Resiling from Reconciling?: Musing on R. v. Kapp

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I. INTRODUCTION

From the beginning, the Supreme Court of Canada has struggled with how the often conflicting rights and freedoms under the Canadian Charter of Rights and Freedoms\(^1\) can be reconciled and with how to balance the rights and freedoms with the limits under section 1. This has not been an easy task and, not surprisingly, given the difficulty of the challenge, the rhetoric of reconciliation and balancing has often been stronger than its achievement. In R. v. Kapp,\(^2\) the majority gave considerable power to section 15(2) of the Charter, giving it at the same time a complementary but “independent” relationship with section 15(1), and the minority awarded unanticipated authority to section 25. In each case, concluding that the requirements of section 15(2) or section 25 have been met brings closure to the inquiry, while talk of reconciliation is set to one side.

Kapp addresses four issues under the Charter that do require clarification or development: the section 15(1) analysis (or what is the status of Law?);\(^3\) the appropriate analysis of section 15(2); the related question of how sections 15(1) and 15(2) interrelate; and the application of section 25. The majority decision, written by the Chief Justice and Abella J., is brisk, with little time spent on nuance. Justice Bastarache takes the opportunity, although he does not need to do so, to provide a definitive statement about the role of section 25, but he does so alone. His minority opinion, focusing almost entirely on section 25, rambles,

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perhaps reflecting a compulsion to put his interpretation of section 25 on record before it is too late.

Although the majority acknowledge the criticisms of Law, seeking to carve a path through the underbrush of the various factors indicating whether there has been an infringement of inequality, their own analysis does not offer a great deal of guidance about the real place or meaning of human dignity in the section 15 analysis. Rather, it seeks to resuscitate the (in retrospect) easier earlier analysis in Andrews. Their analysis under section 15(2) raises at least as many questions as it answers, such as how to analyze section 15(2) when an affirmative action program is challenged by another disadvantaged group, and in particular, by a group more disadvantaged than the one the program targets, because it makes that group’s situation worse. The very status of the preference at the heart of Kapp as an affirmative action program is highly debatable. It was not addressed extensively by the parties during the hearing, and the Crown did not rely on it to justify the program. Similarly, the characterization of Aboriginality as a form of “racialization” may be strongly criticized. Identifying the distinction as based on race reflects an outdated understanding of “race” as a classification.

There is thus much to say about Kapp, but one issue that cuts across these various matters is the willingness of both the majority and the minority to allow some sections of the Charter to “trump” other sections, closing or coming close to cutting off debate about whether the analysis needs to be more complicated. It is this aspect of Kapp that I explore here.

II. The Relationship Between Charter Rights

1. Common Goal, Different Manifestations

The rights and freedoms under the Charter are directed towards different goals, yet are also all reflective of full citizenship in a liberal-democratic society. It has been said that they share a common subtext,
the realization of human dignity, while they also come into conflict. For example, freedom of religion and religious equality are both guaranteed in different sections; other forms of equality are also protected, as is freedom of expression. Yet all of these may be in tension with each other: certain religious beliefs may include beliefs that to others reflect the subordination of women; some kinds of expression may reflect hostility to homosexuality or towards adherents of a particular faith. The right to a fair trial might seem to demand disclosure of particular evidence; to disclose the evidence, however, might seriously impair privacy and equality rights. All of them may be limited by societal interests and concerns that outweigh individual autonomy or warrant restrictions on individual autonomy. Liberal democracies, and this may be particularly true of Canada, want it all or, at least, they say they do: they want everyone to enjoy their rights to the fullest. This is not possible. Complete freedom of expression can be harmful to religious freedom and to equality. Equality among religious beliefs, in the sense that they are all treated as acceptable and open to being acted upon, may run in the face of gender equality (equality on the basis of sexuality) or the security of children, including their lives.

Realistically, the Charter as a whole represents a commitment to certain principles and values that are woven in and among the rights and freedoms. Even section 1’s limitations are expected to reflect this, since a “free and democratic society” includes the liberty to develop and realize one’s full potential, plan one’s own life, make choices or be “eccentric”. It is also now accepted that, while human dignity is not a free-standing right, “notions of human dignity underlie almost every right guaranteed by the Charter”, perhaps taking different form in the various rights. In Kapp, indeed, the majority goes further to say that “the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity”. This common underpinning helps weave a common thread among the rights (and the operation of section 1). Were it easier to define, not so susceptible to so many different contextualized meanings, it might even be a way to address tensions between and among rights: the answer to the question, “the exercise of which of these rights most

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9 Kapp, supra, note 2, at para. 21 (emphasis added). The majority recognizes at para. 22 that the emphasis on human dignity in Law, supra, note 3, has “proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be”.

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promotes human dignity?” (or “the exercise of which of these rights most diminishes human dignity?” or “how do we reconcile them so that the result is the most human dignity for everyone?”) might help us facilitate the reconciliation. Human dignity simply is not manifested in the same way, or even defined in the same way, for everyone, however. While human dignity is useful conceptually, it is far more difficult to operationalize, as has been evident post-Law.

2. Whether to Reconcile or Balance: That Is the Question

As former Justice Frank Iacobucci has said, “no Charter right is absolute. A particular Charter right must be defined in relation to other rights and with a view to the underlying context in which the apparent conflict arises”. Furthermore, “there is no hierarchy of rights, nor should one be inferred from Charter jurisprudence”. Accordingly, when different rights claims arise in the same case, at the rights stage neither one should take priority over the other; rather, they must be interpreted in a way that protects all the interests, while recognizing that not all the claims can be equally successful. He suggests that the process involved in assessing the scope of rights in relation to each other is best described as “reconciliation”, that is, an attempt to make the rights compatible with each other. This is a different exercise from the “balancing” that occurs under section 1 when one right or interest is given primacy over another. Under section 1, the balancing may occur between different rights (as when the court holds that section 2(b) encompasses hate expression, but that this expression is balanced with — and loses to — equality interests), but will always be framed as between a right and a more general societal interest.

A similar process occurs under the Quebec Charter of Human Rights and Freedoms, and some cases under the Quebec Charter, discussed below, raise issues of relevance for Canadian Charter analysis. Section 9.1 of the Quebec Charter states that “[i]n exercising his fundamental
freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.” Section 9.1 is a general limitation clause, but there is a different tone to section 9.1, compared to the wording of section 1 under the Canadian Charter. Section 9.1 indicates an expectation that individuals will consider the impact of their exercise of rights on others. Section 1 places the onus on the state to justify the limitations on rights; in other words, individuals are to accept limitations imposed on them, rather than to explore themselves how the exercise of their rights affects others in the community. The idea of “reconciliation” opens up the idea of “owning” the scope of rights in a particular context in a way that respects the rights of others. It suggests the idea of “rights as relationship,” rather than rights as individual “property”.

Some members of the Supreme Court of Canada have maintained that the Charter does not provide for reconciling rights and that any conflicts between or among rights must be addressed — and balanced — through section 1, and certainly the Charter not only does not provide for internal qualifications (with some exceptions), but does have the general limitation provision. Nevertheless, the Court has found reconciliation an attractive way to address the conflicts at the rights stage to save as much of all the rights as possible, given the particular circumstances of the case (something analogous, perhaps, to defining the scope of federal and provincial constitutional powers?). The idea of reconciliation is consistent with the view that no particular Charter rights are supposed to be treated as if they are more important than other Charter rights. The process is meant to define the rights so that it is not an all-or-nothing proposition. On the other hand, it is not realistic that in all cases the rights can be shaped in a way that everyone’s interests are protected to some degree. And depending on the way a right is defined, the practical effect of reconciliation may be that one right is subordinated to another.

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Former Justice Iacobucci has suggested that *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*17 and, on the same analysis, *Trinity Western University v. British Columbia College of Teachers*18 are “classic example[s] of definitional reconciliation”.19

In *B. (R.)*, the explicit claim was the right of parents to make decisions based on religious belief; but the decision at issue, to deny a blood transfusion, affected a child and therefore the Court took into account the section 7 security rights of the child. Three members of the Court gave the child’s security right sufficient weight that they defined freedom of religion to exclude the right to refuse medical treatment in these circumstances.20 One of the three, former Justice Iacobucci, has since explained that “[b]y defining freedom of religion in this way, a conflict between rights was avoided.”21 This approach is an exclusionary way to avoid a conflict, an approach chosen by the three judges because a child’s life was at risk. It might also be the “right” result. One might question, however, whether this is reconciliation.

The Court approached “context” somewhat differently in *Trinity Western.*22 Trinity Western, a religious-based private educational institution, wanted to offer by itself a teaching training program that it had previously offered in conjunction with Simon Fraser University. The College of Teachers denied its approval because Trinity Western required students and teachers to sign a Community Standards document that identified a number of “practices that are biblically condemned”, including “homosexual behaviour”. The majority at the Supreme Court of Canada acknowledged that the issue “is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school system, concerns that may be shared with their parents and society generally”. Any conflict, they said, should be resolved through “the proper delineation of the rights and values involved”,23 recognizing that that Charter must be read as a whole,

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17 Id.
19 Iacobucci, supra, note 10, at 162.
20 For the analysis of Iacobucci and Major J.J., see B. (R.), supra, note 16, beginning at para. 212. They would have phrased the question to be determined to emphasize the child’s right and place the parents’ freedom of religion in opposition to it: “to what extent can an infant’s right to life and health be subordinated to conduct emanating from a parent’s religious convictions?”: id., at para. 225.
21 Iacobucci, supra, note 10, at 157.
22 Trinity Western, supra, note 18.
23 Id., at paras. 28 and 29.
so that one right is not privileged at the expense of another”.24 They concluded that the proper place “to draw the line” is between belief and conduct, with the former being broader than the latter.25 Justices Iacobucci and Bastarache observed that “[t]o state that the voluntary adoption of a code of conduct based on a person’s own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.”26

Although reconciling rights through the definitional exercise is an admirable objective, it is difficult to do. And the end result is often not much different from a section 1 analysis: one right takes priority over the other. There are two major differences, however: one concerns the onus and who should be responsible for justifying limits on rights; and the other is that when reconciliation occurs at the rights stage, the other rights in conflict have an equivalency to the initial right that was claimed. Under section 1, the task involves placing limits on the exercise of rights that has already received recognition. The two approaches are illustrated by cases about obscenity or pornography and hate speech: does the protection afforded by section 2(b) of the Charter extend to these forms of expression, with the question of whether their impact warrants denial of the exercise considered under section 1? Or is the need for an actual assessment avoided by excluding these expressions from the scope of section 2(b)? The Supreme Court held in each case that while the particular form of expression was protected by section 2(b), it was limited under section 1 by the equality rights of women and Jews, respectively, and society’s interest in the equality rights of citizens.27 In Butler, the Manitoba Court of Appeal had divided on the question, with the majority holding that pornography was not protected by section 2(b).28 In Keegstra, the Chambers Judge concluded that hate speech was not protected by section 2(b).29 These lower court decisions are

24 Id., at para. 31.
25 Id., at para. 25.
26 Id. It does not appear to be relevant that while Trinity Western is a private school, it wanted public approval of its program.
consistent with reconciliation as applied by the three judges in *B. (R.)*, who held that freedom of religion did not encompass parents making medical decisions that threatened the life of their child.

When reconciliation is carried out at the rights stage, the Court has said that rights should be defined with the goal that they do not conflict with one another, using a contextual approach. 30 Different contexts may result in different treatment of the rights vis-à-vis each other. Thus the right to disclosure in criminal and civil cases that raise the right to a fair trial and privacy and equality interests may result in different “reconciliation” of these rights, since the accused’s interest in a criminal case is usually stronger than that of a plaintiff in a civil case. 31

In *Reference re Same-Sex Marriage*, the Court gave short shrift to the argument that recognizing same-sex marriages interfered with the equality rights of religious groups opposed to same-sex marriage and opposite-sex married couples, concluding that “[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.” 32 On the one hand, the Court avoided determining whether the proposed legislation created an impermissible collision with freedom of religion because it had not yet been enacted. 33 On the other hand, the Court was prepared to give its opinion on whether a compulsion on religious officials opposed to same-sex marriage to perform civil same-sex marriages would contravene their freedom of religion: “absent exceptional circumstances” that they could not foresee, it would be contrary to the Charter and could not be justified under section 1. 34

(a) Section 9.1 of the Quebec Charter

The Quebec Charter cases are also relevant in understanding the complexity of the exploration involved when rights are in tension.

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32 [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, at para. 46 (S.C.C.). The Court pointed out that there were no submissions explaining how same-sex marriage contravened equality rights and that the Court was unable to “surmise” how it could.

33 *Id.*, at para. 51.

34 *Id.*, at para. 58.
Amselem, in which Jewish owners of condominiums wanted to place sukkahs on their balconies during Succot, contrary to a condominium by-law requiring balconies to be kept clear, was decided under the Quebec Charter of Human Rights and Freedoms. Justice Iacobucci, for the majority, stated that the interests of the co-owners in “preserving the aesthetic appearance of the balconies” as part of the enjoyment of their property “cannot be reconciled with a total ban imposed on the appellants’ exercise of their religious freedom.” Justice Bastarache, however, viewed the situation rather differently, insisting that Amselem’s freedom of religion and the other co-owners’ right to “peaceful enjoyment and free disposition of [their] property” (protected under section 6 of the Quebec Charter), and their right to life and security (protected by section 1 of the Quebec Charter), “must be reconciled.” In the end, they are not reconciled, because Bastarache J. concluded that “since Mr. Amselem’s right to freedom of religion cannot be exercised in harmony with the rights and freedoms of others or with the general well-being, the infringement of Mr. Amselem’s right is legitimate” and the prohibition against building structures on the balconies does not violate his freedom of religion.

Reconciliation requires everyone in a multicultural society to exercise tolerance, including claimants, in this case Mr. Amselem. It may have been a factor in Bastarache J.’s opinion that the Syndicat had offered a compromise involving a communal sukkah that the claimants initially accepted, but later rejected.

Bruker v. Marcovitz, also under the Quebec Charter, provides another example of an attempt to reconcile rights using societal interests under section 9.1 of the Quebec Charter. In Bruker, a divorcing husband and wife agreed to obtain a get. Subsequently, the husband refused to take the necessary steps and many years later, the wife sued for damages. The husband contended that the contract was not valid under Quebec law (a position upheld by Deschamps J. in dissent) and that granting the wife damages would infringe his freedom of religion. Justice Abella, for the majority, noted that “[s]ection 9.1 confirms the principle that the assertion of a claim to religious freedom must be

36 Id., at para. 86.
37 Id., at para. 165. Life and security were an issue because the sukkahs could block using the balconies as an exit in an emergency.
38 Id., at para. 180.
39 Id., at paras. 176-177.
reconciled with countervailing rights, values, and harm. and “Mr. Marcovitz’s claim must therefore be weighed against the ‘democratic values, public order and the general well-being of the citizens of Québec’ stipulated by s. 9.1”, a weighing in which Mr. Marcovitz “has little to put on the scales”. Interests that include “protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry” and the public interest in enforcing contracts outweighed the religious freedom in this case.

\textit{Amselem}, as a case involving private parties with no government nexus, could not have been a Canadian Charter case. \textit{Bruker v. Marcovitz} could have been considered under the Charter only if Mr. Marcovitz had challenged the provision in the \textit{Divorce Act} prohibiting using a religious process as a bar against remarriage. Had a Canadian Charter analysis been appropriate, however, carried out at the rights stage it would have permitted consideration of the life and security interest in \textit{Amselem} and the equality interest in \textit{Bruker v. Marcovitz}, but not the enjoyment of property in the former and the public interest in the observance of contractual obligations in both. Reconciliation could have resulted in a compromise in \textit{Amselem} in the form of a communal succah, but in \textit{Bruker v. Marcovitz}, one right would almost certainly have had to take priority over the other. Section 1, on the other hand, could encompass all these interests.

3. Immunity from Charter Challenges: \textit{de Jure and de Facto}?

There have been cases in which the choice between reconciliation at the rights stage or a section 1 balancing is moot, since the right is immune from Charter challenge. For example, the guarantee of denominational schools in section 93 of the \textit{Constitution Act, 1867} precludes challenges to separate schools by members of other religions.
Similarly, in *Kapp*, Bastarache J. states that the Charter cannot be interpreted as making “the exercise of powers [that would be protected by section 25] consistent with the purposes of s. 91(24)” unconstitutional.\(^{47}\) These are cases in which state action acquires immunity from Charter challenge and thus is absolutist in nature. These cases provide a model of sorts for the analysis of section 15(2) and section 25 in *Kapp*.

In some ways, however, the rights stage reconciliation approach may have the same result. Thus, for example, the Code in *Trinity Western* is in effect immune from challenge under section 15\(^ {48}\) (as opposed to actions taken that are reliant on the views underlying the Code). There is therefore no significant consideration required about how a written code might have an effect on equality rights because of the *message* that it delivers about the “human dignity” of the targeted group. This might be contrasted with the Court’s comment in *Butler*, that women feel degraded “as ‘victims’ of the message of obscenity”.\(^ {49}\) In *Keegstra*, the majority commented, “It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence.”\(^ {50}\) Thus one might have looked at the conflicting rights at issue in *Trinity Western* differently. There is no dispute that sexual orientation is a protected ground of equality, with the inference that persons claiming this ground have been disadvantaged in the past and may continue to be disadvantaged. Part of that disadvantage has been the beliefs underlying discrimination and, in some instances, hate expression towards the gay and lesbian (and more broadly, the lesbian, gay, bisexual and transgendered or “LGBT”) community. Expressions that reflect or perpetuate those beliefs are detrimental to the goal of equality for the LGBT community. Thus the rights at issue could be framed as the right, on the basis of religious belief, to harm members of a group by assumptions and words about their moral worth and the equality right not to be the subject of words that might cause “damage … of grave psychological and social consequence”.

\(^{47}\) *Kapp*, supra, note 2, at para. 121.

\(^{48}\) This is not only because Trinity Western is a private institution, but because Trinity Western is entitled to hold these religious views without there being an assumption that its students will actually discriminate against gays and lesbians.


\(^{50}\) *Keegstra*, supra, note 13, at para. 60.
III. COMPARING THE ANALYSIS IN KAPP

Where does Kapp fit into this jurisprudence? Kapp raises issues about the relationship between subsections 15(1) and 15(2), and between section 25 and all the rights and freedoms guaranteed by the Charter. To what extent are there potential conflicts or tensions in these relationships and is the analysis of each of these issues in Kapp consistent with previous jurisprudence on reconciliation and balancing?

As part of the federal Aboriginal Fisheries Strategy, the federal government established three pilot sales programs; under one of these programs, it issued an exclusive communal fishing licence to three Aboriginal Bands that permitted the Bands to designate fishers to fish for salmon over a period of 24 hours and sell their catch. Otherwise, the Bands did not have a recognized Aboriginal right to sell fish. Fishers excluded from fishing during this period fished and were charged with fishing at a prohibited time. The trial judge accepted their contention that the licence breached the non-Aboriginal fishers’ equality rights and was not justified under section 1; the Crown appealed successfully and the Court of Appeal upheld the convictions.

1. The Majority’s Section 15(2) Analysis

The Chief Justice and Abella J., for all the members of the Court but Bastarache J. (who appears, however, to agree with the analysis), found that the licence was an affirmative action program under section 15(2) of the Charter; consequently, there was no contravention of the non-Aboriginal fishers’ equality rights. They held that where a program satisfies the requirements of section 15(2), it will not constitute

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51 Some of the fishers the Bands designated were licensed commercial fishers: Kapp, supra, note 2, at para. 8.
53 The trial judge stayed the proceedings: [2003] B.C.J. No. 1772, [2003] 4 C.N.L.R. 238 (B.C. Prov. Ct.). The commercial fishers who challenged the granting of the licence are described as “mainly non-aboriginal”: Kapp, supra, note 2, at para. 1. There is otherwise no information provided about the ethnic origins of these fishers in the decision; however, a scan of their names indicates that they are of various ethnic origins. A failure to explore this further makes it easier to view the challenging fishers as a homogenous group.
discrimination under section 15(1). Following Lovelace, the requirements of section 15(2) are that one of the purposes of the program is ameliorative or remedial and that the program is directed at a disadvantaged group identified by one of the enumerative or analogous grounds. According to the majority, the program in Kapp targeted a disadvantaged group on the basis of race. The most important factor in determining whether a program meets the section 15(2) requirements is the legislature’s goal in enacting the program. In this case, although the government had several reasons for enacting the licence, the majority found that one of the purposes was to provide economic opportunities to native Bands and assist them in achieving self-sufficiency, and that the licence was rationally connected to this goal. This conclusion ended the inquiry.

The majority’s view is encapsulated as follows:

That where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15’s guarantee of substantive equality is furthered, and the claim of discrimination must fail.

Kapp thus can be said to give vigour to section 15(2) in a way that Lovelace, the Court’s previous attempt to interpret section 15(2), might be thought not to have done. Section 15(2) is not there as a caution to ensure that affirmative action programs will not be viewed as “reverse discrimination” and therefore unconstitutional. Rather, it has independent status; section 15(2) does not merely protect affirmative action programs, it means that they cannot be found to discriminate.

The objective of bringing clarity and substance to the section 15(2) issue is highly desirable. Jurisprudential consideration of the section has been confusing and it is important to know whether it is an exception or a defence to section 15(1), whether it is a cautious protection or an assertive statement about the legitimacy of a particular tool to advance equality. Notably, Kapp establishes that section 15 must be read

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56 Kapp, supra, note 2, at para. 3 (emphasis added).
57 Lovelace, supra, note 55.
coherently, as a comprehensive whole. It gives significant value to affirmative action programs as a means of remedying inequality or achieving substantive equality. In doing so, it brings to fruition in a way that the federal Employment Equity Act has not, the vision underlying the Report of the Royal Commission on Equality in Employment, chaired by Judge Rosalie Silberman Abella (as she then was). The mechanism developed by Commissioner Abella was an approach she called “employment equity”, affirmative action in a specific context. The vision giving rise to employment equity transcends the context, however: it refers to the use of proactive programs as a way of remedying past discrimination suffered by disadvantaged groups. In the words of section 15(2), a “law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups”; without exhausting the groups for whom programs may be developed, they include “those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

By reading the section as a whole, protection for affirmative action programs is no longer at risk of being considered an afterthought, a caution in response to American constitutional jurisprudence, but an integral part of substantive equality. These programs provide one tool, although not the only one, for achieving the promise of section 15(1), actual equality. Thus McLachlin C.J.C. and Abella J. develop a holistic approach to subsections 15(1) and (2), saying that these subsections “work together as a whole to promote the vision of substantive equality that underlies s. 15 as a whole”. Subsection 15(1), they explain, is intended to prevent “discriminatory distinctions”, while subsection 15(2) allows government to implement “programs aimed at helping disadvantaged groups improve their situation … without fear of challenge under s. 15(1)”.

Under s. 15(1), the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on enabling governments to pro-actively combat existing discrimination through affirmative measures.

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59 S.C. 1995, c. 44.
60 Kapp, supra, note 2, at para. 16.
61 Id., at para. 25 (emphasis in original).
It needs to be emphasized that section 15(2) permits affirmative action programs, but does not require them.\textsuperscript{62} Thus, once they have established them, governments may apparently ignore them with relative impunity.\textsuperscript{63} Section 15(2) was enacted to avoid challenges to affirmative action programs from members of advantaged groups, in light of the history of affirmative action in the United States,\textsuperscript{64} and it has always been understood that affirmative action programs do not (necessarily) constitute impermissible reverse discrimination. The majority acknowledge that affirmative action programs will “inevitably exclude individuals from other groups”, but that “[t]his does not necessarily make them either unconstitutional or ‘reverse discrimination’”, since “discriminatory conduct entail[s] more than different treatment”.\textsuperscript{65}

In \textit{Lovelace}, the Supreme Court of Canada concluded that the preferable approach to section 15(2) was to view it as “confirmatory” of section 15(1) and that claims against affirmative action programs should first be assessed under section 15(1): “By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review.”\textsuperscript{66} Although it might be argued that the analysis in \textit{Lovelace} avoided coming to terms with an adequate interpretation of section 15(2), it had the merit of requiring that the program be scrutinized to some extent \textit{vis-à-vis} other equality claims. Nevertheless, it concluded the program was acceptable, even though the claimants were at greater disadvantage than were the beneficiaries of the

\textsuperscript{62} Quaere, however, whether they might be required as a remedy for a contravention of s. 15(1).

\textsuperscript{63} See Newfoundland (Treasury Board) v. N.A.P.E., [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.), in which the government of Newfoundland and Labrador argued that the economic situation required them to delay or breach an agreement to pay women in the health care sector pay equity adjustments. Finding that this did constitute a contravention of s. 15(1), the Supreme Court accepted the province’s contention under s. 1 without any real analysis. Post-\textit{Kapp}, how would the tension between the security interests of other people (at least one of the ways societal interests under section 1 could have been described) and the affirmative action program of pay equity been resolved? One also wonders whether the result would have been different had the Court ordered pay equity adjustments in response to a s. 15 challenge.


\textsuperscript{65} \textit{Kapp}, supra, note 2, at para. 28 (emphasis on “necessarily” added; emphasis on “different” in original). The majority relies on \textit{Andrews}, supra, note 4, for this point.

\textsuperscript{66} \textit{Lovelace}, supra, note 55, at para. 108.
program at issue.\textsuperscript{67} I note in this regard that the Court in Lovelace clearly stated that the assessment under section 15(1) or section 15(2) is not about who is more disadvantaged or in a “race to the bottom”.\textsuperscript{68}

The Lovelace Court left open the possibility that this was not the only way of viewing section 15(2); it could also be viewed as an exemption to section 15(1).\textsuperscript{69} Chief Justice McLachlin and Abella J. take yet a different route: “[I]f the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all.”\textsuperscript{70} Elsewhere they make a stronger statement, saying that programs that satisfy section 15(2)’s requirements “s. 15’s guarantee of substantive equality is furthered, and the claim of discrimination must fail.”\textsuperscript{71} From Lovelace’s preference for full scrutiny, Kapp takes us to almost no scrutiny at all. Permission (and thus encouragement) for the government to implement affirmative action programs becomes a limit on the analysis under section 15(1): section 15(2) “tell[s] us … that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combating disadvantage to be discriminatory and in breach of s. 15”.\textsuperscript{72} As a result, any claims that a program infringes equality rights “must fail” once the program is determined to be an affirmative action program under section 15(2).\textsuperscript{73}

The Chief Justice and Abella J. develop the test under section 15(2) (which they allow might be refined in the future) as follows:

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.\textsuperscript{74}

\textsuperscript{67} Ontario had entered into an agreement with First Nations Bands in the province for an on-reserve casino, with the profits to be distributed among Bands registered under the Indian Act, R.S.C. 1985, c. I-5. The claimants, while individually entitled to be or were registered under the Indian Act, were not registered as collectives and were not eligible to benefit from the program. The Court held that the program was not discriminatory because the project was more consistent with the circumstances of registered First Nations Bands than with those of the claimants. The claimants were not intended to be included in the program.

\textsuperscript{68} Lovelace, supra, note 55, at paras. 59 and 69.

\textsuperscript{69} Id., at para. 108.

\textsuperscript{70} Kapp, supra, note 2, at para. 37.

\textsuperscript{71} Id., at para. 3 (emphasis added).

\textsuperscript{72} Id., at para. 38.

\textsuperscript{73} Id., at para. 39. The advantage of this approach is that it avoids “the symbolic problem of finding a program discriminatory before ‘saving’ it as ameliorative”. If the government does not establish that the program falls within s. 15(2), the program must be reviewed under s. 15(1): id., at para. 40.

\textsuperscript{74} Id., at para. 41.
While the test is focused on the legislative goal, abuse by government to forestall equality claims by declaring a program has an ameliorative purpose can be addressed by an examination of whether “the declared purpose is genuine”. The likely impact of the program becomes less important than its purpose, since it is desirable that government have some leeway and be allowed to experiment.\(^{75}\) Even so, the court may assess whether the means chosen by the legislature is “rationally related to [the] ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the state goal of combating disadvantage”.\(^{76}\)

Briefly, other aspects of the majority’s section 15(2) analysis are: “laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection”;\(^{77}\) the group affected must be “specific and identifiable” (thus “broad societal legislation, such as social assistance programs” would not be protected) and “[n]ot all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.”\(^{78}\)

The majority’s approach in \textit{Kapp} gives section 15(2) real substance. Although it does not require the government to take proactive affirmative action measures to promote equality, it makes it far easier for it to do so without fear of being confronted with sustainable challenges that the measures contravene the equality rights of advantaged groups. That was the reason section 15(2) was included in the Charter. As Dickson C.J.C. said in \textit{Edwards Books}:

In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.\(^{79}\)

The majority’s analysis in \textit{Kapp} and the Court’s analysis in \textit{Lovelace} are intended to protect affirmative action programs designed to improve the

\(^{75}\) \textit{Id.}, at paras. 46 and 47. A program that “has no plausible or predictable ameliorative effect may render suspect the state’s ameliorative purpose”: \textit{id.}, at para. 54. An ameliorative program may exist within a larger scheme; s. 15(2) also protects “distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose”: \textit{id.}, at para. 52.

\(^{76}\) \textit{Id.}, at para. 48. In assessing rationality, however, the court should give deference to the legislature: \textit{id.}, at para. 49.

\(^{77}\) \textit{Id.}, at para. 54.

\(^{78}\) \textit{Id.}, at para. 55.

situation of disadvantaged groups from too easy challenge by members of “better situated individuals”. This is consistent with the Charter’s purpose. It is not consistent with the Charter’s purpose to worsen the conditions of disadvantaged groups. Lovelace recognized this and therefore built into the analysis a process for treating challenges by disadvantaged groups differently from those by advantaged groups, through more stringent scrutiny of the program. The Kapp majority does not address this distinction, but it is one that will have to be addressed. Obviously, affirmative action programs do focus on particular disadvantaged groups and not all disadvantaged groups will benefit from it; at least indirectly, these programs could have a negative impact on other disadvantaged groups, including sub-groups of those benefiting. This does not mean that the targeted group has suddenly become “better situated” in the sense meant by Dickson C.J.C. in Edwards; of course, this is not so. To say that the analysis should recognize and include a way of assessing this impact does not mean that the program will be unconstitutional, even if the analysis reveals a negative impact. It will depend on the program, the benefits and the impact. Will this make it more complicated than the majority prefers? It will, but we are at the stage when achieving equality has become, in practice more complex. We need a clear process for determining the constitutionality of section 15(2) programs, one that gives them full recognition, but this does not necessarily translate into a simple process.

2. The Approaches to Section 25

While the majority decision gives section 15(2) significant substantive weight, to the extent that it forecloses any assessment of whether an affirmative action program might nevertheless discriminate against another group, creating or exacerbating a disadvantage that outweighs the benefit of the program to its target group, it expresses reluctance to grant section 25 the same status. Section 25 states:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal
Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Chief Justice McLachlin and Abella J. “question” whether the licence is even encompassed by section 25, since probably “only rights of a constitutional character are likely to benefit from s. 25”.$^{80}$ They are not satisfied that section 25 is more than an interpretive provision; and if it is only interpretive, it would not constitute a bar to the claim that the licence infringes equality rights.

This caution is in marked contrast to Bastarache J.’s definitive interpretation, one that does not require a finding that the licence is an affirmative action program.$^{81}$ He takes the same approach to section 25 that the majority does to section 15(2): section 25 supersedes section 15(1). In his view, section 25 is a bar to the equality claim; as soon as a potential conflict between section 25 and section 15 is established, the analysis shifts to section 25. He rejects the argument that section 25 is merely interpretive; rather, where laws impair native rights, the laws will have to give way to section 25 rights. Section 25 shields laws that distinguish between Aboriginal and non-Aboriginal people when they are enacted to protect Aboriginal interests and these include statutory, as well as constitutional, rights.

I discuss Bastarache J.’s approach here only to illustrate that the approach is similar to the majority’s approach to section 15(2), that is, the tone of the analysis that on the one hand, provides for a simpler approach, but on the other, may neglect to address some of the underlying complications. I do not, for example, address the question of whether section 25 should extend to laws or programs established by ordinary statute, or how the analysis might affect the application of section 25 to provincial statutes or programs, such as the Casino Rama program that was the subject ofLovlace.

According to Bastarache J., the process for determining whether section 25 settles the matter is as follows: it is first necessary to establish a prima facie claim under the Charter right at issue (in Kapp, section 15), followed by a determination of whether the Aboriginal interest which is being challenged falls within section 25. If it does, there will then be an

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$^{80}$ Kapp, supra, note 2, at para. 63.

$^{81}$ Indeed, Bastarache J. points out that the Attorney General of Canada did not rely on s. 15(2) and that the programs did not have as their “primary object the amelioration of the conditions of disadvantaged groups or individuals”, evidently because onLovlace, the program would not have complied with s. 15(2): id., at para. 73. For the majority, this is not of any great importance, since ameliorative objectives need only be one purpose.
assessment of whether there is a “true conflict” between the Charter right and section 25. This could be another way of asking whether the interests at issue can be reconciled. Not only is the right here (the granting of the licence) within section 25, but it is “totally dependent on the exercise of powers given to Parliament under s. 91(24) of the Constitution Act, 1867”, the power over “Indians, and Lands Reserved for Indians”. This reliance on section 91(24) raises a question about the applicability of section 25 to provincial programs. Justice Bastarache suggests that laws that fall under section 88 of the Indian Act, as laws of general application, would not fall into section 25. Would a program such as the Casino Rama program in Lovelace be encompassed by section 25, or would it have to satisfy section 15(2) requirements as an affirmative action program? The Aboriginal right in Kapp is in conflict with section 15(1), since it is not possible to exercise the licence in a manner consistent with the equality rights of the non-Aboriginal fishers. Thus section 25 “provides a full answer to the claim”.  

Justice Bastarache contends that “[section] 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the Charter protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group”. It “reflects [the] imperative need to accommodate, recognize and reconcile aboriginal interests”, the “notions of reconciliation and negotiation present in the treaty process and recognized by the previous jurisprudence of this Court”; it is “a necessary partner to s. 35(1) [of the Constitution Act, 1982]; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation”. It is meant to be a protection of difference; like section 15(2) it is vulnerable to being treated as a way of permitting discrimination. The response to this vulnerability is different in the two instances. The analysis of section 15(2) tends to shy away from saying it permits discrimination, but “acceptable discrimination”; section 25 is quite different, since it reflects the exercise of section 91(24) which “authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a
preferential, discriminatory, or distinctive fashion vis-à-vis others”. In other words, section 25 protects “discriminatory” programs because they are designed to protect Aboriginal interests. It reflects the distinct status of Aboriginal peoples.

Justice Bastarache explains that the general view in the literature, and the trend in the jurisprudence, has been to see section 25 as a “shield” rather than as an interpretive provision. Nevertheless, the shield is not absolute, but is restricted by section 28 guaranteeing gender equality and applies only to laws “that actually impair native rights …, not those that simply have incidental effects on natives”. This view appears to be consistent with the wording of section 25. The rights protected arise from various sources, from treaties and constitutional commitments and statute: “legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from Charter scrutiny”. Treaty rights, presumably, will always be protected, while new rights, under Bastarache J.’s interpretation, may not be, since “[section 25] rights are not constitutionalized and can be taken away [and] Parliament can also make a right subject to the same protections as those afforded in the Charter by its particular terms.” As long as they exist, however, they will always take priority over other interests, even, presumably, if a similar objective could be achieved in a way less exclusionary of other interests (since the program as framed may result in a conflict, even if another program would not). In this case, for example, one alternative might have been assisting Aboriginal fishers not already licence holders to obtain licences and boats; the feasibility of this and its impact were not before the Court and as with section 15(2), the Court will not consider alternatives, only the programs it is asked to assess for constitutionality.

Once a Charter claim has been established and once it has been established that the native right at issue falls within section 25, it is necessary to decide whether there is “a true conflict” between the two. Justice Bastarache concludes that “[t]he right to equality afforded to

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88 Id., at para. 121 (S.C.C.), citing Estey J. in Reference re Bill 30, supra, note 46, at 1206.
89 Id., at paras. 94–96.
90 Id., at para. 97.
91 Id., at para. 103.
92 Id., at para. 100. It must be noted that s. 25 does not create rights, however: id., at para. 118.
93 Id., at para. 111.
every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the *Pilot Sales Program*” (which is a right within the meaning of section 25) and thus “[t]here is a real conflict”.94 Consequently, “[s]ection 25 of the Charter applies in the present situation and provides a full answer to the claim.”95

3. **Strengthening Sections 15(2) and 25: Whither Reconciliation?**

It is not my purpose here to critique the majority’s finding that the communal fishing licence is an ameliorative program under section 15(2), but rather to question whether a finding that it is an ameliorative program ends the inquiry, as it does for the majority.96 Nor is it my concern here whether section 25 should protect the program; rather, it is whether an approach that forecloses further inquiry is appropriate Charter analysis. Both judgments use the language of closure, curt and non-negotiable. Without debating the merits of this particular case, which may well have had the same result under a different analysis, I suggest that this approach is inconsistent with, even antithetical to, the language about and efforts to develop a more nuanced understanding of how competing rights might be reconciled or balanced. I emphasize that my reason for raising this issue relates to the impact on other disadvantaged groups and particularly more disadvantaged sub-groups of the benefited group. Is it necessary to ignore their interests (for now, one presumes) in order to protect affirmative action programs and Aboriginal interests against majority claims?

In this light it is worth returning to the Ontario Court of Appeal’s analysis in *Lovelace*.97 There the Court of Appeal held that “s. 15(2) does not immunize special programs from constitutional review. Even where the substance of a program is authorized by s. 15(2), some feature of it may be discriminatory and thus infringe s. 15(1)”98 It recognized that “[t]he language and history of s. 15(2) seem to militate against such challenges to s. 15(2) programs by members of socially advantaged or privileged groups,” but also appreciated that challenges could also come from disadvantaged groups, as was the case in *Lovelace* itself. Certainly, this is a more complicated approach. As the Court of Appeal in *Lovelace*

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94 Id., at para. 122.
95 Id., at para. 123.
96 Id., at para. 61.
97 *Lovelace* (C.A.), supra, note 64.
98 Id., at para. 65.
said, if a challenge came from a disadvantaged group within the object of the program, the program would likely be discriminatory and would have to be justified under section 1. A challenge from a disadvantaged group outside the object of the program would not be successful and the inference might be, should not be entertained.99

Affirmative action programs are an important redress for historical and current discrimination and it is desirable to encourage governments to establish them in the appropriate case. It is tempting to give affirmative action a great deal of constitutional weight, just as Aboriginal rights have constitutional weight. It is crucial if they are to be successful that governments be able to experiment with programs that might not ultimately be successful. Similarly, equality claims from the majority should not be allowed to undermine or abrogate Aboriginal rights. An analysis that cuts off equality and possibly other claims from members of majority groups is therefore appealing.

That said, neither section 15(2) nor section 25 is a rights-granting section, although one can make the link between section 25 of the Charter and section 35 of the Constitution Act, 1982100 so that section 25 incorporates section 35 rights and therefore protects them from challenge. Assuming for the moment that section 25 encompasses benefits established by ordinary statute, the question that is effectively foreclosed by Bastarache J.’s analysis is whether there might be some cases where the application of section 25 to statutory entitlements requires a more nuanced analysis to ensure that new statutory entitlements in particular might not have a negative impact on disadvantaged groups. Similarly, the majority’s analysis of section 15(2) does not allow for a situation in which an affirmative action program has a negative impact on a sub-group of the disadvantaged group that is the target of the program, that is, makes the sub-group’s situation worse. To allow that this could warrant an appropriate review of the program is not to diminish the importance of affirmative action programs; nor is it meant to encourage detailed second-guessing of the program. It is to recognize that section 15(2) is ultimately about remedies and not rights and that it is desirable that remedies even for disadvantaged groups do not result in greater disadvantage for other disadvantaged groups, at least not without some scrutiny.

99 Id., at paras. 65, 67 and 68. Even though the claimants in Lovelace were disadvantaged, they were not successful in their claim at the Court of Appeal or at the Supreme Court of Canada.

100 Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
Kapp itself did not require the Court to consider whether it would have developed the same clear-cut approach had the claimants been disadvantaged. As Sarah Kraicer observes, the claimants in Kapp specifically stated in their factum that “the trial judge had been correct to find that ‘no member of the claimant group can claim pre-existing disadvantage, stereotyping or prejudice’”. As Kraicer asks, would it have mattered had the “protest fishers” been Métis or persons of Japanese heritage? Yet the surnames of some of the claimants at least suggest that they come from communities that have suffered disadvantage in the past. Perhaps the protest fishers’ self-identification precluded any serious assessment of who was advantaged and disadvantaged; regardless, it made it easier to avoid any factual analysis of that type.

IV. CONCLUSION

The analysis under both section 15(2) and section 25 might have been appropriate in Kapp, setting aside for the moment whether treating the difference as one based on race was itself legitimate. (In this respect, viewing the program as an “Aboriginal right” may be more satisfying than characterizing it as an “affirmative action program”.) What is troubling is the willingness of both the majority and Bastarache J. to use the language of closure, of finality, of language that comes close to granting immunity from scrutiny on the difficult question these situations raise: how do we take into account the impact on more disadvantaged members of the targeted group who are not included in the program? Perhaps the fear (and reality) of attack by majority groups warrants the Kapp approach.

In the end, perhaps, one flaw of both judgments in Kapp is that they seek to make the law simple through prioritizing rights, when the realities that the law applies to are far from simple. While complex analyses can be difficult to apply, frustrating the goal of advancing equality or Aboriginal rights, and resulting too often in confusing jurisprudence, the answer is not always to strip the analysis of nuances that are fundamental to the guarantee. Efforts to reconcile and balance

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101 Kraicer, supra, note 5.
102 These surnames included, among others, van Lam, Nakutsuru, Nguyen, Phan and Yoshikawa. The history of the British Columbia fishery is complicated, as Sonia Lawrence explained in her presentation at the Osgoode Constitutional Cases Conference on April 17, 2009.
103 As illustrated by Morris and Cheng’s review of the s. 15(1) post-Law case law and the section 15(2) jurisprudence in this volume: supra, note 58.
may often be unnecessarily complex and are often far from satisfying; they do, however, try to grapple with what is a complicated world of rights. As Abella J. has explained in relation to section 9.1 of the Quebec Charter:

Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.¹⁰⁴

This complexity is true under the Charter, not only for multiculturalism, but for other broad societal commitments to individual rights and remedies. The strength of the Charter lies in its capacity to help us negotiate the tensions inherent in a pluralist society. The two analyses in Kapp in their own ways seek to locate the proactive advancement of disadvantaged groups squarely within that capacity. This is laudable. Nevertheless, by seeking to minimize the potential for challenges from majority groups, both also risk excluding even consideration of the experience of sub-groups of the beneficiaries who are even more disadvantaged. The facts in Kapp mean that this issue might still be addressed in future cases, despite the language in Kapp itself, with respect to section 15(2). The status of Bastarache J.’s section 25 interpretation, and the majority’s reluctance to concur, leaves open the question of whether the shield will operate against only non-Aboriginal claims or against those brought by other Aboriginal groups whose situation may be more dire than those who have acquired rights. Or is it a question of everyone waiting their turn?

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¹⁰⁴ Bruker v. Marcovitz, supra, note 40, at para. 2. Under the Quebec Charter, the “reconciling” occurs because rights are subject to considerations set out in s. 9.1 involving “democratic values, public order and the general well-being of the citizens of Quebec”.
