlin, "Equality: The Most Difficult Right" (2001) 14 S.C.L.R. (2d) 17, at 17, describing the "daunting" challenge faced by Canadian courts in interpreting s. 15.

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

[16] Charter, *supra*, note 2, at s. 15.

[17] Morris & Cheng, *supra*, note 7, at 283. See also Walter S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 242, at 247, explaining that s. 15(2) was added out of "excessive caution" arising from the American experience; and *Lovelace*, *supra*, note 12, at paras. 105-106. At the time the Charter was drafted, the case of

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.[18] Without express protection for ameliorative government programs, the Equal Protection Clause of the United States Constitution[19] had been — and continues to be[20] — relied on to ground claims that ameliorative programs constitute a violation of the equality rights of relatively more advantaged individuals and groups.

The inclusion of section 15(2) in the Canadian Charter signalled a rejection of the American approach, in favour of a substantive understanding of equality focused on accommodating difference to ensure equality of results.[21] The purpose of section 15(2) is to "reinforce the important insight that substantive equality requires positive action to ameliorate the conditions of socially disadvantaged groups".[22] Governments must be free to engage in ameliorative programming

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Regents of the University of California v. Bakke, 438 U.S. 265 (S.C. 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.

[18] 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 and ARCH Disability Law Centre, 2010), online: Law Commission of Ontario <http://www.lco-cdo.org/disabilities/sheldon.pdf> [hereinafter "*ARCH Report*"], at 13.

[19] U.S. Const., Amend V & XIV. In *Plessy v. Ferguson*, 163 U.S. 537 (S.C. 1896), Harlan J. (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 Law and 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.

[20] See, *e.g.*, *Fisher v. University of Texas at Austin*, 570 U.S. __ (2013).

[21] 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, 2006) [hereinafter "Faraday, Denike & Stephenson"].

[22] Colleen Sheppard, *Litigating the Relationship Between Equity and Equality* (Study Paper) (Toronto: Ontario Law Reform Commission, 1993), at 28 [hereinafter "Sheppard"]. See also Morris & Cheng, *supra*, note 7, 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*, *supra*, note 15, at 169, citing *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 347 (S.C.C.) [hereinafter "*Big M*"].

without the threat that "reverse discrimination" claims by more advantaged individuals and groups might undermine their efforts.[23]

(b) Interpreting Section 15(2): From Lovelace *to* Cunningham

Following a number of inconsistent lower court judgments on the scope and operation of section 15(2),[24] the Supreme Court of Canada first considered the matter in its 2000 decision in *Lovelace v. Ontario*.[25] At issue in *Lovelace* was the Ontario First Nations Fund (the "Fund"), a program that restricted profits from on-reserve casinos to bands registered under the *Indian Act*[26] in order to "ameliorate the social, cultural and economic conditions of band communities".[27] 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.

Although the claim in *Lovelace* was decided under section 15(1),[28] the Supreme Court expounded on the relationship between section 15(1) and section 15(2).[29] 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

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

[24] See, *e.g.*, *Manitoba Rice Farmers Assn. v. Manitoba (Human Rights Commission)*, [1987] M.J No. 553, 50 Man. R. (2d) 92 (Man. Q.B.) [hereinafter "*Manitoba Rice Farmers*"]; *MacVicar v. British Columbia (Family and Child Services)*, [1986] B.C.J. No. 1712, 34 D.L.R. (4th) 488 (B.C.S.C.).

[25] *Supra*, note 12.

[26] R.S.C. 1985, c. I-5.

[27] *Lovelace*, *supra*, note 12, at para. 74.

[28] The 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 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": *id.*, at para. 73.

[29] The Ontario Court of Appeal in *Lovelace v. Ontario*, [1997] O.J. No. 2313, 33 O.R. (3d) 735 (Ont. C.A.), had resolved the case on the basis of s. 15(2).

defence to the applicability of the s. 15(1) discrimination analysis".[30] The Court concluded that the correct interpretation was to understand section 15(2) as "confirmatory and supplementary"[31] of section 15(1), but acknowledged, "we may well wish to reconsider this matter at a future time in the context of another case".[32] Understood as an interpretive aid without independent force, section 15(2) was rendered largely insignificant after *Lovelace*.[33]

However, the ameliorative purpose or effect of an impugned law or program was absorbed into the analytical framework for section 15(1) in *Law v. Canada (Minister of Employment and Immigration)*.[34] In establishing its heavily critiqued *Law* analysis,[35] a unanimous Supreme Court identified human dignity as the touchstone of the equality guarantee.[36] The ameliorative purpose or effect 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 in violation of section 15(1).[37] The Court in *Law* acknowledged the possibility that a law or program could have an ameliorative purpose or effect in respect of 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.[38] The Court suggested

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[30] *Lovelace*, *supra*, note 12, at para. 97. For further perspectives on the early debates on the appropriate role of s. 15(2) see, *e.g.*, Edward M. Iacobucci "Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution" (1998) 36 Osgoode Hall L.J. 293, at 326; Drumbl & Craig, *supra*, note 23, at 85; Michael Pierce, "A Progressive Interpretation of Section 15(2) of the *Charter*" (1993) 57 Sask. L. Rev. 263 [hereinafter "Pierce"].

[31] *Lovelace*, *supra*, note 12, at para. 105.

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

[33] Morris & Cheng, *supra*, note 7, at 299, find that after *Lovelace*, equality jurisprudence considering claims related to ameliorative programs reflected the "diminished significance" of s. 15(2).

[34] [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"].

[35] See, *e.g.*, Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor Y.B. Access Just. 111; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 C.J.W.L. 37; Christopher D. Bredt & Adam M. Dodek, "Breaking the *Law's* Grip on Equality: A New Paradigm for Section 15" (2003) 20 S.C.L.R. (2d) 33; Faraday, Denike & Stephenson, *supra*, note 21.

[36] *Law*, *supra*, note 14, at para. 51, the Court concluding, "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".

[37] *Id.*, at paras. 72-73.

[38] *Id.*

that in these situations it would be necessary to "consider justification under s. 1, or the operation of s. 15(2)".[39]

Both *Lovelace* and *Law* left open the possibility of revisiting the interpretation of section 15(2) in future, and in 2008 the 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 Aboriginal Fisheries Strategy (the "Strategy"), a federal program designed to "enhance aboriginal involvement in the commercial fishery".[40] As part of the Strategy, the government granted a communal fishing licence to three Aboriginal bands, permitting only band-designated fishers to fish for salmon during a designated 24-hour period, and to sell any fish they caught. All other commercial fishers were excluded from the fishery during this time. The excluded fishers engaged in a "protest fishery" and were charged with fishing at a prohibited time.[41] They challenged the communal fishing licence as an infringement of their equality rights under section 15(1) of the Charter.

In yet another unanimous section 15 decision,[42] the Supreme Court agreed that the communal fishing licence created a distinction on the enumerated ground of race,[43] but because the objective of the government program was "the amelioration of the conditions of a disadvantaged group" — the Aboriginal fishers — the Strategy was declared constitutional under section 15(2).[44] In reaching its conclusion in *Kapp*, the Supreme Court established a new analytical framework for section 15 of the Charter.

The Court first emphasized that sections 15(1) and (2) work together to promote the goal of substantive equality: section 15(1) "is aimed at

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[39] *Id.*

[40] *Kapp*, *supra*, note 1, at paras. 6-7.

[41] *Id.*, at para. 9.

[42] 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: 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.

[43] 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.

[44] *Kapp*, *supra*, note 1, 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.*, Tremblay, *supra*, note 8.

preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds", while section 15(2) "preserves the right of governments to implement … programs [aimed at helping disadvantaged groups improve their situations], without fear of challenge under s. 15(1)".[45] Following brief comments on section 15(1) which, without saying as much, strongly suggested a shift away from the *Law* framework[46] and back to the broader language of the two-part test in *Andrews*,[47] the majority of the *Kapp* decision focused on the "enabling"[48] provision of section 15(2). Here, the Court did a conceptual about-face away from *Lovelace*, interpreting section 15(2) as having independent force to insulate ameliorative programs from scrutiny under section 15(1) of the Charter when two conditions are met:

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[49]

In order to demonstrate that an impugned law or program has an "ameliorative or remedial purpose" the Court found that an "intent-based" analysis was appropriate, making the "legislative goal rather than actual effect … the paramount consideration".[50] In assessing whether a stated ameliorative purpose is "genuine", it is appropriate to look to whether the legislature "chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that

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[45] *Kapp*, *supra*, note 1, at para. 16.

[46] *Id.*, at paras. 17-22. The suggestion that *Kapp* ushered in a return to *Andrews* was confirmed in subsequent cases including, *e.g.*, *Ermineskin Indian Band Nation v. Canada*, [2009] S.C.J. No. 9, [2009] 1 S.C.R. 222 (S.C.C.). See also Watson Hamilton & Koshan, "Courting Confusion?", *supra*, note 7, at 934.

[47] The *Andrews* framework, *supra*, note 15, asks first, whether the law creates a distinction based on an enumerated or analogous ground, and second, whether that distinction creates a discriminatory disadvantage by perpetuating prejudice or stereotyping. 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 — and more uncertainty — about s. 15(1) than it answered: see, *e.g.*, Majury, *supra*, note 7, at 8-9; and Bruce Ryder, "*R. v. Kapp*: Taking Section 15 Back to the Future", online: TheCourt <http://www.thecourt.ca/2008/07/02/r-v-kapp-taking-section-15-back-to-the-future/>.

[48] *Kapp*, *supra*, note 1, at para. 25.

[49] *Id.*, at para. 41.

[50] *Id.*, at paras. 44 and 49. The Court was clear at paras. 50-52 that a satisfactory ameliorative purpose could be one of several objectives pursued by an impugned law or program.

the program may indeed advance the stated goal of combating disadvantage".[51] If an impugned law or program is found to have a genuine 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 program".[52]

Accordingly, the Court in *Kapp* established a "unified approach" to section 15.[53] Once a claimant has demonstrated that an impugned law or program imposes differential treatment based on an enumerated or analogous ground (per the first step of *Andrews*), the government may argue pursuant to section 15(2) that the law or program has an ameliorative purpose targeting a disadvantaged group. If section 15(2) is satisfied, the law or program will be constitutional and will not be subject to any further scrutiny. Only where the government fails to meet its burden under section 15(2) will the law or program be subject to section 15(1), where the claimant can show that the distinction is discriminatory because it perpetuates prejudice or stereotyping (per the second step of *Andrews*).[54] Finally, if discrimination is made out under section 15(1), the government can attempt to justify the law or program under section 1. The Court in *Kapp* again left open the possibility that this new analytical framework could require "some adjustment" in future cases.[55]

In 2011, the Supreme Court considered the operation of the *Kapp* framework outside of the "reverse discrimination" context in *Alberta v. Cunningham*, which involved a claim that an ameliorative program was under-inclusive in its demarcation of the target group.[56] The claimants

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[51] *Id.*, at para. 48. At para. 49 the Court explained that for the impugned distinction to be "rationally related" the government must demonstrate some kind of correlation between the program and the disadvantage that the target group experiences.

[52] *Id.*, at para. 52.

[53] Tremblay, *supra*, note 8, at 183.

[54] *Kapp*, *supra*, note 1, at para. 40.

[55] *Id.*, at para. 41.

[56] *Cunningham*, *supra*, note 5. Prior to *Cunningham*, there had been debate over whether *Kapp* was intended to be limited to the "reverse discrimination" context of *Kapp*, or whether it represented a global framework for all s. 15 equality claims: see, *e.g.*, *Nation Micmac de Gespeg v. Canada (Minister of Indian and Northern Affairs)*, [2009] F.C.J. No. 1656, 402 N.R. 313, at para. 9 (F.C.A.) [hereinafter "*Jean*"], where Trudel J., considering the relevance of *Kapp* to the case of under-inclusion at issue, noted "(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."

were members of the Peavine Métis community in Alberta who registered under the *Indian Act*[57] in order to obtain particular health benefits.[58] The impugned legislation, the *Métis Settlements Act* ("MSA"),[59] 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 the Peavine community. They argued that the provisions of the MSA denying them membership in their Métis community infringed their equality rights under section 15(1) of the Charter.[60]

The Supreme Court was unanimous in its application of the *Kapp* framework to the *Cunningham* claim. After concluding that the MSA differentiated between Métis who were registered under the *Indian Act* and Métis who were not, the Court turned to section 15(2).[61] In assessing the ameliorative purpose of the MSA, the Court confirmed that the determination of purpose under section 15(2) was "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".[62] Applying this analysis, the MSA was found to have a very specific ameliorative purpose:

> [T]he object of the *MSA* program is not the broad goal of benefiting all Alberta Métis, as the claimants contend, but 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.[63]

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57 *Supra*, note 26.

58 For an important discussion on the role of choice in the *Cunningham* decision, see Women's Legal Education and Action Fund (LEAF), Intervener Factum in *Alberta (Minister of Aboriginal Affairs and Northern Development) v Cunningham*, online: LEAF <http://leaf.ca/wordpress/wp-content/uploads/2013/02/Factum_LEAF_Finale_Cunningham.pdf>, at paras. 22-25 [hereinafter "LEAF Factum"]. See also Diana Majury, "Women are Themselves to Blame" in Faraday, Denike & Stephenson, *supra*, note 21, at 219.

59 R.S.A. 2000, c. M-14 [hereinafter "MSA"].

60 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 5, at paras. 89-95.

61 *Id.*, at paras. 56-58.

62 *Id.*, at para. 61.

63 *Id.*, at para. 62.

The distinction drawn in the MSA between Métis registered under the *Indian Act* and Métis who were not was found to be rationally related to this ameliorative object as required by *Kapp*.[64] The Court clarified that the "serve and advance" threshold, enunciated in *Kapp* as requiring that the impugned distinction "serve and [is] necessary" to the ameliorative purpose of the law or program,[65] does not require "proof that the exclusion is essential to realizing the object of the ameliorative program".[66] The government need only demonstrate that the distinction at issue "in a general sense serves or advances the [ameliorative] object of the program".[67] The distinction in the MSA was "saved" by section 15(2) and declared constitutional.

Among the most pressing uncertainties since the framework established in *Kapp* was confirmed as the global approach to section 15 in *Cunningham* are those related to the powerful role now played by section 15(2) in insulating government programs with an ameliorative purpose from review under section 15(1) and section 1 of the Charter. Of particular concern is the operation of section 15(2) in cases based on the under-inclusiveness or discriminatory effects of a government law or program with an ameliorative purpose.

II. UNDER-INCLUSIVE AND DISCRIMINATORY AMELIORATIVE PROGRAMS

In *Kapp*, the exemptive interpretation of section 15(2) was consistent with the purpose of that section: it insulated an ameliorative program targeting a disadvantaged group from a claim of "reverse discrimination" by a relatively more advantaged group. Accordingly, section 15(2) enabled the government to treat people differently in order to further substantive equality. The *Kapp* framework for section 15(2) operates in the name of substantive equality in the context of *Kapp*-style "reverse discrimination" claims.

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[64] *Id.*, at para. 73, finding 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".

[65] *Kapp*, *supra*, note 1, at para. 52.

[66] *Cunningham*, *supra*, note 5, at para. 45.

[67] *Id.*, at para. 45.

The same cannot be said of the *Kapp* framework where a section 15 claim alleges that a government law or program is under-inclusive or has discriminatory effects. 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 highly deferential analysis according to *Cunningham* — the *Kapp* framework ignores the possibility that a program with an ameliorative purpose could be discriminatory by virtue of its means or effects. An ameliorative program may be based on a discriminatory distinction within a disadvantaged group (as alleged in *Cunningham*) or between disadvantaged groups, or it may result in discriminatory or disadvantageous effects for some members of the targeted group or for other marginalized groups. Yet the *Kapp* framework forecloses arguments that a government law or program is both ameliorative *and* discriminatory at the same time.[68]

The failure to interrogate the means or effects of an allegedly discriminatory law or program with an ameliorative purpose is at odds with a long line of jurisprudence confirming that Charter rights may be violated via purpose or effects.[69] It is also fundamentally inconsistent with the principle of substantive equality that animates section 15. Key to the substantive approach is clear recognition that section 15 captures not only overt or purpose-based discrimination, but also discrimination arising from adverse effects[70] and under-inclusion.[71] Indeed, many of the foundational cases adjudicated under section 15 over the past two

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[68] 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 8, at 66-67; and LEAF Factum, *supra*, note 58, at paras. 8-18.

[69] See, *e.g.*, *Big M*, *supra*, note 22, at para. 80. See also Watson Hamilton & Koshan, "Courting Confusion?", *supra*, note 7, at 940-41, arguing that *Kapp*'s "resurrection of *Andrews* should have reinstituted the idea that unconstitutional purpose *or effects* of a law would be sufficient to prove a s. 15(1) claim".

[70] Adverse effects claims allege that a facially neutral law (or one with an ameliorative purpose) has a more burdensome impact on members of an historically marginalized group. Adverse effects discrimination was described by the Supreme Court in *Eldridge v. British Columbia*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 62 (S.C.C.) [hereinafter "*Eldridge*"] (emphasis added):

> A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). *It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law.* As McIntyre J. stated in *Andrews* …"[t]o approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned".

[71] See, *e.g.*, *Brooks v. Canada Safeway Ltd.*, [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219, at 1240 (S.C.C.), concluding, "[u]nderinclusion may be simply a backhanded way of permitting discrimination". See also *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.) [hereinafter "*Vriend*"].

decades have involved claims that a benefit-conferring law or program is under-inclusive,[72] including *Lovelace*,[73] *Egan v. Canada*,[74] *Eldridge v. British Columbia*,[75] *Vriend v. Alberta*[76] and *M. v. H.*[77] These cases were clearly attuned to the possibility and particularities of ameliorative-discriminatory government laws or programs.[78] In *Law*, for example, the 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 under-inclusiveness:

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[72] Watson Hamilton & Koshan explain in "Not Getting It", *supra*, note 8, at 59: "Prior to *Kapp*, and subsequently, the Supreme Court has heard mainly section 15 challenges brought by disadvantaged claimants who sought to be included within ameliorative laws, programs or activities."

[73] *Supra*, note 12.

[74] [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) [hereinafter "*Egan*"]. In *Egan*, the Court addressed the opposite-sex definition of "spouse" in the *Old Age Security Act*, R.S.C. 1985, c. O-9. The majority concluded that the definition did not infringe equality rights because the distinction between opposite and same-sex couples was relevant to the purpose of the Act, which the majority described at 515 as the "support and protection" of legal marriage. In one of three dissenting opinions, Iacobucci J. found the objective of the Act to be the "alleviation of poverty in elderly households" and concluded that the exclusion of same-sex seniors from the legislation was not rationally connected to this goal, stating at 608, "[i]f there is an intention to ameliorate the position of a group, it cannot be considered entirely rational to assist only a portion of that group".

[75] *Supra*, note 70. *Eldridge* involved a claim that a decision by hospital officials not to fund sign language interpretation as an insurable "medically necessary service" pursuant to the relevant provincial legislation infringed s. 15. The Court agreed that the hospital had violated the equality rights of deaf persons and reiterated at para. 73 that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner … In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons …" (citations omitted).

[76] *Supra*, note 71, where the Court was asked to assess a s. 15 claim based on the failure of the Alberta government to include sexual orientation as a prohibited ground of discrimination in the *Individual Rights Protection Act*, R.S.A. 1980, c. I-2. The purpose of the impugned legislation was ameliorative and described by the Court at para. 95 as "... to affirm and give effect to the principle that all persons are equal in dignity and rights ... [by] prohibit[ing] discrimination in a number of areas and with respect to an increasingly expansive list of grounds".

[77] [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.). In *M. v. H.*, the Court considered whether the opposite-sex definition of "spouse" in Part III of the *Family Law Act*, R.S.O. 1990, c. F.3 was under-inclusive and thereby discriminatory on the basis of sexual orientation. The definition was relevant to spousal support obligations under the Act. The majority of the Court at para. 71 "reject[ed] the idea that the allegedly ameliorative purpose of this legislation does anything to lessen the charge of discrimination in this case".

[78] In *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, [2009] A.J. No. 678, 8 Alta. L.R. (5th) 16, at para. 24 (Alta. C.A.) [hereinafter "*Cunningham Appeal*"], the Alberta Court of Appeal pointed out, "[i]f the discriminatory effects of specific provisions could be disregarded in light of an overall ameliorative purpose, cases like *Vriend v Alberta* … would no longer be good law".

> ... An ameliorative purpose or effect … will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. *I emphasize that this factor [ameliorative purpose or effect] 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 members of a historically disadvantaged group will rarely escape the charge of discrimination*.[79]

Nevertheless, the *Cunningham* application of the *Kapp* framework to allegedly under-inclusive ameliorative legislation means that a government law or program with an ameliorative purpose and potentially discriminatory means or effects will *often* "escape the charge of discrimination" via the operation of section 15(2).

The Supreme Court in *Cunningham* heard arguments in favour of recognizing the fundamental contextual differences between *Cunningham*-style claims of under-inclusiveness and *Kapp*-style claims of "reverse discrimination".[80] The Women's Legal Education and Action Fund ("LEAF"), intervening in *Cunningham*, argued that in cases of under-inclusiveness "[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".[81] LEAF urged the Court not to extend the *Kapp* framework to claims of under-inclusiveness, arguing that in such circumstances, the *Kapp* deference to legislative purpose means that section 15(2) serves to "shield from scrutiny discrimination *within* the [ameliorative] scheme".[82] When an under-inclusive law or program with an ameliorative purpose is at issue, the *Kapp* framework for section 15(2) does not operate in furtherance of substantive equality.[83]

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[79] *Law*, *supra*, note 14, at para. 72 (emphasis added; citations omitted).

[80] LEAF Factum, *supra*, note 58, at para. 4, 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".

[81] *Id.*, at para. 15.

[82] *Id.*, at para. 10.

[83] *Id.*, at para. 7, citing in part *Kapp*, *supra*, note 1, at para. 16. LEAF made similar arguments about the applicability of *Kapp* at the Federal Court of Appeal in *Jean*, *supra*, note 56.

In an effort to embed the critical distinction between "reverse discrimination" and under-inclusiveness claims in the analytical framework of section 15, LEAF proposed the following "threshold questions" to determine whether section 15(2) is properly engaged in a given context:

(1) Is the scheme ameliorative within the meaning of section 15(2)?

- If yes, go to question 2

- If not, section 15(2) is not engaged — go to section 15(1).

(2) Is the challenge to the very fact of targeting (instead of delineation of the targeted group)?

- If challenge to the very fact of targeting, section 15(2) is engaged — apply the two-step *Kapp* test.

- If challenge to the delineation of targeted group, section 15(2) is not engaged — go to section 15(1).[84]

LEAF's argument was rejected in *Cunningham*. Despite reiterating that the "purpose of s. 15(2) is to save ameliorative programs from the charge of *reverse discrimination*" the Court either failed to appreciate that *Cunningham* was not a "reverse discrimination" case, or failed to see why under-inclusiveness cases demand a different approach.[85] The *Kapp* framework was thus confirmed as the singular mode of analysis for all kinds of equality claims involving ameliorative programs. The global applicability of *Kapp* has translated to lower courts in Canada, which are now applying *Kapp* and *Cunningham* to "save" legislation with an ameliorative purpose even where the claim is based on under-inclusiveness.[86]

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[84] LEAF Factum, *supra*, note 58, at para. 18.

[85] *Cunningham*, *supra*, note 5, at para. 41 (emphasis added).

[86] See, *e.g.*, *Pratten v. British Columbia (Attorney General)*, [2011] B.C.J. No. 931, 22 B.C.L.R. (5th) 307 (B.C.S.C.), which involved a challenge to the provisions of the B.C. *Adoption Act*, R.S.B.C. 1996, c. 5 and associated regulation B.C. Reg. 291/96 that establish the mechanisms whereby adult adopted children can obtain information about their biological parents. The claimant alleged the Act was under-inclusive because it did not include parallel provisions for "the benefit of adults conceived using sperm from an anonymous donor" at para. 224. The Attorney General, relying on *Kapp*, argued at para. 235 that s. 15(2) provided a complete "defence" to the claim. The trial judge, writing before the release of *Cunningham*, rejected the application of s. 15(2) at para. 239 on the basis that the claim was not one of "reverse discrimination" but one of under-inclusiveness. On appeal ([2012] B.C.J. No. 2460, 37 B.C.L.R. (5th) 269 (B.C.C.A.) [hereinafter "*Pratten* CA"]), the B.C. Court of Appeal, writing after *Cunningham*, concluded that s. 15(2) was dispositive. The

The positioning of section 15(2) as a possible "trump card"[87] in equality cases involving ameliorative laws or programs marks a major departure from earlier judicial interpretations that indicate this was precisely the reading of section 15(2) the Court initially sought to avoid. Faced with the opportunity to expand the role of section 15(2) in *Lovelace*, the Court declined to do so based on the purpose of section 15(2), the plain language of the text[88] and in light of concerns about the internal coherence of section 15 and the process of Charter adjudication.[89] The *Lovelace* Court explained:

> ... treating s. 15(2) as an exception or defence would render s. 1 of the *Charter* redundant ... Such an approach would be inconsistent with the overall structure of the *Charter*, and consequently it is preferable ... to recognize the interpretive interdependence of ss. 15(1) and 15(2).[90]

The Court in *Lovelace* preferred the interpretive reading of section 15(2) in order to ensure that the substance of an allegedly ameliorative law or program would be "subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review".[91] There was also acknowledgment that the structure of the Charter situates section 1 as the exclusive site[92] whereby a government can "save" an impugned law or

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Adoption Act had as its purpose 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". Given that the purpose was the targeting of adoptees only, the distinction between adoptees and donor offspring was rationally related to that purpose, and the distinction was "saved" under s. 15(2). Pratten's application for leave to appeal to the Supreme Court of Canada was dismissed: [2013] S.C.C.A. No. 36 (S.C.C.).

87 Hughes, *supra*, note 7, at 256.

88 *Lovelace*, *supra*, note 12, at para. 105, finding it to be "clear that the s. 15(2) phrase 'does not preclude' cannot be understood as language of defence or exemption. Rather, this language indicates that the normal reading of s. 15(1) includes the kind of special program under review in this appeal."

89 *Id.*, at paras. 106-107.

90 *Id.*, at para. 107 (referencing Drumbl & Craig, *supra*, note 23, at 122 on the redundancy of s. 1 if an exemptive approach to s. 15(2) was adopted). See also *R. v. Hess; R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.) [hereinafter "*Hess*"], where McLachlin J. (as she then was), writing in dissent for herself and Gonthier J. on whether s. 146(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 could be "saved" under s. 15(2) because it had a beneficial purpose, warned: "Interpreted expansively ... it [s. 15(2)] threatens to circumvent the purpose of s. 1."

91 *Lovelace*, *supra*, note 12, at para. 108.

92 The "notwithstanding clause", Charter, *supra*, note 2, at s. 33, allows governments to declare that a law will operate notwithstanding the fact that it may infringe certain constitutionally guaranteed rights. See, *e.g.*, *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.).

program, making an exemptive reading of section 15(2) inconsistent with the accepted process of Charter adjudication.

It is unclear why the reasons for preferring the interpretive approach to section 15(2) set out in *Lovelace* and other early section 15 cases are no longer controlling. There was no evidence in *Kapp* that the interpretive approach to section 15(2) has failed to operate as the framers of the Charter intended; that is, there is no indication that an interpretive reading of section 15(2) has 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 23 years from the coming-into-force of section 15 for a single "reverse discrimination" claim to make it to the Supreme Court level.[93] This does not mean that "reverse discrimination" claims are not being made,[94] but it does suggest that existing Charter mechanisms have, to date, been sufficient to weed out such claims, either by concluding that an impugned distinction is not discriminatory under section 15(1)[95] or by finding that an ameliorative program that discriminates against a more advantaged group is "reasonable" and "demonstrably justified" under section 1. It is also possible that the "mere presence of s. 15(2) … may serve as an effective disincentive to raising claims of 'reverse discrimination' in the first place".[96]

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[93] As noted above, that case was *Kapp*, *supra*, note 1. Although the Charter was formally adopted in 1982, s. 15 came into force three years later in 1985, so as to provide governments an opportunity to review existing legislation for Charter compliance.

[94] Among the first s. 15 cases, *Nova Scotia (Attorney General) v. Phillips*, [1986] N.S.J. No. 401, 34 D.L.R. (4th) 633 (N.S.S.C.) was a challenge to a social welfare benefit available to single mothers but not single fathers. The Court found that the benefit scheme violated s. 15 because benefits should be conferred on both mothers and fathers or neither. The benefit scheme was ultimately struck down in its entirety.

[95] It is likely that many true "reverse discrimination" claims would fail at this juncture with a finding that the distinction at issue does not perpetuate stereotypes or prejudice against the relatively more advantaged claimant group, but instead corresponds to the actual circumstances of disadvantage of the group targeted by ameliorative legislation (the "correspondence" factor from *Law*, *supra*, note 14). See, *e.g.*, the commentary of Arbour J.A. (as she then was) in *Eaton v. Brant (County) Board of Education*, [1995] O.J. No. 315, 22 O.R. (3d) 1 (Ont. C.A.) (revd on other grounds [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.)), where the Ontario Court of Appeal at 10-11 considered the relationship between s. 15(1) and (2) of the Charter in the context of special education for children with disabilities.

[96] Pierce, *supra*, note 30, at 264, suggests that one explanation for the near-total lack of direct attacks on ameliorative programs under s. 15 is that the existence of s. 15(2) implies that "any legal controversy over the constitutionality of such schemes has already been decided".

The only hint as to the Court's justification for adopting the exemptive interpretation of section 15(2) is the following statement from *Kapp*: "This approach has the advantage of avoiding the *symbolic problem* of finding a program discriminatory [under section 15(1)] before 'saving' it as ameliorative ...".[97]

This "symbolic problem" may be live in cases of true "reverse discrimination", where a finding of discrimination under section 15(1) could appear to validate a claim by a more advantaged group seeking to strike down an ameliorative program. However in the context of claims of under-inclusiveness, where a disadvantaged claimant alleges discriminatory exclusion from the benefits of an ameliorative program, the "symbolic problem" evaporates. In these cases, finding that an ameliorative law or program infringes a Charter right and then "saving" it under section 1, where it is appropriate to do so, seems entirely consonant with the accepted process of adjudicating rights, as noted in *Lovelace*, above.[98] Indeed, taking a broad, purposive approach[99] to the scope of substantive rights and then requiring express justification of limits is the hallmark of the Canadian approach.[100]

In my view, the Court was wrong to extend the exemptive reading of section 15(2) established in *Kapp* to claims of under-inclusiveness in *Cunningham*. The most principled way forward would be for the Court to "reconsider its approach … by taking seriously the sort of alternative

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[97] *Kapp*, *supra*, note 1, at para. 40 (emphasis added).

[98] *Lovelace*, *supra*, note 12.

[99] The "purposive" approach to interpreting Charter rights, first established in *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 156 (S.C.C.), was described in *Big M*, *supra*, note 22, at paras. 116-117 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".

[100] See, *e.g.*, Lorraine Weinrib, "The Supreme Court of Canada and Section One 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"; 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. Comp. L. 213, at 224. See also Carissima Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2008) 6 J. L. & Equality 163, at 163, arguing that the judicial approach to the Charter guarantee of freedom of religion, where establishing a *prima facie* infringement of the Charter right is relatively "straightforward (because the right is defined broadly and from an almost completely subjective viewpoint)", could benefit the complicated s. 15 jurisprudence.

proposed by LEAF" in *Cunningham*, above.[101] However, only time will tell whether or when judicial reassessment of section 15 might actually occur. In the meantime, courts will continue to rely on the *Kapp* framework for section 15, necessitating careful reflection on how the issues described above might be mitigated *within* the general boundaries of *Kapp*. In the next section, I propose a possible interpretation of the *Kapp* framework that could reveal possibilities for addressing some of the problems with claims of under-inclusiveness and adverse effects where an ameliorative law or program is at issue.

III. RE-READING SECTION 15(2) AS AN INTERNAL LIMIT ON EQUALITY

Given the new interpretation of section 15(2) adopted in *Kapp* and extended in *Cunningham* to claims of under-inclusiveness, a new reading of section 15(2) is now required. In this section, I suggest that because the successful operation of section 15(2) circumvents section 15(1) of the Charter where an ameliorative law or program is at issue, section 15(2) can properly be understood as an internal limit on the right to equality guaranteed by section 15(1). After identifying the limit and setting it in context, I show how the operation of the section 15(2) limit effectively supplants the analysis under section 1 of the Charter. I then seek to establish a foundation for adapting the principle of proportionality embodied by the *Oakes* test to the section 15(2) context in order to respond to present problems with the application of the *Kapp* framework to section 15 claims based on under-inclusion or discriminatory effects where an ameliorative program is at issue.

The limit on the equality guarantee imposed by the exemptive reading of section 15(2) can be stated as follows: *Every individual has a right to equality before and under the law, and the right to equal protection and equal benefit of the law without discrimination on the basis of enumerated or analogous grounds* except *in relation to a government law, program or activity that has as its purpose the amelioration of the situation of a disadvantaged group identified by enumerated or analogous grounds*. Where a claimant runs up against the

[101] Watson Hamilton & Koshan, "Not Getting It", *supra*, note 8, at 80, noting the particular barriers created by the *Kapp* approach to s. 15(2) for persons with disabilities seeking access to necessary services.

ameliorative law or program limit, his or her right to equality must yield without any inquiry into the impacts of the law or program on Charter rights, and with minimal justification required of the government seeking to rely on section 15(2). While this kind of limit might be appropriate in true cases of "reverse discrimination", it is deeply problematic when applied to claims alleging that an ameliorative law or program is under-inclusive or has adverse effects.

Understanding section 15(2) as an internal limit on equality brings section 15 into the class of Charter rights with express internal limits, including, for example, section 7, which guarantees "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[102] The Court has declared that section 7 represents a "qualified" right, meaning that a government may restrict the right so long as it does so in a manner consistent with the principles of fundamental justice.[103] The existence of the express limit in section 7 has been described by the Supreme Court as requiring "the delineation of the boundaries of the rights and principles in question"[104] confirming the relevant conceptual work to be done when an internal limit is at issue.

The most obvious place to begin delineating the scope of the section 15(2) limit on equality is by considering the operation of section 15(2) in displacing section 1 of the Charter. Section 1 is the established location where an impugned government law or program might be "saved" from a finding of unconstitutionality, but only after the government has satisfied "the exclusive justificatory criteria ... against which limitations on ... [Charter] rights and freedoms must be measured".[105] These "justificatory criteria" were originally established in the two-part test set out in *R. v. Oakes*.[106] The *Oakes* test requires scrutiny of the purpose, means and effects of the law or program at issue, by asking first, whether the law or

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[102] Charter, *supra*, note 2, at s. 7. Other rights with internal limits or qualifiers include s. 8, which guarantees: "Everyone has the right to be secure against *unreasonable* search or seizure" and s. 9, which provides: "Everyone has the right not to be *arbitrarily* detained or imprisoned" (emphasis added).

[103] *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at 179 (S.C.C.).

[104] *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 97 (S.C.C.), citing *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at para. 66 (S.C.C.).

[105] *Oakes*, *supra*, note 11, at para. 63.

[106] *Id.* The *Oakes* analysis was modified in subsequent cases including, significantly, *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) [hereinafter "*Dagenais*"] and *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, at paras. 35 and 37 (S.C.C.) [hereinafter "*Wilson Colony*"].

program pursues "an objective related to concerns which are pressing and substantial in a free and democratic society";[107] and second, whether the means chosen to pursue the objective are "reasonable and demonstrably justified".[108] This second inquiry involves a context-specific proportionality assessment, whereby the Court looks to whether: (1) the means adopted are rationally connected to the objective; (2) the means impair Charter rights as minimally as possible; and (3) there is proportionality between the salutary and deleterious effects of the rights-infringing measure.

Under the *Kapp* framework, sections 1 and 15(2) now serve a similar function: each permit the state to justify an impugned law or program with the result that, if the justificatory criteria are satisfied, it 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).[109] However, the government has a significantly less onerous task in seeking to uphold an impugned law or program under section 15(2) because it does not have to satisfy the *Oakes* test. Instead, the government need only bring evidence as to the ameliorative purpose of the law or program at issue, and demonstrate that the impugned distinction "in a general sense serves or advances the [ameliorative] object of the program".[110] This is a highly deferential test for section 15(2), providing only "minimal" scrutiny in the assessment of a program's ameliorative purpose and no scrutiny as to its actual effectiveness.[111]

Permitting declarations of constitutionality to be made by courts pursuant to section 15(2) on a considerably lower justificatory standard then that established in *Oakes* violates the spirit of the Charter, which guarantees Charter rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and

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[107] *Id.*, at para. 69.

[108] *Id.*, at para. 70.

[109] Drumbl & Craig, *supra*, note 23, at 122.

[110] *Cunningham*, *supra*, note 5, at para. 45.

[111] Majury, *supra*, note 7, at 10. Any inquiry into the actual effects of ameliorative legislation is prohibited. In *Cunningham*, *supra*, note 5, at para. 74, the Supreme Court concluded that the Alberta Court of Appeal "erred in demanding positive proof" that the impugned distinction (between Métis and Métis who are also status Indians) would have the effect of enhancing the ameliorative goals of the MSA program, concluding that "all the government need show is that it was rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to [its ameliorative] purpose".

democratic society".[112] In *Andrews* the Court divided on the appropriate level of scrutiny under section 1 in equality cases, with the majority rejecting the argument by McIntyre J. that a relaxed standard was required so as not to unduly hinder the government line-drawing that is inherent to equality-enhancing laws or programs.[113] Comparing the justificatory criteria in *Oakes* and *Kapp*, both of which can result in a finding that an impugned law or program is constitutional, it is clear that *Kapp* permits the justification of alleged limits on equality rights on a standard less burdensome then *Oakes*. Given that the *Kapp* framework applies equally to claims of "reverse discrimination", under-inclusiveness and adverse effects discrimination, these divergent standards are cause for concern.

In light of the equivalency between section 15(2) and section 1, the principles underpinning the section 1 limitations analysis are relevant to delineating the scope of the section 15(2) limit on equality rights. This means that proportionality should be part of the government's burden in cases where it seeks to rely on section 15(2) to "save" an ameliorative program from scrutiny under section 15(1) and section 1 of the Charter. Recall that according to *Kapp*, once an equality claimant has demonstrated that an impugned law or program imposes differential treatment based on an enumerated or analogous ground, the government may trigger section 15(2) by showing that the law or program has a genuine ameliorative purpose targeting a disadvantaged group identified by grounds. Incorporating proportionality into the 15(2) analysis would expand the government's burden by requiring that in order to "save" an impugned law or program pursuant to section 15(2), the government must demonstrate not only that the law or program has an ameliorative purpose, but *also* that the means chosen to pursue that ameliorative purpose and the established or anticipated effects of the ameliorative program are proportionate.

There are substantive and structural reasons that proportionality is an appropriate conceptual tool for use in the section 15(2) context. First,

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[112] Charter, *supra*, note 2, at s. 1.

[113] *Andrews*, *supra*, note 15, at 183. 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". See also *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769 (S.C.C.), where differences of opinion regarding s. 1 re-emerged. Justice Arbour, concurring in the result, emphasized at para. 91 the importance of conducting the s. 1 analysis in cases of discrimination with "uncompromising rigour".

despite the Court's adoption in *Kapp* of a deferential, purpose-based test for ameliorative programs, there is "no evidence that s. 15(2) was enacted to aggressively promote affirmative action programs … or to blindly exempt such programs from constitutional scrutiny".[114] The Court's comments in *Kapp* and *Cunningham* reveal anxiety, rooted in the American experience with "reverse discrimination" claims, about "inappropriate judicial intervention into [ameliorative] government programs"[115] and concern that "courts will invalidate affirmative action schemes if they undertake a means analysis".[116] Yet Canadian courts regularly review the purpose, means *and* effects of complex social policy legislation in section 1, using proportionality review under *Oakes*. This makes proportionality a tested tool appropriate for assessing ameliorative programs pursuant to section 15(2).

Second, requiring express consideration of the means and effects of an ameliorative program through proportionality review ensures that purpose does not over-determine the assessment of the constitutionality of an ameliorative law or program. By inquiring into means and effects, ameliorative programs that are under-inclusive or have discriminatory effects may be properly identified and, in accordance with the purpose of section 15(2), will not be exempted from further scrutiny. Ensuring that claims of under-inclusiveness and adverse effects are possible even where the impugned law or program has an ameliorative purpose is consistent with prior section 15 jurisprudence and the principle of substantive equality.

Finally, given that section 15(2) displaces, or operates in place of section 1 when an ameliorative law or program is at issue, fidelity to the principles of Charter adjudication mean that section 15(2) should "[import] … the justification analysis from s. 1 of the *Charter*".[117] The

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[114] Drumbl & Craig, *supra*, note 23, at 115.

[115] *Kapp*, *supra*, note 1, at para. 44, citing in part Pierce, *supra*, note 30. Legitimacy concerns related to judicial review of social programs have haunted Courts since the early days of the Charter. See, *e.g.*, *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.); and *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.). See also David Wiseman, "Competence Concerns in *Charter* Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51 McGill L.J. 503.

[116] Pierce, *supra*, note 30, at 273 finds these concerns compelling, concluding that a subjective test, focused narrowly on the "intention of those authorizing or creating the [ameliorative] scheme" is preferable to an objective test, which would include consideration of what a program actually or potentially achieves.

[117] *Lovelace*, *supra*, note 12, at para. 98, citing *Manitoba Rice Farmers*, *supra*, note 24, at 101-102 .

test for section 15(2) should mirror that in section 1 in order to ensure greater consistency between the "saving" provisions in sections 1 and 15(2).[118] Indeed, as noted below, pieces of the section 1 proportionality analysis are evident in existing jurisprudence on section 15(2), suggesting that the Court is well aware of the equivalency between sections 1 and 15(2).

While a full enunciation of the shape of proportionality review in section 15(2) is beyond the scope of this inquiry, this section considers three key issues, particularly as they dovetail with or diverge from the *Oakes* assessment under section 1: first, context and the appropriate degree of deference; second, how the elements of *Oakes* might be re-crafted to suit the section 15(2) context; and, third, the resulting relationship between section 15(2) and section 1.

1. Context and Deference in Section 15(2)

Proportionality has long been celebrated by courts in Canada and elsewhere[119] as the "preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest".[120] Indeed, pre-*Kapp* inquiries have helpfully considered the role that proportionality might play in resolving a conflict "between a discrimination claim under s. 15(1) and an affirmative action claim under s. 15(2)",[121] consistent with the "paradigmatic situation" where proportionality analysis is triggered "once a *prima facie* case has been made to the effect that a right has been infringed by a government measure".[122] That the impugned law or program in fact violates a constitutional right is the critical backdrop

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[118] Drubml & Craig, *supra*, note 23, at 122.

[119] See, *e.g.*, Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2013), at 457 [hereinafter "Barak"], declaring that as a result of the reception of proportionality into numerous legal systems, "we now live in the age of proportionality".

[120] Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum. J. Transnat'l L. 72, at 73 [hereinafter "Stone Sweet & Mathews"].

[121] Tremblay, *supra*, note 8, at 202. Drumbl & Craig, *supra*, note 23, at 115-21, writing in 1992, envisioned a proportionality test under s. 15(2) that is operative only after a claimant has demonstrated that his or her rights have been infringed under s. 15(1).

[122] Stone Sweet & Mathews, *supra*, note 120, at 75.

against which the proportionality analysis under section 1 of the Charter is conducted.

However, the Supreme Court in *Kapp* complicated the application of proportionality to ameliorative programs under section 15(2) by positioning section 15(2) to be considered *before* an assessment of whether the impugned law or program is discriminatory within the meaning of section 15(1). All that is certain going into a section 15(2) inquiry is that a distinction has been drawn on an enumerated or analogous ground; the quality of that distinction is unknown. This means that proportionality cannot operate in the "paradigmatic" way that it does in section 1. The proportionality inquiry must be adjusted to attend to the fact that no rights infringement has been established when section 15(2) is triggered in the *Kapp* framework.[123]

One way to frame proportionality review of an ameliorative law or program under section 15(2), notwithstanding that no rights infringement has been established, would be to focus on the relationship between the overall ameliorative purpose of the impugned law or program and the established distinction that treats the claimant differently (though not necessarily discriminatorily within the meaning of section 15(1)), in light of the purpose of section 15(2) and the right to substantive equality in section 15(1). The balance to be struck is then between the legitimate interests of the state in pursuing the ameliorative law or program, and the interests of the claimant who is excluded from that law or program.

The particular context of section 15(2) has implications for the level of deference with which the proportionality assessment should be undertaken. While the context of an established rights infringement dictates "a stringent standard of justification" be imposed on a government attempting to uphold a limit on a Charter right under the *Oakes* test,[124] the context of section 15(2) dictates a rather greater degree of deference will be appropriate when the proportionality of a genuinely ameliorative program is at stake.[125] Distinctions drawn as part of an ameliorative program will always be part of a government attempt to

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[123] Sheppard, *supra*, note 22, at 20 concludes that it would be inappropriate for courts to frame ameliorative programs as constituting *prima facie* violations of s. 15(1) because doing so would situate ameliorative programs as "exceptions to equality, rather than expression of it".

[124] *Oakes*, *supra*, note 11, at para. 65.

[125] Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1" (2006) 34 S.C.L.R. (2d) 501, at 503 explains the role of deference in qualifying or tailoring the *Oakes* analysis to the particular context of a given case.

protect a socially vulnerable group and/or balance the interests of various social groups. These are circumstances with which Canadian courts are familiar; it is well-established that in Charter cases where a government law or program has as its goal the protection of a vulnerable group, or where the government is striking a balance between groups, relatively more deference to government line-drawing will generally be appropriate.[126] This same logic counsels toward a higher degree of deference when a court is assessing an ameliorative law or program under section 15(2). A "measure of leeway" should be afforded governments to ensure that "the bar of constitutionality … [is not] … set so high that responsible, creative solutions to difficult problems would be threatened".[127]

However, the need for "leeway" should not result in minimal scrutiny of the complicated line drawing exercises and implementation strategies that are necessarily part of ameliorative laws and programs. The "drafters of the *Charter* surely could not have intended that the right against discrimination in s. 15(1) should be … easily evaded by the state".[128] The appropriate degree of deference should always be a context-specific decision with careful attention paid to the particular facts of a given case; not a strict requirement dictated by the analytical framework of section 15(2). It is in the context-specific assessment of deference that the nature of the claim related to an ameliorative program might properly be taken into account: because the purpose of section 15(2) is to insulate ameliorative programs from challenges of "reverse discrimination", relatively more deference is appropriate in assessing these kinds of challenges; conversely, where the claim targets not the fact of an ameliorative program but its definition of the targeted group or its discriminatory effects on a disadvantaged group, the proportionality inquiry should be more stringent because these are not the kinds of claims that section 15(2) was designed to guard against. Affording express recognition to the differences between "reverse discrimination",

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[126] See, *e.g.*, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 993 (S.C.C.). The Court explained, "as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function".

[127] *Wilson Colony*, *supra*, note 106, at paras. 35 and 37.

[128] Drumbl & Craig, *supra*, note 23, at 115-16, argue, based on a pre-*Kapp* reading of s. 15(2), that "the overriding principle which should inform the interpretation of s. 15(2) is *scepticism*. Courts should be cautious when entertaining the argument that discrimination is justified under s. 15(2)."

under-inclusiveness and adverse effects claims will permit a court to adjust its level of deference to better accord with the purpose of section 15(2) and the principle of substantive equality.

2. Proportionality Analysis in Section 15(2)

(a) Pressing and Substantial Objective/Ameliorative Objective

Under the *Oakes* test, the pressing and substantial objective inquiry requires that "the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom".[129] The differing context of section 15(2) mandates that this first stage be re-conceptualized as requiring the government to demonstrate that the impugned distinction is part of a law or program with a genuinely ameliorative purpose. This inquiry aligns generally with the first stage of *Kapp*, where a court will assess the sincerity of the government's assertion of ameliorative purpose with reference to the language of the provision, the legislative history and the situation and needs of the targeted group.[130]

The appropriate degree of deference must be applied carefully at the ameliorative object stage, because the definition of the purpose of an impugned law or program colours the rest of the proportionality analysis. It is always possible that a court may cast legislative purpose according to its own terms, despite what the parties argue.[131] This was the case in *Cunningham*, where the Supreme Court adopted a considerably narrower reading of the purpose of the MSA then that advanced by the claimants and accepted at the Court of Appeal. As a result, the framing of the purpose by the Supreme Court essentially "buil[t] the challenged provision — excluding those with Indian status — into the rationale for the [MSA] program".[132]

Courts will also need to develop a principled approach to what constitutes an ameliorative law or program for the purposes of section 15(2);

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[129] *Oakes*, *supra*, note 11, at para. 69, citing *Big M*, *supra*, note 22, at 352.

[130] *Kapp*, *supra*, note 1, at para. 47; *Cunningham*, *supra*, note 5.

[131] The Court in *Kapp*, *supra*, note 1, at para. 46 affirmed that in assessing an allegedly ameliorative purpose, there is no need for the court to "slavishly accept the government's [or the claimant's] characterization of its purpose".

[132] Watson Hamilton & Koshan, "Not Getting It", *supra*, note 8, at 67.

surely not all social legislation conferring a benefit on a group identified by grounds is properly captured by section 15(2). In *Kapp* the 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).[133]

(b) Rational Connection/Rationally Related Means

The rational connection inquiry under section 1 looks to whether "the measures adopted … [are] … carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations."[134] In the context of section 15(2) the "means" at issue will always be the established distinction on an enumerated or analogous ground created by the impugned ameliorative law or program. The rational connection inquiry must then be re-cast for the purposes of section 15(2) as asking whether the distinction at issue (the means) is rationally related to the ameliorative object of the law or program.

The rational relationship between object and means is included in the current *Kapp* framework as part of the inquiry into whether the law or program has a "genuinely" ameliorative object.[135] A distinction is rational, according to *Kapp*, if there exists a "correlation between the [ameliorative] program and the disadvantage suffered by the target group".[136] In my view this inquiry should not focus solely on why the government included the groups it included, but must also ask, is the *exclusion* of the claimant group rationally related to the ameliorative purpose of the law or program?[137] Requiring justification of the exclusion of the claimant group will ensure that there is a significant connection between the means and the ameliorative purpose of the law or program.

A useful example of how the rationally related means analysis might be framed in a section 15(2) case is the decision of the Alberta Court of

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[133] *Kapp*, *supra*, note 1, at para. 55. Watson Hamilton & Koshan, "Courting Confusion?", *supra*, note 7, at 948 question whether or not human rights legislation, such as that at issue in *Vriend*, *supra*, note 71, would qualify as an ameliorative law for the purposes of s. 15(2).

[134] *Oakes*, *supra*, note 11, at para. 70.

[135] In *Kapp*, *supra*, note 1, at para. 48, the Court found it appropriate to look to "whether the legislature chose means rationally related to [the] ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combating disadvantage".

[136] *Id.*, at para. 49.

[137] I am indebted to Daphne Gilbert for her input on this point.

Appeal in *Cunningham*.[138] The Court of Appeal 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".[139] Applying the *Kapp* framework, the Court of Appeal held 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".[140] The Court of Appeal concluded that the exclusion of Métis registered under the *Indian Act* was "relatively arbitrary" and thus did "not rationally advance the purported legislative purposes of the *MSA*".[141] The Court refused to apply section 15(2) to exempt the MSA from scrutiny under section 15(1).

(c) Minimal Impairment/Justified Distinction

Under *Oakes*, the minimal impairment stage is closely related to rational connection, and has been variously described as requiring that the means impair Charter rights "as little as possible",[142] "as little as is reasonably possible",[143] "no more than necessary"[144] and as asking "whether there are less harmful means of achieving the legislative goal".[145] Once again, because in the section 15(2) context no rights infringement has been established some revision to the usual minimal impairment inquiry is required.

A helpful starting point recalls that the crux of the minimal impairment or "necessity" component of proportionality analysis "demands that the means selected by the law to fulfill the law's purpose

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138 *Cunningham Appeal*, *supra*, note 78, at paras. 19-31.

139 *Id.*, at para. 24.

140 *Id.*

141 *Cunningham*, *supra*, note 5, at para. 32.

142 *Oakes*, *supra*, note 11, at para. 70, citing *Big M*, *supra*, note 22, at 352.

143 *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 722 (S.C.C.).

144 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 160 (S.C.C.).

145 *Wilson Colony*, *supra*, note 106, at para. 53, *per* McLachlin C.J.C.; but see the dissenting opinions of Abella and LeBel JJ., who take issue with the majority's re-reading of minimal impairment as considering only those means which could achieve the legislative goal to maximum effectiveness.

be necessary".[146] In the section 15(2) context this element would require that the distinction drawn be necessary to the ameliorative purpose of the law, permitting courts to review the government line-drawing exercise and, importantly, to capture legitimate claims of under-inclusiveness. In *Cunningham*, the Court recognized (though did not elaborate on) the possibility that demonstrating the necessity of an impugned distinction might properly be part of the section 15(2) inquiry:

> 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 …[147]

The question at this stage then becomes: "does the distinction go no further than is justified by the object of the ameliorative program?" Based on the statement from *Cunningham*, a distinction will be justified so long as it "serves or advances" the ameliorative goal. A court could most readily assess the question of whether a distinction is justified by looking for evidence that the ousting of the excluded group was necessary in order to ameliorate the conditions of another group identified by the enumerated or analogous grounds.

There are clear risks that inhere in the question of whether a distinction is "justified" in the way anticipated in *Cunningham*, above. Not least, if the assessment is reduced to a singular question of whether the included and excluded groups "share a similar history of disadvantage and marginalization" (a factor which did not stop the *Cunningham* court from justifying the exclusion of some Peavine Métis from the MSA) then the analysis could quickly descend into pure formalism, leading claimants to argue that they are so similar to the targeted group that their exclusion fails to "serve and advance" the ameliorative purpose of the impugned law, program or activity.[148] Courts

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[146] Barak, *supra*, note 119, at 540. In the American "strict scrutiny" test, a similar component requires that rights-infringing legislation be "narrowly tailored" to use the least drastic or least intrusive means available.

[147] *Cunningham*, *supra*, note 5, at para. 45 (emphasis added).

[148] *Id.*, at para. 86. Watson Hamilton & Koshan, "Not Getting It", *supra*, note 8, at 73 note the particularly troubling implications of this risk for persons with disabilities and helpfully point to *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.) as an example of a case where the Court found (at para. 102) that a distinction drawn in

would need to be wary of these risks and take a robust, substantive approach to the question of whether the exclusion of the claimant group truly "serves and advances" the purpose of the program, with a view to the principle enunciated in *Eldridge* that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner".[149] To this end, evidence that the established distinction is arbitrary or is based on stereotypes or prejudice, the hallmarks of discrimination under section 15(1), would indicate that a distinction is not justified at this stage.

Also relevant to the determination of whether a distinction passes the justified distinction stage would be the alternatives available to the government in pursuing its ameliorative object. Similar to the minimal impairment step of *Oakes*, a court could look to evidence that the government considered and rejected other, more inclusive options to fulfill its ameliorative objective. So, for example, where evidence exists that a government opted not to extend benefits in an ameliorative program to all members of an enumerated or analogous group because of concerns about cost, a court may conclude that the distinction is not justified because it does not serve the ameliorative purpose of the program but rather the financial considerations of the government.[150]

(d) Salutary and Deleterious Effects/Ameliorative and Deleterious Effects

The final stage of proportionality analysis under section 1 requires that "both the underlying *objective* of a measure and the *salutary effects* that actually result from its implementation be proportionate to the deleterious effects the measure has on fundamental rights and freedoms".[151] Depending on "the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve".[152] This stage is important because it is

workers' compensation legislation that excluded persons with certain kinds of disabilities from full benefits was "inconsistent with the ameliorative purpose of the Act".

[149] *Eldridge*, *supra*, note 70, at para. 73.

[150] The Court has generally held that "budgetary considerations cannot be used to justify a [rights] violation under s. 1": *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at 709 (S.C.C.), though in certain circumstances, cost has served as a "pressing and substantial objective" sufficient to limit rights: see, *e.g.*, *Newfoundland (Treasury Board) v. NAPE*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.).

[151] *Dagenais*, *supra*, note 106, at 887 (emphasis in original).

[152] *Oakes*, *supra*, note 11.

here that the actual effects of the impugned law or program are expressly considered.[153] The inquiry could be substantially similar under section 15(2), assessing the ameliorative effects of the impugned law or program and then considering the deleterious impacts on the claimant group of exclusion from the law or program at issue.

The inquiry into ameliorative effects would look specifically to whether or not the ameliorative purpose of the government law or program is in fact realized, in whole or in part. While the government should be required to show evidence demonstrating the actual or anticipated effectiveness of the law or program, it is clear from the section 1 context that the evidentiary threshold will not be stifling.[154] The Court in *Kapp* was concerned that requiring a program to be effective at ameliorating disadvantage in order to be constitutional would dissuade governments from adopting "innovative [ameliorative] programs, even though some may ultimately prove to be unsuccessful".[155] However, given the significance of the result where section 15(2) is operative — insulation from full Charter scrutiny — it seems reasonable to require *some* evidence that a law or program has done or will likely do what it purports to do. Requiring evidence of the effects of an ameliorative law or program would ensure that section 15(2) is not used as a sword to exempt from more searching review laws or programs with an ameliorative aim that are ultimately ineffective, or those that are paternalistically imposed by governments but do not actually function to the advantage of disadvantaged groups.[156]

The deleterious effects stage is where an ameliorative program with adverse effects might properly be captured in section 15(2). Here a court would consider the negative impact on the claimant of the impugned

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[153] In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 125 (S.C.C.), the Court explained, "[t]he third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*".

[154] *Wilson Colony*, *supra*, note 106, at para. 85, adopted a deferential threshold at the salutary effects stage, finding "a government enacting social legislation is not required to show that the law will in fact produce the forecast benefits. Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial".

[155] *Kapp*, *supra*, note 1, at para. 47

[156] See M. David Lepofsky & Jerome E. Bickenbach, "Equality Rights and the Physically Handicapped" in Anne F. Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 323.

distinction resulting in exclusion from the ameliorative program. The assessment should be contextual and specific and may rely on evidence that the distinction itself, or exclusion from the ameliorative program, has the effect of "perpetuating group disadvantage and prejudice … or impos[ing] disadvantage on the basis of stereotyping".[157] The Court in *Kapp* emphasized that sections 15(2) and 15(1) "work together to promote the vision of substantive equality that underlies s. 15 as a whole", meaning that the section 15(1) definition of discrimination might rightly inform the assessments at both the deleterious effects and justified distinction stages, as noted above.[158] Where an ameliorative law or program fails to have actual ameliorative effects, or where a program with an ameliorative purpose has disproportionately deleterious results, proportionality will not be made out and section 15(2) should fail.

3. Relationship between Section 15(2) and Section 1

The obvious question that arises from the proposal to read section 15(2) as an internal limit on section 15(1) and incorporate proportionality review into the definition of that limit relates to the relationship that would then exist between section 15(2) and section 1. In order to preserve consistency between the "saving" provisions of the Charter, where an ameliorative program fails the section 15(2) proportionality assessment, it cannot then be justified under section 1.[159] This is consistent with the general approach to internal limits under section 7, where the Supreme Court has held that a violation of section 7 of the Charter might only be justified under section 1 in very rare cases, akin to emergency.[160]

Accordingly, if the government seeks to justify a program according to section 15(2) because it believes it is a proportionate ameliorative program, and fails, the analysis turns to section 15(1) where the claimant attempts to establish that the impugned distinction is in fact discriminatory.

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[157] *Kapp*, *supra*, note 1, at para. 25.

[158] *Id.*, at para. 16.

[159] In *Manitoba Rice Farmers*, *supra*, note 24, an early s. 15 case, the Manitoba Queen's Bench that took the view that s. 15(2) represented a narrow exception to s. 15(1) and as a result concluded that where a government relies unsuccessfully on s. 15(2) to "exempt" a program from further review, the program cannot subsequently be justified under s. 1.

[160] See, *e.g.*, *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 119 (S.C.C.). See also Kent Roach, "Common Law Bills of Rights as Dialogue Between Courts and Legislatures" (2005) 55 U.T.L.J. 733, at 764.

If it is, the law, program or activity will be deemed unconstitutional without further recourse to section 1. Sections 1 and 15(2) are mutually exclusive.

IV. CONCLUSION

According to the Supreme Court, "[t]he rights enshrined in s. 15(1) of the *Charter* ... reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society ... The difficulty lies in giving real effect to equality."[161] That difficulty takes new form in the Court's latest iteration of the framework of analysis for section 15: by establishing section 15(2) as an exemptive provision for government laws or programs with an ameliorative purpose, no matter the nature of the equality claim, the Supreme Court in *Kapp* and *Cunningham* established a significant barrier for equality claimants. The deferential approach to ameliorative programs in *Kapp* goes too far in trusting that governments understand how to operationalize substantive equality through ameliorative programs, and is inconsistent with the purpose of section 15(2) and with prior equality jurisprudence. Ultimately, the Court should re-visit the "unified approach" to section 15 with express recognition of the differential operation of section 15(2) in cases of "reverse discrimination" and cases of adverse effects or under-inclusiveness.[162]

In the meantime, the Court's "about-face" on the interpretation of section 15(2) requires that equality scholars, advocates and activists consider opportunities for the development of a more principled *Kapp* framework. In this paper I have proposed one possible strategy: if the interpretation of section 15(2) as an exemptive provision is to endure, it is necessary to understand section 15(2) as an internal limit on constitutional equality rights and to then argue for the inclusion of context-specific proportionality review of ameliorative programs at the section 15(2) stage. This adjustment would make the *Kapp* test for ameliorative programs more consistent with section 1 and may mitigate the serious risk that under-inclusive ameliorative programs and those with discriminatory effects will be "saved" by section 15(2), while preserving the purpose of section 15(2) in protecting ameliorative laws and programs from claims of true "reverse discrimination".

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[161] *Vriend*, *supra*, note 71, at paras. 67-68.

[162] Tremblay, *supra*, note 8, at 183.