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# Pregnancy as a 'personal circumstance'? A case study of equality jurisprudence under the Canadian Charter of Rights

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## **Pregnancy as a ‘personal circumstance’? A case study of equality jurisprudence under the Canadian Charter of Rights<sup>1</sup>**

This article examines the recent decision of the Federal Court of Appeal in *Miceli-Riggins v Attorney General of Canada* as an example of the approach which the Canadian courts are taking to the interpretation of s. 15 of the Charter of Rights (in the area of social benefits) following the Supreme Court’s recent attempts to ‘restate’ that law in a series of cases, including *Kapp*, *Withler* and *Québec v A*. It argued that, whatever the intention of the Supreme Court, the restatement of the law has created general confusion in the lower courts and tribunals. In addition, in cases concerning social benefits, the Court’s statements, in cases such as *Withler* and *Gosselin*, that in the context of a larger benefits scheme ‘[p]erfect correspondence is not required’ between a benefits program and the actual needs and circumstances of the claimant group, have led to a situation where the lower courts feel that they do not need to engage seriously with an analysis of discrimination where the case involves complex benefit schemes.

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<sup>1</sup> I would like to thank the two anonymous referees for their helpful comments on an earlier draft.

## **Pregnancy as a ‘personal circumstance’? A case study of equality jurisprudence under the Canadian Charter of Rights**

This article examines the recent decision of the Federal Court of Appeal in *Miceli-Riggins v Attorney General of Canada*<sup>2</sup> as an example of the approach which the Canadian courts are taking to the interpretation of s. 15 of the Charter of Rights (in the area of social benefits) following the Supreme Court’s recent attempts to ‘restate’ that law in a series of cases, including *Kapp* and *Withler*.<sup>3</sup> It argued that, whatever the intention of the Supreme Court,

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<sup>2</sup> 2013 FCA 158. See also the ruling of the Pension Appeal Board: *S. M.-R v Minister of Human Resources and Skills Development*, 3 January 2012. The PAB rejected the claim by a majority of 2-1. The title of the article refers to Justice Stratas’ statement that Ms. Miceli-Riggins ‘failed to meet the contributory requirements of the Plan not because she was a woman, but because of her personal circumstances’ (at 77).

<sup>3</sup> *R v Kapp* 2008 SCC 41; *Withler v. Canada (Attorney General)* 2011 SCC 12; and *Québec (Attorney General) v. A* 2013 SCC 5. See generally S. Moreau, "R. v Kapp: New Directions for Section 15" (2008-2009) 40 Ottawa L Rev 283; P.-E. Veil, "A New Direction in the Interpretation of Section 15(1)? A Case Comment on R. v Kapp" (2008) 6(1) JL & Equality 33; M. Morris and J. Cheng, "Lovelace and Law Revisited: The Substantive Equality Promise of Kapp". (2009), 47 S.C.L.R. (2d) 281; J. Watson Hamilton & J. Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp" (2010) 47 Alta L Rev 927; id. 'Meaningless mantra: substantive equality after Withler' (2011) 16:1 Review of Constitutional Studies 31-62; id. "The Continual Reinvention of Section 15 of the Charter" (2013) 64 University of New Brunswick Law Journal 19 – 53; J. Koshan "“Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 Charter Showdown”, (2013) 22(1) *Constitutional Forum* 31-46. At the time of writing, detailed legal analysis of *Québec (Attorney General) v. A* remains limited, though see J. Koshan, 'Under the influence: Discrimination under Human Rights legislation and Section 15 of the Charter', *Canadian Journal of Human Rights* (2014) 3:1, 116-42; M. Biddulph and D. Newman 'Equality Rights, Ratio Identification, and the Un/Predictable Judicial Path Not Taken: *Québec*

the restatement of the law has created general confusion in the lower courts and tribunals. In addition, in cases concerning social benefits, the Court's statements, in cases such as *Withler* and *Gosselin*, that in the context of larger benefits schemes '[p]erfect correspondence is not required' between a benefits program and the actual needs and circumstances of the claimant group, may lead to a situation where the lower courts feel that they do not need to engage seriously with an analysis of discrimination where the case involves complex benefit schemes.<sup>4</sup> Indeed, the *Miceli-Riggins* ruling and a number of other cases discussed in this article raise a concern that this is now the pervasive approach in equality challenges to complex benefit regimes.

## 1. Facts

The case involved Ms. Miceli-Riggins whose health deteriorated following (but apparently unrelated to) childbirth. When she claimed disability benefits under the Canada Pension Plan<sup>5</sup> she did not qualify as she did not satisfy the 'workforce attachment' requirement, i.e. that she had contributed to the Plan in four of the last six calendar years (the 'four-of-six' requirement).<sup>6</sup> The facts of the case are somewhat complicated, at least to readers

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(*Attorney General*) v. A and R. v. *Ibanescu*' UBC Law Review 48:1 (forthcoming 2015); and the roundtable discussion: <http://ablawg.ca/2013/06/05/roundtable-on-quebec-v-a-searching-for-clarity-on-equality/>

<sup>4</sup> *Withler v. Canada (Attorney General)* 2011 SCC 12 at 71; *Gosselin v Québec (Attorney General)* 2002 SCR 84 at 55

<sup>5</sup> R.S.C. 1985, c. 8.

<sup>6</sup> S. 44(2) of the Plan. In *Granovsky v. Canada (Minister of Employment and Immigration)* 2000 SCC 28 this had been described as the 'recency of contributions' requirement.

unfamiliar with the complexities of qualification for insurance benefits. However, Ms.

Miceli-Riggins' basic argument was that several provisions which provided exceptions to the four-of-six requirement were discriminatory contrary to s. 15 of the Charter and that she should be entitled to benefits.

Ms. Miceli-Riggins made contributions to the Plan from 1986 to 1993 and in 1996 and January 1997.<sup>7</sup> She gave birth (three months prematurely) in January 1997 and ceased work. Because her contributions in 1997 were below the minimum insurable level (the 'basic exemption' of \$3,500 p.a.), they were returned to her and 1997 was shown as a year of no contributions. The precise status of her disability was never determined but it was accepted that she was not disabled (for the purpose of the Plan) in 1997 and the earliest date she claimed to be disabled was in August 1999.<sup>8</sup> She formally claimed disability benefits in 2000. By this time she did not satisfy the four-of-six requirements.<sup>9</sup>

In order to mitigate the impact of the 'workforce attachment' requirement, the Canada Pension Plan includes a number of 'drop-out' provisions which allow persons unable to contribute in specific years to 'drop out' those years in the calculation of the four-of-six rule. These include a general drop-out provision for persons unable to contribute because of

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<sup>7</sup> She attended college in 1994 and 1995.

<sup>8</sup> Under the Plan, to qualify for disability benefit a person must have a severe and prolonged mental or physical disability. A disability is 'severe' only if the person is incapable regularly of pursuing any substantially gainful employment. The details of the applicant's health status are discussed at length by both the PAB (at 4 (majority) and 7-53 (dissent)) and the FCA (at 13-19). The case law on the interpretation of 'disability' is considered by the PAB at 58-66.

<sup>9</sup> Although she would have done so had her child been born in December 1996 or when it was due later in 1997.

illness, unemployment and other related reasons. There is also a time-limited disability drop out.<sup>10</sup> Finally, and of specific relevance to this case, there is the child rearing drop-out (CRDO).<sup>11</sup> The CRDO allows any month to be excluded from the contributory period where two conditions are met: (1) the contributor is a 'family allowance recipient' as defined in the CPP Regulations; and (2) the contributor has earnings for the year below the basic exemption amount. The applicant received child tax benefit from February 1997 to 2004 and, therefore, the seven year period from February 1997 could be excluded from her contribution period in assessing the four-of-six rule.

The second provision considered in this case was the 'proration' provision set out in s. 19 of the Plan. This provides for a proration of the amount of the year's 'basic exemption' in a year in which the contributor reaches 18 or 70 or dies; when a retirement pension becomes payable; or when a disability pension becomes or ceases to be payable. The purpose is to ensure that the person does not lose the benefit of contributions made in that year because his or her birthday (or other relevant event) happens to occur early in the year with the consequence that the person's earnings would otherwise fall below the basic exemption and be excluded. However, pregnancy is not amongst the events included in s. 19. The applicant's main argument was that this was discriminatory and that, in order to rectify this

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<sup>10</sup> Considered by the Supreme Court in *Granovsky v. Canada (Minister of Employment and Immigration)* 2000 SCC 28.

<sup>11</sup> Also referred to as the Child Rearing Provisions (CRP). For earlier rulings involving the CRDO see *Harris v Canada (Human Resources and Skills Development)* 2009 FCA 22 in which the FCA rejected a challenge to the upper age limit (of 7 years) for the CRDO from a mother who cared for a disabled child who required care beyond that age and *Taylor v Minister of Social Development* CP 22241, 18 August 2006 in which the PAB rejected a general challenge to the upper age limit.

discrimination, the courts should 'read in' pregnancy to s. 19. If this was done, it would mean that 1997 would be counted as a contribution year and she would be entitled to drop-out the subsequent years when she received child benefits so the applicant would continue to satisfy the contribution requirements up to 2004 (long after the period where she appeared to have become disabled).<sup>12</sup>

## **2. The arguments**

The applicant argued that both the CRDO itself and s. 19 were discriminatory.<sup>13</sup> Indeed, it appears (though the arguments are not clearly set out by the Court of Appeal) that the applicant launched a broader challenge to the Canada Pension Plan as applied to women.<sup>14</sup> It was argued that the overall impact of the contribution requirements of the Canada Pension Plan 'work together to deny women equal access to a disability pension'.<sup>15</sup> In particular

- (1) Women are generally more likely to stop working to care for a child, making it harder to meet the minimum contribution level for the year, especially following the birth of a child;

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<sup>12</sup> She would have made contributions in 1992, 1993, 1996 and 1997 (four of the last six years).

<sup>13</sup> The arguments are set out in most detail in the dissenting ruling of the Honourable J.S. Moore, a member of the PAB.

<sup>14</sup> See *Miceli-Riggins* (FCA) at 38-40. See also the arguments presented to the PAB at 121 et seq.

<sup>15</sup> At 38.



- (2) Childbirth physically disrupts a women's participation in the workforce. As a result, it is harder to satisfy the minimum contribution level required in years where a woman gives birth;
- (3) Women generally earn less money than men, making it generally harder to satisfy the minimum contribution level required for the year;
- (4) Pregnancy carries risks of disability, meaning that women who give birth may not return to the workforce.<sup>16</sup>

The overall impact of the Plan and, in particular, the CRDO and the proration provisions was – it was argued - in breach of the s. 15 (1) of the Charter of Rights which provides that

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.

### **3. The rulings**

The Pension Appeals Board

The majority of the PAB shortly dismissed the challenge.<sup>17</sup> The majority referred to the classic *Law* test for discrimination:

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<sup>16</sup> At 39. While true, point 3 is hardly stateable given the ruling in *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3 (discussed below) while point 4 did not appear to apply to the applicant.

<sup>17</sup> *S. M.-R v Minister of Human Resources and Skills Development*, 3 January 2012.

- (1) Does the impugned law make a distinction between the claimant and others in one or more characteristics, or fail to take into account the claimant's disadvantaged position in Canada, resulting in different treatment between the claimant and others?
- (2) Is the claimant subject to different treatment based on one or more enumerated or analogous grounds?
- (3) Does the different treatment discriminate by extending or withholding a benefits which shows the application of group or personal characteristics, by treating the claimant as less capable or worthy of recognition or value as a human being, and as a member of Canadian society, unworthy of equal of concern, respect and consideration?

Despite coming four years after the Supreme Court's restatement of the approach to s. 15 in *Kapp*, the majority of the PAB made no reference to that case. As readers will recall, in that case, the Supreme Court identified

a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?<sup>18</sup>

Despite citing *Law*, the majority made little effort to establish whether the law made a distinction between the applicant and others. It concluded that the month of birth of a child was not an enumerated or analogous ground and immediately jumped to the conclusion that

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<sup>18</sup> *R v Kapp* 2008 SCC 41 at paragraph 17.

The Child Rearing Dropout Provision [sic.] which do not allow for proration, does not mean that women or parents with young children are less worthy of recognition as human beings, or as members of Canadian society.<sup>19</sup>

In doing so, the majority relied on general statements from the Supreme Court to the effect that '[p]erfect correspondence between a benefits program and the actual needs and circumstances of the claimant group is not required ...'.<sup>20</sup> The dissenting member set out at great length the facts and arguments but unfortunately provided very little legal basis for his conclusion that the failure to allow the applicant to prorate was a breach of the Charter.<sup>21</sup>

The Federal Court of Appeal

The Court of Appeal took a different (if equally unclear) approach to the s. 15 test.

'Traditionally', Stratas J.A. announced, 'courts adjudicating section 15 challenges have considered two questions'

(1) Does the legislation create a distinction based on an enumerated or analogous ground?

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<sup>19</sup> *S. M.-R v Minister of Human Resources and Skills Development* at 17.

<sup>20</sup> *Gosselin v Québec (Attorney General)* 2002 SCR 84 at 55. The majority also referred to *Krock v Canada (Attorney General)* 2001 FCA 188 to the effect that in the context of 'a complex statutory benefit scheme' the issue of the design of social benefit programs is 'a task for which Parliament is better suited than the courts'.

<sup>21</sup> Dissent at 149-150.

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In other words, is there discrimination?<sup>22</sup>

As with the PAB, the Court paid little attention to whether the law created a distinction based on an enumerated ground (although the court later accepted that there was a 'detrimental effect' on the applicant).<sup>23</sup> Rather it dived into a discussion of discrimination, pointing out that different treatment in itself did not infringe s. 15. The Court correctly stated that discrimination involved state action, inaction or legislation that perpetuated disadvantage and stereotyping,<sup>24</sup> but went on, rather more dubiously, to recall the *Law* approach stating that

Discrimination works a personal sting upon the individual, assaulting his or her dignity by labelling the individual, for reasons outside of his or her control, as being unworthy of equal respect, equal membership or equal belonging in Canadian society.<sup>25</sup>

In a confusing melange the Court went on to refer to various approaches put forward by the Supreme Court including the *Law* four contextual factors and more recent discussions in *Withler* again without any suggestion that there is any tension between the different

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<sup>22</sup> At 43 citing *Law*, *Kapp* and *Withler* as though there was no difference between the approaches adopted in these cases.

<sup>23</sup> At 88.

<sup>24</sup> At 46 citing *Kapp*.

<sup>25</sup> At 47. Stratas J.A. avoids using the term 'human dignity' but the reference to dignity can hardly refer to anything else even though the Supreme Court appeared to reject any reliance on human dignity in *Kapp* referring to it (at 21) as an 'additional burden on equality claimants'.

understandings. The Court then focussed on the ‘special context’ of social benefit legislation.<sup>26</sup> Drawing on several Supreme Court precedents (including *Law* and *Gosselin*), Stratas J.A. concluded that ‘distinctions arising under social benefits legislation will not lightly be found to be discriminatory’.<sup>27</sup> In particular, the court referred to the Supreme Court’s statement in *Withler* that

In cases involving a pension benefits program ... , the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the applicant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.<sup>28</sup>

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<sup>26</sup> At 56 et seq.

<sup>27</sup> At 57, citing *Gosselin* 2002 SCR 84 at 55 and *Withler* at 67.

<sup>28</sup> *Withler* at 67. A few paragraphs later in that judgement the Supreme Court re-emphasised the point (at 71) stating that in considering the relevant contextual factors ‘a central consideration is the purpose of the impugned provision in the context of the broader pension scheme. It is in the nature of a pension benefit

Stratas J.A. went on to claim erroneously that ‘the Supreme Court on occasion has required that something quite discernible or concrete, such as an illegitimate ‘singling out’ of a particular group, must be present before social benefits legislation will be adjudged to be discriminatory.’ In doing so he cited Chief Justice McLachlin’s statement in *Auton* to the effect that

It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner....<sup>29</sup>

Leaving aside the current status of *Auton* as precedent, Stratas J.A. clearly misreads this paragraph. The Supreme Court was simply giving an example on what *would* involve discrimination (i.e. singling out a disadvantaged group for inferior treatment). It never

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scheme that it is designed to benefit a number of groups in different circumstances and with different interests. The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.’

<sup>29</sup> *Auton* at 41 (citation excluded).

*required* such singling out as a necessary condition for discrimination. Turning to a consideration of the Canada Pension Plan, Stratas J.A. pointed out (repeatedly) that the Plan is not a 'general social welfare scheme' and is 'not supposed to meet everyone's needs'.<sup>30</sup>

Applying the general principles of law to the facts of the case, Stratas J.A. concluded that the claim must fail. His reasons are lengthy and to some extent outline different reasons why the claim must fail (or the same reasons couched differently). First, he concluded that the applicant had not shown that the impugned provision was responsible for a negative effect on women. Rather 'she failed to meet the contributory requirements of the Plan not because she was a woman, but because of her personal circumstances'<sup>31</sup> In addition, he found that the applicant had not shown that categories included in (or excluded from) s. 19 of the Plan were related to an enumerated or analogous ground.<sup>32</sup>

Second, and more generally, Stratas J.A. found that

When a person is denied benefits under a complex and intricate social benefits scheme such as this, one does not conclude that the person is not an equal member of Canadian society, is deserving of less worth, or does not belong with the rest of us. One concludes that, like so many others, the person did not get benefits under a non-universal scheme because technical qualification requirements were not met.<sup>33</sup>

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<sup>30</sup> At 68, 69, 73, and 88.

<sup>31</sup> At 77. Including the facts that she studied for two years in 1994-5, that her child was born early in 1997, and that her inability to work (disability) developed only later.

<sup>32</sup> At 50.

<sup>33</sup> At 84.

‘There must’ he argued ‘be something more that takes the case outside of being a mere artifact of a complex benefits scheme and into the realm of discrimination.’<sup>34</sup> He was satisfied that any difference in treatment in this case was just such an artifact and pointed to the fact that the detrimental impact applied only to ‘some women’, i.e. those in the highly unusual circumstances of the applicant. The detrimental impact on the applicant was ‘a consequence of the interaction of complicated rules within a complicated scheme that is *not* a general social welfare scheme available to all in every circumstance.’<sup>35</sup>

Third, the outcome was the result of the specific factual circumstances of the case (though this appears simply to restate earlier arguments). Stratas J.A. echoed the PAB in pointing out that ‘[t]he month in which a child is born is not an enumerated or analogous ground under section 15 of the Charter, nor is it a personal characteristic upon which the applicant was denied a benefit under the Plan’.<sup>36</sup>

Fourth, he pointed out that the Supreme Court has indicated that the courts are to assess ‘whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme’ and need not insist on ‘perfect correspondence between a benefit program and the actual needs and circumstances of the applicant group’:<sup>37</sup> In his view the lines in the current case were generally appropriate.

Fifth, the CRDO provisions did not contribute to any pre-existing disadvantage to the applicant nor were they based on any stereotype of women. Indeed, and sixth, the

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<sup>34</sup> At 85.

<sup>35</sup> At 88.

<sup>36</sup> At 93.

<sup>37</sup> At 94 citing *Withler*, *supra* at paragraph 67.



impugned provisions were best regarded as ameliorative.<sup>38</sup> Evidence showed that the CRDO provisions were much more likely to be relied upon and to benefit women.<sup>39</sup> Stratas J.A. also pointed out that

The proration provision under section 19 of the Plan is intended to ensure that where a contributory period ends by virtue of advanced age, disability, entitlement to certain retirement provisions or death, a person is not disadvantaged by virtue of the fact that they could not work and contribute under the Plan for any month after that event. This, too, is ameliorative.<sup>40</sup>

On the basis of the case law and, in particular, *Withler*, Stratas J.A. concluded that the ameliorative nature of the CRDO and the proration provisions led to the conclusion that the applicant has not established discrimination.

Finally, although it does not appear to form part of the *ratio* of the decision, Stratas J.A. noted that the ameliorative nature of the provisions *may* have ‘other consequences’ for s. 15 analysis.<sup>41</sup> He pointed out that the Supreme Court in *Kapp* had ruled that an ameliorative

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<sup>38</sup> At 101.

<sup>39</sup> See the data at 103. Almost half (45.9%) of women have the CRDO provisions applied to the calculation of their retirement benefits, as opposed to 0.3% of men. The operation of the CRDO provisions positively affects 53% of female retirement beneficiaries and 66% of female disability beneficiaries. In the case of retirement benefits, a woman who takes advantage of CRDO on average receives benefits that are 24% higher. In the case of disability benefits, a woman who takes advantage of the CRDO provisions on average receives benefits that are 7% higher.

<sup>40</sup> At 109.

<sup>41</sup> At 111 et seq.

law, program or activity under s. 15(2) of the Charter cannot be found to be discriminatory under s. 15(1).<sup>42</sup>

#### 4. Discussion

Equal protection - S. 15(1)

The Supreme Court of Canada was subject to much criticism of its approach to s. 15 of the Charter and, in particular, to the approach set out in *Law* with its focus on human dignity and the four contextual factors. In fairness to the Court, it responded to this criticism and, in cases such as *Kapp*, attempted to develop an alternative and clearer approach which would support the goal of substantive equality. But it has done so in a manner which has only generated more confusion and which has left the Charter jurisprudence under s. 15 in a worse state than it was under *Law*. To take *Miceli-Riggins* as an example, the lower courts and tribunals appear to be entirely unsure what approach to adopt. The PAB referred only to *Law* and the majority did not even cite *Kapp*.<sup>43</sup> The Federal Court of Appeal in contrast referred to the *Kapp* test as ‘traditional’ as though there was no difference between this and *Law*. Indeed, the Court of Appeal could argue with some justification that the Supreme

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<sup>42</sup> S. 15(2) provides that ‘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.’

<sup>43</sup> Though the PAB, unlike the FCA, did not refer to the concept of *dignity*.

Court has said that the two approaches are ‘in substance’ the same.<sup>44</sup> Which begs the question as to why the Supreme Court decided to reframe the issue at all.

This is not an isolated example. First, there are other cases – as in the Court of Appeal in *Miceli-Riggins* - where the court or tribunal has relied on the notion of human dignity.<sup>45</sup>

Again such cases can point to the Supreme Court in *Kapp* which, even if it was critical of the use of ‘human dignity’ and referred to it as an ‘additional burden’, also said that ‘human dignity is an essential value underlying the s. 15 equality guarantee.’<sup>46</sup> Second, there are more cases – again like *Miceli-Riggins* – where courts or tribunals cite all the various iterations of the s. 15 test without any clear indication as to how they differ.<sup>47</sup> Courts and

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<sup>44</sup> *Kapp* at 14.

<sup>45</sup> See the Nova Scotia Workers' Compensation Appeals Tribunal (2012 CANLII 77348) (exclusion of stress injury not suffered as ‘an acute reaction to a traumatic event’ not a breach of s. 15). The Tribunal focussed extensively on the justification for the rule rather than whether it perpetuated prejudice and stereotyping. The Nova Scotia Workers' Compensation Appeals Tribunal again relied heavily on human dignity in 2005 CANLII 53515 (refusal of survivor benefits to a divorced woman not in breach of s. 15). The Federal Court of Appeal adopted a similar approach to that in *Miceli-Riggins* in *Runchey v. Canada (Attorney General)*, 2013 FCA 16 (unsurprisingly as the judgment was authored by Stratas J.A.).

<sup>46</sup> *Kapp* at 21. Despite the subsequent ruling in *Withler*, the Nova Scotia Workers' Compensation Appeals Tribunal (2012 CANLII 77348) relied on the Nova Scotia Court of Appeal in *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130 (CanLII), 2009 NSCA 130 (at 37) which held that the concept of human dignity as a legal test ‘should be retained in the spirit of the analysis in that it remains an “essential value” underlying section 15 claims’

<sup>47</sup> See, for example, *Martin v Canada (A.G)* 2013 FCA 15 and the Umpire’s decision in that case [CUB 76899]. The case concerned the fact that parents of twins were only entitled to the same parental benefits as parents of a single birth under the Employment Insurance Act. The Umpire stated (at pp. 36-37) that ‘[w]hether the

tribunals routinely rely on the *Law* contextual factors (again an approach approved by the Supreme Court).

Third, although the Supreme Court attempted to clarify the meaning of the phrase ‘create disadvantage by perpetuating prejudice or stereotyping’ in *Withler*, this attempt was rather circular and, indeed, the Court’s unanimity on the issue fractured in *Québec (Attorney General) v. A*.<sup>48</sup> This case involved the issue as to whether provisions of Civil Code of Québec dealing with family assets and spousal support were in breach of s. 15 because their application was limited to married and civil union spouses (thus excluding *de facto* spouses). It is difficult to extract the ratio of this lengthy ruling.<sup>49</sup> Five judges (including McLachlin C.J.) agreed that the provisions were in breach of s. 15 but McLachlin C.J. held that this was a reasonable limit under s. 1 of the Charter with the result that the provisions were upheld.<sup>50</sup> For our purposes, the importance of this case lies in the approach taken to the interpretation of s. 15.

Abella J. took the view that discrimination under s. 15 did not necessarily require a showing of prejudice or discrimination. She said

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elements are conceptualized as a demeaning of dignity, as in *Law*, or as the creation of a disadvantage through the perpetuation of prejudice or stereotyping, as in *Andrews* and *Kapp*, it is clear that discrimination necessarily entails some offence to the way a group is treated in society’.

<sup>48</sup> 2013 SCC 5 (delivered after *Miceli-Riggins* had been heard but before judgment in that case but not referred to by Stratas J.A.). See the discussion in J. Koshan ‘Under the influence’ *op. cit.* at pp. 134-37.

<sup>49</sup> M. Biddulph and D. Newman ‘Equality Rights, *Ratio* Identification, and the Un/Predictable Judicial Path Not Taken: *Québec (Attorney General) v. A* and *R. v. Ibanescu*’ *UBC Law Review* 48:1 (forthcoming 2015).

<sup>50</sup> Three judges (Deschamps, Cromwell and Karakatsanis JJ.) would have ruled that only one provisions was not justified under s. 1 while Abella J. would have held that none were.

In referring to prejudice and stereotyping [in *Kapp*], the Court was not purporting to create a new s. 15 test. *Withler* is clear that “[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter* ?” Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate ...<sup>51</sup>

She was satisfied that the provisions were in breach of s. 15 as they perpetuated historic disadvantage against *de facto* couples based on their marital status.<sup>52</sup> She found ‘no need to look for an attitude of prejudice motivating, or created by, the exclusion of *de facto* couples from the presumptive statutory protections’. Nor need the Court ‘consider whether the exclusions promote the view that the individual is less capable or worthy of recognition as a human being or citizen ...’.<sup>53</sup>

Deschamps, Cromwell and Karakatsanis JJ. agreed with Abella J. that the legislation infringed the guaranteed right to equality by excluding *de facto* spouses. They did not specifically discuss the *Kapp* test but also found that the exclusion of *de facto* spouses from the provisions perpetuated a historical disadvantage.<sup>54</sup>

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<sup>51</sup> At 325. Interestingly, this approach has been followed by the Ontario Workplace Safety and Insurance Appeals Tribunal, Decision No. 2157/09, 2014 ONWSIAT 938 – also one of the few recent successful s. 15 cases concerning social benefits.

<sup>52</sup> At 356.

<sup>53</sup> At 357.

<sup>54</sup> AT 382-385.

McLachlin C.J. also agreed with Abella J.'s s. 15 analysis.<sup>55</sup> She took a broad approach to what constituted discrimination stating

... To constitute discrimination, the impugned law must have the purpose or effect 'of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration'.

Most recently, this Court has articulated the approach in terms of two steps: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or false stereotyping? While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected.<sup>56</sup>

She found that the provisions perpetuates pre-existing disadvantage but also that they relied on false stereotypes.<sup>57</sup>

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<sup>55</sup> At 416.

<sup>56</sup> At 417-18.

<sup>57</sup> At 427-28.

In contrast, the minority judgement on s. 15 (by LeBel J.) reemphasised the importance of human dignity in a s. 15 analysis.<sup>58</sup> Having reviewed the case law from *Andrews* to *Withler*, the minority emphasised that ‘a discriminatory disadvantage is as a general rule one that perpetuates prejudice or that stereotypes.’<sup>59</sup> Absent such a *discriminatory* disadvantage there could be no breach of s. 15.<sup>60</sup>

It might be argued that the Abella J.’s analysis has advanced equality law by indicating that a broader approach will be taken to what constitutes disadvantage. However, the narrow basis of the majority, combined with the ultimate outcome of this case, and the difficulty in identifying a formal *ratio decidendi* might rather suggest that the Court is quite split on the analytical approach to adopt to s. 15 and that some of the weaknesses of the *Kapp* restatement spring from the fundamental division of views.<sup>61</sup>

This confusion at the highest level has arguably led to a situation where the lower courts and tribunals have simply replaced the term ‘human dignity’ with ‘perpetuating prejudice or stereotyping’ and are applying their own innate sense of what is appropriate leading to precisely the same result as under the *Law* test.<sup>62</sup> In the absence of clear guidance, the

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<sup>58</sup> At 138.

<sup>59</sup> At 171.

<sup>60</sup> At 175-76.

<sup>61</sup> See also Koshan who states that we cannot take Justice Abella’s approach to be ‘the definitive approach to equality rights under section 15 given the complicated split in *Québec v A.*’ ‘Under the Influence’ *op. cit.* at 136.

<sup>62</sup> There have been a number of post-*Kapp* decisions which have come to the same conclusion as earlier cases, sometimes relying directly on the earlier decisions without any new analysis: *Heubach v. The Queen*, 2010 TCC 409 following *Barnett v. The Queen*, 2005 TCC 719 (as to Canada child tax benefit for joint custodial parents).

See also the Ontario Workplace Safety and Insurance Appeals Tribunal in 2012 ONWSIAT 1019 which came to

lower courts and tribunals has simply relied on their intuitive sense of what does or does not constitute 'discrimination'.

Finally, even if the Court wished to remove the 'additional burden' of human dignity in *Kapp*, it has effectively added an additional hurdle in social benefits cases through its statements to the effect that judicial restraint is required when dealing with complex benefit schemes.<sup>63</sup> Several of the recent cases involving social benefits have relied on the Court's statement that 'perfect correspondence' is not required.<sup>64</sup> It is noteworthy that there appears to have been only one recent case involving social benefits in which a s. 15 challenge was successful.<sup>65</sup>

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the same (negative) conclusions as earlier rulings, albeit on the basis of a fresh consideration of the legal issues (reduction in cumulative value of impairments where a person suffers more than one injury). The Tribunal also (rather dubiously) concluded that a distinction (if any) was on the basis of 'impairment' rather than disability. In fairness, one should say that the same Tribunal in 2011 ONWSIAT 2525 carried out a detailed legal and contextual analysis in coming to the conclusion that the limitation of loss of earnings benefits to 2 years for a person aged 63 was not a breach of s. 15.

<sup>63</sup> As we have seen, the Supreme Court had raised this issue previously in case such as *Law* and *Gosselin*.

<sup>64</sup> See, for example, *Fannon v. Canada Revenue Agency*, 2012 FC 876 at 21 (concerning Canada child tax benefit for non-custodial parents); Decision No. 681/10, 2012 ONWSIAT 1019; *Martin v Canada (A.G)* 2013 FCA 15 at 120; *Runchey v. Canada (Attorney General)*, 2013 FCA 16 at 140 ; WCAT # 2013-273-AD, 2014 CANLII 52515 at 8 and 14.

<sup>65</sup> Decision No. 2157/09, 2014 ONWSIAT 938 (limitations of compensation for mental stress contrary to s. 15 and not saved by s. 1) which, as noted above, followed Abella J.'s approach in *Québec v A*. In addition to unsuccessful cases already cited, see also *S.G. c. Tribunal administratif du Québec*, 2012 QCCS 2435 (taking into account of alimentary pension in calculation social assistance not in breach of s. 15); *SM c Québec (Emploi et Solidarité sociale)*, 2012 CanLII 40830; 2012 QCTAQ 61127 (person not entitled to social assistance of last



Of course, in itself the Court's statement is unexceptional. The Canada Pension Plan is not a general social welfare scheme for all and, while it may be anomalous that Ms. Miceli-Riggins would have qualified for benefit had she given birth in December 1996 or later in 1997, this does not in itself indicate discrimination. But the problem is that the lower courts are simply using these sweeping statements to suggest that *any* failure to qualify for a benefit which has complex criteria is 'a mere artifact of a complex benefits scheme' and to avoid a proper examination of the issue .

In this case, a positive outcome was perhaps not facilitated by the fact that the applicant's lawyers ran a broad brush attack on the CPP, including the CRDO. There is indeed no doubt that social insurance programs (which by definition are linked to contribution and work records) tend to favour men because, in most countries, men are more likely to be employed, to be regularly employed and to earn higher incomes. But no court in any country has held that a social insurance program which relies on a work record is *in itself* in breach of any constitutional equality norm. More specifically, in Canada, the Federal Court of Appeal has rejected a challenge to the lower work limit for employment insurance in

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resort while cohabiting with a person in employment); *Astley v. The Queen*, 2012 TCC 155 (entitlement to Canada child tax benefit in the case of the two persons who have married but have not commenced to live together); *Côté c. Commission de la santé et de la sécurité du travail*, 2012 QCCA 1146 (reduction in income replacement indemnity in the case of persons suffering work injury when 64 years of age); *Fannon v. Canada (National Revenue)*, 2013 FCA 99. This is not , of course, to suggest that all cases could or should have succeeded but it is noteworthy that in the same period several human rights claims were upheld: *Ball v. Ontario (Community and Social Services)*, 2010 HRT0 360; *Martel v. Ontario (Community and Social Services)*, 2012 HRT0 735; *WCB v. Mercer et al*, 2012 NWTSC 57.

*Lesiuk*.<sup>66</sup> In that case a woman was denied benefits under the Employment Insurance Act as she fell just short of the 700 hours worked within a particular qualification period which was required. However, the Court ruled that this did not amount to discrimination contrary to the Charter. In addition, it is hard to see how the CRDO could be found to be discriminatory. The challenge should have been directed specifically against the proration provisions of s. 19 of the CPP. These applied to the standard social security 'risks' such as age, disability and death but *not* to people who ceased work due to pregnancy or who availed of the CRDO.<sup>67</sup> The reason for this distinction was not even discussed by either the PAB or the Court. One might speculate that it was due to inadvertence on the part of the legislature but, absent proper analysis, we do not know.

The Court stated that the objective of the provisions was to ensure a person is not disadvantaged by virtue of the fact that they could not work and contribute under the Plan for any month after specific events. While these events apply both to men and women, arguably maternity is also such an event and one that applies only to women, while women

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<sup>66</sup> *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3. The reasoning in *Lesiuk* is arguably as unconvincing as in the instant case but courts in other jurisdictions have consistently upheld similar lower earnings thresholds for social insurance purposes. See, for example, Case C317/93, *Nolte*, [1995] ECR I-4624 (European Court of Justice) and *Fisher v Secretary of Health, Education and Welfare* 522 F.2d 493 (7<sup>th</sup>. Cir. 1975).

<sup>67</sup> For reasons which are unclear, the applicant sought to have the words 'or in which his contributory period drops-out under s. 44(2)(b)(iv) of this Act,' read in to s. 19 (rather than the words 'or in which she gives birth to a child'). Before the PAB (the point is not discussed by the FCA), the Minister had argued that the Board should not 'read in' such a provision, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679. However, it is by no means clear that reading in in this case would be inconsistent with anything the Supreme Court said in *Schachter* which would have involved a much more significant reading in. However, the issues were not fully (or even partially) addressed in this case.

are much more likely to avail of the CRDO. No specific rationale for the exclusion of these events has been advanced.<sup>68</sup> It might perhaps be countered that the proration provisions are confined to 'long-term' events - unlike maternity - but the courts never even engaged with these issues.<sup>69</sup> Certainly the dismissal of the argument on the basis that giving birth early in the year is not an enumerated status shows a total lack of understanding of equality issues similar to the early flawed analysis of pregnancy-related discrimination.<sup>70</sup> Of course, the argument is not that the rule differentiated between women who gave birth early in the year and those who gave birth later but that the rule failed to recognise the needs of women who are the only ones who give birth.

If we look at the *Kapp* questions, the proration provisions arguably do create a distinction based on an enumerated ground, i.e. sex, in that they cover a range of events which can happen to a man but not an event (childbirth) which can only happen to a woman.<sup>71</sup>

Second, the distinction arguably does create a disadvantage by perpetuating stereotyping i.e. that conditions which stop men from working (such as disability) are important while events which stop women from working (such as child birth or child care responsibility) are not. Thus, in the absence of any clear justification, the proration provisions could be found to be in breach of s. 15 of the Charter.

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<sup>68</sup> It seems likely that this was largely due to inadvertence but this is only speculation.

<sup>69</sup> Child care (as allowed for under the CRDO) is also a long-term event so this argument would hardly apply.

<sup>70</sup> *Bliss v. Canada (Attorney General)* [1979] 1 S.C.R. 183 overruled by *Brooks v. Safeway Canada* [1989] 1 S.C.R. 1219.

<sup>71</sup> Or, in the alternative, an event which is much more likely to happen to a woman (i.e. the beginning of a CRDO period).

## Ameliorative laws - S. 15(2)

As we have seen, Stratas J.A. suggested that the ameliorative nature of the provisions might have 'other consequences' for s. 15 analysis and that the Supreme Court in *Kapp* had ruled that an ameliorative law, program or activity under s. 15(2) of the Charter cannot be found to be discriminatory under s. 15(1).<sup>72</sup> At first sight, this suggestion might appear to be persuasive.<sup>73</sup>

For a long time, s. 15(2) was simply seen as an aid to interpretation of the principle of equal treatment set out in s. 15(1).<sup>74</sup> However, the Supreme Court in *Kapp*, ill-advisedly and unnecessarily, erected s. 15(2) into a free-standing provision which appears to protect 'ameliorative' provisions from challenge. In *Kapp* the Supreme Court set out the test for s. 15(2) as

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.<sup>75</sup>

*Kapp*, of course, concerned a challenge to a provision protecting a minority (aboriginal) group by a mainly 'majority' group rather than a challenge to an underinclusive ameliorative

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<sup>72</sup>At 111 et seq.

<sup>73</sup> See also J. Watson Hamilton and J. Koshan "The Supreme Court of Canada, Ameliorative Programs, and Disability: Not Getting It" (2013) 25:1 Canadian Journal of Women and the Law 56-80.

<sup>74</sup> *Lovelace v Ontario*, 2000 SCC 37.

<sup>75</sup> *Kapp* at para 41.

provision. In, *Cunningham*, the Supreme Court did consider such a provision.<sup>76</sup> In that case, the Alberta Metis Settlements Act (MSA) providing that voluntary registration under the Indian Act precluded membership in a Métis settlement. Members of a Métis community in Alberta registered as Indians in order to obtain medical benefits under the Indian Act. This led to the revocation of their membership in the Métis settlement was revoked. The claimants argued that this was in breach of the Charter guarantees of equality (s. 15), freedom of association and liberty (s. 7).<sup>77</sup> The Supreme Court ruled that the s. 15 claim must be dismissed as the provision was protected by s. 15(2). The Court stated that where the government relies on s. 15(2) to defend the distinction, it

must show that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality. There must be a correlation between the program and the disadvantage suffered by the target group. Courts must examine the program to determine whether, on the evidence, the declared purpose is genuine; a naked declaration of an ameliorative purpose will not attract s. 15(2) protection against a claim of discrimination.<sup>78</sup>

The Court concluded that

If these conditions are met, s. 15(2) protects all distinctions drawn on enumerated or analogous grounds that 'serve and are necessary to' the ameliorative purpose. In

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<sup>76</sup> *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37.

<sup>77</sup> The discussion of the freedom of association and s. 7 issues are not considered here but the claimants lost on all grounds.

<sup>78</sup> *Cunningham* at 44. Internal citations are not included.

this phrase, “necessary” should not be understood as requiring proof that the exclusion is essential to realizing the object of the ameliorative program. What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality. A purposive approach to s. 15(2) focussed on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program. To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s. 15’s purpose of promoting substantive equality.<sup>79</sup>

The Court emphasised that a distinction will not be considered to serve or advance the ameliorative goal if, for example, ‘the state chooses irrational means to pursue its ameliorative goal’.<sup>80</sup>

On the face of it, the drop-out provisions (CRDO) and the proration provisions can be described as ‘an ameliorative or remedial purpose’ and they clearly target disadvantage groups which are included in the enumerated or analogous grounds under the Charter. However, the issue is whether the impugned distinction in this case ‘serves or advances the object of the program’. In the case of the proration’ provisions, if (as I speculate) there is no clear rationale for the exclusion of maternity/child care responsibilities, it would be difficult to argue that their exclusion advances the object of the program. However, a final conclusion must await clarification by the Supreme Court of the role of s. 15(2) in relation to underinclusive ameliorative programs.

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<sup>79</sup> At 45.

<sup>80</sup> At 46.

## Reasonable limits - S. 1

We have argued above that the proration provision could be found to be in breach of s. 15.

In order to be justified under s. 1 of the Charter as a reasonable limit which could be demonstrably justified in a free and democratic society, the provisions would have to satisfy the *Oakes* test.<sup>81</sup> This provides that

1. There must a pressing and substantial objective for the law or government action.
2. The means chosen to achieve the objective must be proportional to the burden on the rights of the claimant.
  - i. The objective must be rationally connected to the limit on the Charter right.
  - ii. The limit must minimally impair the Charter rights; and
  - iii. There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

It seems very unlikely that this rather minor provision of a complicated social benefits scheme could be shown to addressing a 'pressing and substantial objective' or, given that it seems most likely that pregnant women were excluded by inadvertence rather for any clear rationale, that it could satisfy the other aspects of the text.

## 5. Conclusion

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<sup>81</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103.

The Supreme Court in *Kapp* and the subsequent cases attempted to respond to the criticisms which had been made of the *Law* analysis and, in particular, of the concept of human dignity as a legal test in s. 15 jurisprudence. It did so to restate the Court's 'commitment to substantive equality'.<sup>82</sup> It is clear that this attempt, however, praiseworthy, has not been successful. It would be difficult to argue that the achieving the goal of substantive equality through the legal system is any easier now than it was in 2008. Indeed, a review of recent equality jurisprudence in the area of social benefits would suggest that there has been little, if any, change over the last 7 years, except that there is possibly less clarity as to the correct approach to apply now than there was then.

This is in part due to the Court's initial reluctance to spell out clearly how the *Kapp* approach differed from its predecessor, when it was 'in substance' the same. Plus ça change, plus c'est la même chose may be an amusing epigram but it is not very useful as judicial guidance. In the light of the divisions in *Québec (Attorney General) v. A* one might suspect that some of the lack of clarity arose from divisions within the Court itself. However, if the worthy objectives outlined in *Kapp* are to be achieved a further and clearer restatement of the law is required.

The Court, in many ways, made substantive equality more difficult to achieve in cases concerning complex benefit schemes through its warnings that perfect correspondence is not required and of the need for judicial restraint. Of course, few would suggest that perfect correspondence is necessary and courts in the USA and Europe generally allow a margin of discretion to government on socio-economic issues. Nonetheless there is a difference between allowing an appropriate margin of discretion and abdicating responsibility for

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<sup>82</sup> *Kapp* at 14.



adjudicating on equal protection simply because the case involves a complex scheme of benefits. The Supreme Court has been regrettably slow to take on appeals in such cases which might have helped to clarify the appropriate approach.<sup>83</sup>

Finally, as noted above, the Court's interpretation of s. 15(2) as a free-standing provision which protects 'ameliorative' provisions from challenge is unwise and may only create a further barrier to substantive equality.

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<sup>83</sup> Such as *Downey v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 65 and *Harris v. Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 22.