

Pregnancy as a “Personal Circumstance”?

***Miceli-Riggins* and Canadian Equality Jurisprudence**

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

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Cet article examine le récent jugement rendu par la Cour d'appel fédérale dans l'affaire Miceli-Riggins c Canada (Procureur général), qui illustre l'approche adoptée par des tribunaux canadiens quant à l'interprétation de l'article 15 de la Charte canadienne des droits et libertés dans le domaine des prestations d'aide sociale. Cette approche fait suite aux efforts récents de la Cour suprême du Canada visant à « redéfinir » le droit dans ce domaine, notamment dans les arrêts Kapp, Withler, et Québec c A. La Cour d'appel fédérale a soutenu que, quelle que soit l'intention de la Cour Suprême, ces efforts avaient semé la confusion chez des tribunaux inférieurs. En outre, dans les arrêts portant sur les prestations d'aide sociale comme Withler et Gosselin, les déclarations de la Cour voulant qu'une « disposition contestée ne viole pas la Charte canadienne même en absence de correspondance parfaite » entre le programme social et la situation et les besoins véritables du groupe de demandeurs ont mené à une situation où des tribunaux inférieurs ne se sentent pas tenus de se livrer à une analyse sérieuse du caractère discriminatoire.

I. Introduction

This article examines the recent decision of the Federal Court of Appeal (FCA) in *Miceli-Riggins v Canada (Attorney General)*² as an example of the approach which Canadian courts are taking to the interpretation of section 15 of the *Canadian Charter of Rights and Freedoms* with regards to social benefits.³ This approach has been shaped by the Supreme Court’s recent attempts to “restate” that law in a series of cases including *R v Kapp*, *Withler v Canada (Attorney General)* and *Québec (Attorney General) v A*.⁴ The article argues that, whatever the intention of the Supreme Court, the restatement of the law has created general confusion in lower courts and tribunals. In addition, following cases that concern larger social benefits schemes such as *Withler* and *Gosselin v Québec (Attorney General)*, the Court’s statements that “[p]erfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required”⁵ may lead to a situation where lower courts feel that they do not need to engage seriously with an analysis of discrimination. Indeed, *Miceli-Riggins*, as well as a number of other cases referenced in this article, raise a concern that this is now the pervasive approach in equality challenges to complex benefit regimes.

² *Miceli-Riggins v Canada (AG)*, 2013 FCA 158, [2014] 4 FCR 709 [*Miceli-Riggins*]. The title of the article refers to Stratas JA’s statement that the appellant, Ms. Miceli-Riggins, “failed to meet the contributory requirements of the *Plan* not because she was a woman, but because of her personal circumstances” (*ibid* at para 77). See generally *SM-R v Minister of Human Resources and Skills Development*, 2012 LNCPEN 1 (QL), Appeal No CP22528 [*Miceli-Riggins* PAB cited to LNCPEN] (the initial Pension Appeals Board (PAB) hearing rejected the claim by a majority of 2-1).

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁴ *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*]; *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*]; *Québec (AG) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Québec v A*]. See generally Sophia Moreau, “*R. v. Kapp*: New Directions for Section 15” (2008–2009) 40:2 *Ottawa L Rev* 283; Paul-Erik Veel, “A New Direction in the Interpretation of Section 15(1)? A Case Comment on *R. v. Kapp*” (2008) 6:1 *JL & Equality* 33; Michael H Morris & Joseph K Cheng, “*Lovelace* and *Law* Revisited: The Substantive Equality Promise of *Kapp*” (2009) 47:1 *SCLR* (2d) 281; Jonnette Watson Hamilton & Jennifer Koshan, “Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*” (2010) 47:4 *Alta L Rev* 927; Jonnette Watson Hamilton & Jennifer Koshan, “Meaningless Mantra: Substantive Equality after *Withler*” (2011) 16:1 *Rev Const Stud* 31; Jonnette Watson Hamilton & Jennifer Koshan, “The Continual Reinvention of Section 15 of the *Charter*” (2013) 64:1 *UNBLJ* 19; Jennifer Koshan, “Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown” (2013) 22:1 *Const Forum Const* 31. At the time of writing, detailed legal analysis of *Québec v A* remains limited, but see Jennifer Koshan, “Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*” (2014) 3:1 *Can J Hum Rts* 115 [Koshan, “Under the Influence”]; Michelle Biddulph & Dwight Newman, “Equality Rights, *Ratio* Identification, and the Un/Predictable Judicial Path Not Taken: *Quebec (Attorney General) v A* and *R v Ibanescu*” (2015) 48:1 *UBC L Rev* 1; Jennifer Koshan & Jonnette Watson Hamilton, “Roundtable on *Quebec v A*: Searching for Clarity on Equality” (5 June 2013), *ABlawg* (blog), online: <ablawg.ca/2013/06/05/roundtable-on-quebec-v-a-searching-for-clarity-on-equality/>.

⁵ *Withler*, *supra* note 4 at para 67; *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 55, [2002] 4 SCR 429 [*Gosselin*].

II. Facts

The case involved Ms. Miceli-Riggins whose health deteriorated following, but apparently unrelated to, childbirth. When she claimed disability benefits several years later under the *Canada Pension Plan*,⁶ she did not qualify; she did not satisfy the “workforce attachment” requirement because she had not contributed to the *Plan* in four of the last six calendar years (also known as the “four-of-six” requirement).⁷ For readers unfamiliar with the complexities of qualification for insurance benefits, the facts of the case are somewhat complicated. However, Miceli-Riggins’ basic argument was that several provisions, which provided exceptions to the four-of-six requirement, were discriminatory contrary to section 15 of the *Charter*, and as such, she should have been entitled to receive benefits.

Miceli-Riggins made contributions to the *Plan* from 1986 to 1993, in 1996 and in January 1997.⁸ She gave birth (three months prematurely) in January 1997 and ceased working. As her contributions in 1997 were below the minimum insurable level (the basic exemption of \$3,500 *per annum*), they were returned to her and 1997 was recorded as a year of no contributions. The precise nature of her disability was never determined, but it was accepted that she was not disabled for the purposes of the *Plan* in 1997 and the earliest date that she claimed to be disabled was August 1999.⁹ By the time she formally claimed disability benefits in 2000, she did not satisfy the four-of-six requirement.¹⁰

In order to mitigate the workforce attachment requirement, the *Plan* includes a number of “drop-out” provisions which allow persons unable to contribute in specific years to drop those years in the calculation of the four-of-six requirement. These include a general drop-out provision for persons unable to contribute because of illness, unemployment and other related reasons. There is also a time-limited disability drop-out.¹¹ Finally, and of specific relevance to this case, there is the child rearing drop-out (CRDO).¹²

⁶ *Canada Pension Plan*, RSC 1985, c C-8 [*Plan*].

⁷ *Ibid*, s 44(2)(a)(i). This was described as the “recency of contributions” requirement in *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 10, [2000] 1 SCR 703 [*Granovsky*].

⁸ She attended college in 1994 and 1995.

⁹ To qualify for disability benefits under the *Plan*, 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”. *Miceli-Riggins PAB*, *supra* note 2 at para 4. The details of the applicant’s health status are discussed at length by both the PAB (*ibid* at paras 4 (majority), 35–81 (dissent)) and the FCA (*Miceli-Riggins*, *supra* note 2 at paras 13–19). The PAB also considered the case law on the interpretation of “disability” (*Miceli-Riggins PAB*, *supra* note 2 at paras 86–94).

¹⁰ Miceli-Riggins would have satisfied this requirement had her child been born in December 1996, or later in 1997 (nearer her due date).

¹¹ Considered by the Supreme Court in *Granovsky*, *supra* note 7.

¹² Also referred to as the Child Rearing Provisions (CRP). For earlier rulings involving the CRDO, see *Harris v Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 22, [2009] 4 FCR 330 [*Harris*] (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); *Taylor v Canada (Minister of Social*

The CRDO allows “any month to be excluded from the contributory period where: (1) the contributor is a ‘family allowance recipient’ as defined in the *Plan* Regulations; and (2) the contributor has earnings for the year below the minimum amount of contribution required for that year.”¹³ Since the applicant received the Child Tax Benefit from February 1997 to 2004, the seven year period following February 1997 could be excluded from her contribution period when assessing the four-of-six requirement.

The second provision considered in this case was the “proration” provision set out in section 19 of the *Plan*. This provides for a proration of the basic exemption amount in a year in which the contributor reaches age 18 or age 70, when a retirement pension becomes payable, when a disability pension becomes or ceases to be payable or when the contributor dies. The purpose of this proration is to ensure that the contributor does not lose the benefit of contributions because his or her earnings fall below the basic exemption amount when a birthday (or other relevant event) happens to occur early in the year.¹⁴ However, pregnancy is not amongst the events included in section 19. The applicant’s main argument was that this was discriminatory and that, in order to rectify this discrimination, the courts should read in pregnancy to section 19. If pregnancy was read in, it would mean that, for Miceli-Riggins, 1997 would have counted as a contribution year and, by dropping out the subsequent years when she received Child Tax Benefits, she would have satisfied the contribution requirements through 2004, long after the period where she appeared to have become disabled.¹⁵

III. Arguments

The applicant argued that both the CRDO itself and section 19 of the *Plan* were discriminatory.¹⁶ Indeed, it appears (although the arguments are not clearly set out by the FCA) that the applicant launched a broader challenge to the *Plan* as it applied to women.¹⁷ It was argued that the overall impact of the contribution requirements of the *Plan* “work together to deny women equal access to a disability pension.”¹⁸ In particular:

Development), 2006 LNCPEN 50 (QL), Appeal No CP 22241 (in which the PAB rejected a general challenge to the upper age limit).

¹³ *Miceli-Riggins*, *supra* note 2 at para 30.

¹⁴ *Plan*, *supra* note 6, s 19(a).

¹⁵ She would have made contributions in 1992–93, 1996 and 1997 (four of the last six years).

¹⁶ The arguments are set out in the most detail in the dissenting ruling of the Honourable JS Moore, a member of the PAB (*Miceli-Riggins* PAB, *supra* note 2 at para 29ff).

¹⁷ *Miceli-Riggins*, *supra* note 2 at paras 38–40. See also the arguments presented to the PAB (*Miceli-Riggins* PAB, *supra* note 2 at paras 149–61).

¹⁸ *Miceli-Riggins*, *supra* note 2 at para 38.

- 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;
- Childbirth physically disrupts a [woman'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;
- Women generally earn less money than men, making it generally harder to satisfy the minimum contribution level required for the year;
- Pregnancy carries risks of disability, meaning that women who give birth may not return to the workforce.¹⁹

The overall impact of the *Plan*, and in particular the CRDO and the proration provisions, was argued to be a breach of section 15(1) of the *Charter*, which provides that

[e]very 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.²⁰

IV. Rulings

A. Pension Appeals Board

The majority of the PAB shortly dismissed the challenge. They summarized the classic test for discrimination from *Law v Canada (Minister of Employment and Immigration)*²¹ as follows:

- (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 [benefit] 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?²²

Despite the PAB's ruling being delivered four years after the Supreme Court's restatement of the approach to section 15 in *Kapp*, the majority made

¹⁹ *Ibid* at para 39. While true, the third point is hardly arguable given the decision in *Canada (AG) v Lesiuk*, 2003 FCA 3, [2003] 2 FCR 697 [*Lesiuk*], while the fourth point did not appear to apply to the applicant.

²⁰ *Charter*, *supra* note 3, s 15(1).

²¹ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 548–49, 170 DLR (4th) 1 [*Law*].

²² *Miceli-Riggins PAB*, *supra* note 2 at para 16.

no reference to that case. As readers will recall, in *Kapp*, 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?”²³

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 “[t]he Child Rearing Dropout Provision which [does] 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.”²⁴

In doing so, the majority relied on general statements from the Supreme Court that “[p]erfect correspondence between a benefits program and the actual needs and circumstances of the claimant group is not required”.²⁵ The dissenting member set out the facts and arguments at great length 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*.²⁶

B. Federal Court of Appeal

The FCA took a different (if equally unclear) approach to the section 15 test. Justice Stratas noted that “[t]raditionally, courts adjudicating section 15 challenges have considered two questions: (1) Does the legislation create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In other words, is there discrimination?”²⁷ 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).²⁸ Rather it dove into a discussion of discrimination, pointing out that different treatment by itself does not infringe section 15.²⁹ Justice Stratas stated that “discrimination is state action, state inaction or legislation

²³ *Kapp*, *supra* note 4 at para 17.

²⁴ *Miceli-Riggins PAB*, *supra* note 2 at para 17.

²⁵ *Withler*, *supra* note 4 at para 67; *Gosselin*, *supra* note 5 at para 55. The majority also referred to *Krock v Canada (AG)*, 2001 FCA 188, 273 NR 228 at para 11, indicating 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”.

²⁶ *Miceli-Riggins PAB*, *supra* note 2 at paras 177–78.

²⁷ *Miceli-Riggins*, *supra* note 2 at para 43, citing *Law*, *supra* note 21, *Kapp*, *supra* note 4 at para 17, and *Withler*, *supra* note 4 at para 30 (as though there was no difference between the approaches adopted in these three cases).

²⁸ *Miceli-Riggins*, *supra* note 2 at para 88.

²⁹ *Ibid* at para 44.

that perpetuates disadvantage and stereotyping”,³⁰ but went on, rather more dubiously, to recall the *Law* approach, stating that “[d]iscrimination 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”.³¹

In a confusing melange, the FCA went on to refer to various approaches put forward by the Supreme Court, including the four contextual factors from *Law* and the more recent discussions in *Withler*, again without any suggestion that there is any tension between the different analyses.³² The FCA then focussed on the “special context of social benefits legislation”.³³ Drawing on several Supreme Court precedents, including *Law* and *Gosselin*, Justice Stratas concluded that “distinctions arising under social benefits legislation will not lightly be found to be discriminatory.”³⁴ In particular, Justice Stratas referred to the Supreme Court’s statement in *Withler* that

[i]n 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.³⁵

Justice Stratas went on to claim erroneously that “the Supreme Court on occasion has required that something quite discernible or concrete, such as

³⁰ *Ibid* at para 46.

³¹ *Ibid* at para 47. Stratas JA avoids using the term “human dignity”, but the reference to dignity can hardly refer to anything else. The Supreme Court previously appeared to reject any reliance on human dignity, referring to it as an “additional burden on equality claimants”. *Kapp*, *supra* note 4 at para 22 [emphasis in original].

³² *Miceli-Riggins*, *supra* note 2 at paras 48–55.

³³ *Ibid* at para 56.

³⁴ *Ibid* at para 57.

³⁵ *Withler*, *supra* note 4 at para 67. A few paragraphs later, the Supreme Court re-emphasized this point, stating that when 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 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 (*ibid* at para 71).

an illegitimate ‘singling out’ of a particular group, must be present before social benefits legislation will be adjudged to be discriminatory”.³⁶ In doing so, he cited Chief Justice McLachlin’s statement in *Auton (Guardian ad litem of) v British Columbia (Attorney General)* that

[i]t 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 [a] 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.³⁷

Leaving aside the current status of *Auton* as precedent, Justice Stratas clearly misreads this paragraph. The Supreme Court was simply giving an example of what *would* involve discrimination (i.e. singling out a disadvantaged group for inferior treatment). It never *required* such singling out as a necessary condition for discrimination. Turning to a consideration of the *Plan*, Justice Stratas pointed out (repeatedly) that the *Plan* is “not a general social welfare scheme” and is “not supposed to meet everyone’s needs.”³⁸

Applying the general principles of law to the facts of the case, Justice Stratas concluded that the claim must fail. His decision was lengthy and to some extent outlined different reasons (or at least, the same reasons couched differently) why the claim must fail. 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.”³⁹ In addition, he found that the applicant had not shown that categories included in (or excluded from) section 19 of the *Plan* were related to an enumerated or analogous ground.⁴⁰

Second, and more generally, Justice Stratas found that

[w]hen 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.⁴¹

³⁶ *Miceli-Riggins*, *supra* note 2 at para 61.

³⁷ *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78 at 41, [2004] 3 SCR 657 [*Auton*] [citations omitted].

³⁸ *Miceli-Riggins*, *supra* note 2 at paras 68–69, 73, 88 [emphasis in original].

³⁹ *Ibid* at para 77 (including the facts that she studied for two years in 1994–95, that her child was born early in 1997, and that her inability to work (i.e. her disability) developed only later).

⁴⁰ *Ibid* at para 80.

⁴¹ *Ibid* at para 84.

He held that “there must be something more that takes the case outside of being a mere artifact of a complex benefits scheme and into the realm of discrimination.”⁴² 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.⁴³ 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.”⁴⁴

Third, the outcome was the result of the specific factual circumstances of the case (though this appears simply to restate earlier arguments). Justice Stratas 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*.”⁴⁵

Fourth, he pointed out that the Supreme Court had indicated that, when analyzing benefit schemes, 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’”.⁴⁶ In Justice Stratas’ view, the lines drawn in the current case were generally appropriate.

Fifth, the CRDO provisions did not contribute to any pre-existing disadvantage, nor were the provisions based on any stereotype of women. Indeed, and sixth, the challenged provisions were “best regarded as ameliorative”,⁴⁷ as evidence showed that the CRDO provisions were much more likely to be relied upon by, and to benefit, women.⁴⁸ Justice Stratas also commented that

[t]he 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.⁴⁹

⁴² *Ibid* at para 85.

⁴³ *Ibid* at para 87.

⁴⁴ *Ibid* at para 88 [emphasis in original].

⁴⁵ *Ibid* at para 93.

⁴⁶ *Ibid* at para 94, citing *Withler*, *supra* note 4 at paras 67, 71.

⁴⁷ *Miceli-Riggins*, *supra* note 2 at para 101.

⁴⁸ See *Miceli-Riggins*, *ibid* at para 103: “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” [citations omitted].

⁴⁹ *Ibid* at para 109.

Relying on the case law, and in particular *Withler*, Justice Stratas concluded that the ameliorative nature of both the CRDO and the proration provisions prevented the applicant from successfully showing discrimination.

Finally, although it does not appear to form part of the *ratio decidendi* of the decision, Justice Stratas noted that the ameliorative nature of the provisions “may have other consequences for the section 15 analysis.”⁵⁰ Specifically, he indicated that the Supreme Court in *Kapp* ruled that an ameliorative law, program or activity under section 15(2) of the *Charter* could not be found to be discriminatory under section 15(1).⁵¹

V. Discussion

A. Equal Protection – Section 15(1)

The Supreme Court of Canada has been subject to much criticism for its approach to section 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 did so in a manner which generated more confusion and left *Charter* jurisprudence concerning section 15 in a worse state than it had previously been under *Law*. To take *Miceli-Riggins* as an example, lower courts and tribunals appear to be entirely unsure of which approach to adopt.⁵² The PAB referred only to *Law* and the majority did not even cite *Kapp*.⁵³ In contrast, the FCA referred to the *Kapp* test as “traditional”⁵⁴ as though there was no difference between this test and the one in *Law*. Indeed, the FCA could argue with some justification that the Supreme Court stated that the two approaches are “in substance” the same,⁵⁵ which begs the question as to why the Supreme Court decided to reframe the issue at all.

This is not an isolated example. There are other cases, as in *Miceli-Riggins*, where the court or tribunal has relied on the notion of human dignity in their

⁵⁰ *Ibid* at para 111 [emphasis added].

⁵¹ *Charter*, *supra* note 3, s 15(2): “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

⁵² See also *Runchey v Canada (AG)*, 2013 FCA 16, 226 ACWS (3d) 104 [*Runchey*]. The FCA adopted a similar approach to that in *Miceli-Riggins* (unsurprisingly as the judgment was authored by Stratas JA).

⁵³ Though the PAB, unlike the FCA, did not refer to the concept of “dignity”.

⁵⁴ *Miceli-Riggins*, *supra* note 2 at para 43.

⁵⁵ *Kapp*, *supra* note 4 at para 14.

section 15 analyses.⁵⁶ Those courts can point to the Supreme Court's reasoning in *Kapp* which, while critical of the use of "human dignity" and referring to it as an "additional burden", conceded that "human dignity is an essential value underlying the s. 15 equality guarantee."⁵⁷ Additionally, there are cases – again like *Miceli-Riggins* – where courts or tribunals cite all the various iterations of the section 15 test without any clear indication as to how they differ.⁵⁸ Courts and tribunals continue to rely on the *Law* contextual factors in their decisions (an approach approved by the Supreme Court).

Although the Supreme Court attempted to clarify the meaning of the phrase "create a disadvantage by perpetuating prejudice or stereotyping"⁵⁹ in *Withler*, this attempt was rather circular and, indeed, the Court's unanimity on the issue fractured in *Québec v A*.⁶⁰ This case involved the issue as to whether provisions of the *Civil Code of Québec* dealing with family assets and spousal support were in breach of section 15 because their application was limited to married and civil union spouses (thus excluding non-married but cohabitating spouses, referred to as *de facto* spouses). It is difficult to extract the *ratio* of this lengthy ruling.⁶¹ Four Justices held that the provisions were compliant with section 15, while the remaining five, including Chief Justice McLachlin, agreed that the provisions were in breach. The five justices who found breaches of section 15, however, differed in their section 1 analyses, as Chief Justice McLachlin held that these provisions were a reasonable limit under section 1 of the *Charter*.⁶² Consequently, the provisions were upheld

⁵⁶ See e.g. 2011-359-AD (*Re*), 2012 CanLII 77348 (NS WCAI) [2011-359-AD]. This Nova Scotia Workers' Compensation Appeals Tribunal decision ruled that, for the purposes of denying a workers compensation claim, a claimant's s 15 rights were not violated by excluding stress injuries not suffered as "an acute reaction to a traumatic event" from coverage (*ibid* at 7). The Tribunal focused 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 2013-273-AD (*Re*), 2014 CanLII 53515 (NS WCAI) [2013-273-AD] (refusal of survivor benefits to a divorced woman not in breach of s 15).

⁵⁷ *Kapp*, *supra* note 4 at paras 21-22. Despite the subsequent ruling in *Withler*, *supra* note 4, the Nova Scotia Workers' Compensation Appeals Tribunal in 2011-359-AD, *supra* note 55, relied on the Nova Scotia Court of Appeal in *Hartling v Nova Scotia (AG)*, 2009 NSCA 130, 314 DLR (4th) 11, 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" (*ibid* at para 37 [emphasis in original]).

⁵⁸ See e.g. *Martin v Canada (AG)*, 2013 FCA 15, [2014] 3 FCR 117 [*Martin*], *aff'g Employment Insurance Act (Re)* (11 September 2009), CUB-76899, online: Employment Insurance Office of the Umpire <www.ei.gc.ca/eng/policy/appeals/cubs/70000-80000/76000-76999/76899.shtml> [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*, SC 1996, c 23. The EI Umpire stated that "[w]hether the 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." CUB-76899, *supra* note 58.

⁵⁹ *Withler*, *supra* note 4 at para 61ff.

⁶⁰ The *Québec v A* decision was delivered after *Miceli-Riggins* was argued, but before the judgment was delivered. It was not referred to by Stratas JA in his reasoning in *Miceli-Riggins*. See generally Koshan, "Under the Influence", *supra* note 4 at 134-37 (for a discussion of the Court's differing analyses of s 15).

⁶¹ See generally Biddulph & Newman, *supra* note 4 (for a discussion of how Canadian courts should treat the *Québec v A* ruling, specifically concerning issues of *ratio decidendi* and *stare decisis*).

⁶² The remaining three justices (Deschamps, Cromwell and Karakatsanis JJ) who agreed with Abella J that

as constitutional. For our purposes, the importance of this case lies in the approach taken to the interpretation of section 15.

Justice Abella, in one of the opinions that found a section 15 breach, took the view that discrimination under section 15 did not necessarily require a showing of prejudice or discrimination. She held that

[i]n 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.⁶³

She was satisfied that the provisions were in breach of section 15 as they perpetuated a historic disadvantage against *de facto* couples based on their marital status.⁶⁴ 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.”⁶⁵

Justices Deschamps, Cromwell and Karakatsanis agreed with Justice Abella 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.⁶⁶

Chief Justice McLachlin also agreed with Justice Abella’s section 15 analysis.⁶⁷ She took a broad approach to what constituted discrimination, stating that in order

[t]o 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

there had been a breach of s 15 rights held that the exclusion of *de facto* spouses was not justified under s 1, but held that the remainder of the challenged provisions were justified.

⁶³ *Québec v A*, *supra* note 4 at para 325 [emphasis in original] [citations omitted]. Interestingly, this approach has been followed by the Ontario Workplace Safety and Insurance Appeals Tribunal in one of the few successful s 15 cases concerning social benefits, *Decision No 2157/09*, 2014 ONWSIAT 938, 15 CCEL (4th) 28 [Decision No 2157/09].

⁶⁴ *Québec v A*, *supra* note 4 at para 356.

⁶⁵ *Ibid* at para 357.

⁶⁶ *Ibid* at paras 382–85.

⁶⁷ *Ibid* at para 416.

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.⁶⁸

The Chief Justice found that the provisions perpetuated a pre-existing disadvantage and also relied on false stereotypes.⁶⁹

In contrast, the minority judgment on section 15 (authored by Justice LeBel) re-emphasized the importance of human dignity in a section 15 analysis.⁷⁰ Having reviewed the case law from *Andrews v Law Society of British Columbia*⁷¹ to *Withler*, Justice LeBel emphasized that “a discriminatory disadvantage is as a general rule one that perpetuates prejudice or that stereotypes”.⁷² Absent such a *discriminatory* disadvantage, there could be no breach of section 15.⁷³

It might be argued that Justice Abella's analysis advanced equality law by indicating that a broader approach should be taken with regards to what constitutes disadvantage in a section 15 analysis. However, the narrow basis of the majority concerning section 15, combined with the ultimate outcome of this case and the difficulty in identifying a formal *ratio*, might rather suggest that the Supreme Court is quite split on which analytical approach to adopt when considering section 15 challenges. Furthermore, it could be argued that some of the weaknesses of the *Kapp* restatement spring from this fundamental division of views.⁷⁴

This uncertainty at the highest court has arguably led to a situation where lower courts and tribunals have simply replaced the term “human dignity” with “perpetuating prejudice or stereotyping” in their analyses and are applying their own sense of what is appropriate to the facts before them, leading to precisely the same results as under the *Law* test.⁷⁵ In the absence of

⁶⁸ *Ibid* at paras 417–18 [citations omitted].

⁶⁹ *Ibid* at paras 427–28.

⁷⁰ *Ibid* at para 138.

⁷¹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

⁷² *Québec v A*, *supra* note 4 at para 171.

⁷³ *Ibid* at paras 175–76.

⁷⁴ See also Koshan, “Under the Influence”, *supra* note 4 at 136, which states that we cannot take Abella J's approach to be “the definitive approach to equality rights under section 15 given the complicated split in *Québec v A*”.

⁷⁵ 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. See e.g. *R v Heubach*, 2010 TCC 409, 2010 DTC 1299, following *R v Barnett*, 2005 TCC 719, 2005 DTC 1692 (as to the Child Tax Benefit for joint custodial parents). See also the Ontario Workplace Safety and Insurance Appeals Tribunal in *Decision No 681/10*, 2012 ONWSIAT 1019, [2012] OWSIATD No 1025 [*Decision No 681/10*], which, when considering issues concerning a reduction in the cumulative value of impairments (where a person suffers more than one injury), came to the same (negative) conclusions as earlier rulings, albeit on the basis of a fresh consideration of the legal issues. The Tribunal also, rather dubiously, concluded that a distinction (if any) was on the basis of “impairment” rather than “disability” (*ibid* at para 45). In fairness, one should say that the same Tribunal in *Decision No 512/06*, 2011 ONWSIAT 2525, [2011] OWSIATD No 2505, carried out a detailed legal and contextual analysis in coming to the conclusion that the limitation of loss of earnings

clear guidance, lower courts and tribunals have simply relied on their intuitive sense of what does or does not constitute discrimination.

Finally, even if the Supreme 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.⁷⁶ Several of the recent cases involving social benefits have relied on the Supreme Court’s statement that perfect correspondence is not required.⁷⁷ It is noteworthy that there appears to have been only one recent case involving social benefits in which a section 15 challenge was successful.⁷⁸

Of course, in itself this statement is unexceptional. The *Plan* is not a general social welfare scheme for all and, while it may be anomalous that Miceli-Riggins would have qualified for benefit coverage had she given birth in December 1996 or later in 1997, this does not in itself indicate discrimination. The problem is that 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”⁷⁹ and thereby avoid a proper examination of the issue.

In this case, the likelihood of a positive outcome was perhaps undermined by the fact that the applicant’s lawyers ran a broad brush attack on the *Plan*, including the CRDO. There is 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.⁸⁰ But no court in any country has held

benefits to two years for a person aged 63 was not a breach of s 15.

⁷⁶ As we have seen, the Supreme Court had raised this issue previously in cases such as *Law*, *supra* note 21 and *Gosselin*, *supra* note 5.

⁷⁷ See e.g. *Fannon v Canada (Revenue)*, 2012 FC 876 at 21, 415 FTR 160 (concerning the Child Tax Benefit for non-custodial parents); *Decision No 681/10*, *supra* note 75 at para 65; *Martin*, *supra* note 58 at para 120; *Runchey*, *supra* note 52 at para 140; *2013-273-AD*, *supra* note 56 at 8, 14.

⁷⁸ *Decision No 2157/09*, *supra* note 63. This case concerned the limitations of compensation for mental stress which were found to be contrary to s 15 and not saved by s 1. As noted above, this case followed *Abella J’s* s 15 approach from *Québec v A*. In addition to unsuccessful cases already cited, see also *SG c Tribunal administratif du Québec*, 2012 QCCS 2435, [2012] JQ No 5152 (taking into account alimentary pensions in the calculation of social assistance was not in breach of s 15); *SM c Québec (Ministre de l’Emploi et de la Solidarité sociale)*, 2012 QCTAQ 061127, 2012 LNQCAQ 147 (person not entitled to social assistance of last resort while cohabiting with a person in employment); *R v Astley*, 2012 TCC 155, 2012 DTC 1162 (entitlement to the Child Tax Benefit in the case of the two persons who were married but have not commenced living together); *Côté c Commission de la santé et de la sécurité du travail*, 2012 QCCA 1146, 2012 JQ No 5875 (reduction in income replacement indemnity in the case of persons suffering a work injury when 64 years of age); *Fannon v Canada (Revenue)*, 2013 FCA 99, 2013 DTC 5088, aff’g 2012 FC 876, 415 FTR 160. 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 HRTO 360, 69 CHRR D/300; *Martel v Ontario (Community and Social Services)*, 2012 HRTO 735, [2012] OHRID No 729; *Northwest Territories (Workers’ Compensation Board) v Mercer*, 2012 NWTSC 57, [2012] 12 WWR 164.

⁷⁹ *Miceli-Riggins*, *supra* note 2 at para 85.

⁸⁰ *Shahra Razavi et al*, “Gendered Impacts of Globalization: Employment and Social Protection” (2012)

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 FCA has rejected a challenge to the lower work limit for employment insurance in *Lesiuk*.⁸¹ In that case, a woman was denied benefits under the *Employment Insurance Act* as she fell just short of the required 700 hours worked within a particular qualification period. However, the Supreme Court ruled that this did not amount to discrimination contrary to the *Charter*. Similarly, it is hard to see how the FCA in *Miceli-Riggins* could have found the CRDO to be discriminatory. The challenge should have been directed specifically against the proration provision of section 19 of the *Plan*. These provisions applied to the standard “risks” that social security schemes protect against, such as age, disability and death, but *not* to people who ceased work due to pregnancy or who avail of the CRDO.⁸² The reason for this distinction was not even discussed by the PAB nor by the FCA. One might speculate that this was due to inadvertence on the part of the legislature but, absent proper analysis, we do not know.

The FCA stated that the objective of the proration provision was to ensure a person was not disadvantaged by virtue of the fact that, because of the occurrence of one of the specific enumerated events, they could not work and contribute to the *Plan*.⁸³ All of the enumerated events can impact *both* men and women, but maternity, arguably a comparable event, applies *only* to women and is excluded. Likewise, women are much more likely to avail of the CRDO. No specific rationale for the exclusion of these events has been advanced.⁸⁴ It might perhaps be countered that the proration provision is confined to “long-term” events – unlike maternity – but the courts never engaged with these issues.⁸⁵ The dismissal of the argument on the basis that giving birth early in the year is not an enumerated ground shows a total lack of understanding of equality issues similar to the flawed pre-*Charter* analysis of pregnancy-related

United Nations Research Institute for Social Development Research Paper No. 2012-3, online: <[www.unrisd.org/80256B3C005BCCF9/6E16D1DC33F5D82BC12579D000478859/\\$file/Dfid%20paper.pdf](http://www.unrisd.org/80256B3C005BCCF9/6E16D1DC33F5D82BC12579D000478859/$file/Dfid%20paper.pdf)>.

⁸¹ *Lesiuk*, *supra* note 19. The reasoning in *Lesiuk* is arguably as unconvincing as in the present case, but courts in other jurisdictions have consistently upheld similar lower earnings thresholds for social insurance purposes. See e.g. *Nolte v Landesversicherungsanstalt Hannover*, Case C-317/93, [1995] ECR I-4624 (ECJ); *Fisher v Secretary of Health, Education and Welfare*, 522 F (2d) 493 (7th Cir 1975).

⁸² In *Miceli-Riggins PAB*, *supra* note 2 at para 111, 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 of the *Plan* (rather than the words “or in which she gives birth to a child”). Before the PAB (the point was not discussed by the FCA), the Minister had argued that the PAB should not “read in” such a provision, citing *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1 [*Schachter*]. 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 involved a much more significant reading in. However, the issues were not fully (or even partially) addressed in this case.

⁸³ *Miceli-Riggins*, *supra* note 2 at para 109.

⁸⁴ It seems likely that this was largely due to inadvertence but this is only speculation.

⁸⁵ Child care (as allowed for under the CRDO) is also a long-term event so this argument would hardly apply.

discrimination.⁸⁶ 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 as the only ones who give birth.

If we look at the *Kapp* questions, the proration provision arguably does create a distinction based on an enumerated ground, i.e. sex, in that they cover a range of events which can happen to men and women, but omit an event (childbirth) which can happen only to women.⁸⁷ Second, the distinction does create a disadvantage by perpetuating stereotyping, specifically that conditions which stop men from working (such as disability) are important and therefore enumerated, while events which stop women from working (such as childbirth or child care responsibility) are not. Thus, in the absence of any clear justification, the proration provision could be found to be in breach of section 15 of the *Charter*.

B. Ameliorative Laws – Section 15(2)

As we have seen, Justice Stratas suggested that the ameliorative nature of the provisions might have “other consequences” for a section 15 analysis, and that the Supreme Court in *Kapp* had ruled that under section 15(2) of the *Charter*, an ameliorative law, program or activity cannot be found to be discriminatory under section 15(1).⁸⁸ At first sight, this suggestion might appear to be persuasive.⁸⁹

In its early jurisprudence, section 15(2) was simply seen as an aid to interpretation of the principle of equal treatment set out in section 15(1).⁹⁰ However, the Supreme Court in *Kapp*, ill-advisedly and unnecessarily, erected section 15(2) into a free-standing test which appears to protect ameliorative provisions from challenge:

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.⁹¹

Kapp dealt with a section 15 challenge, filed by a majority group, against an ameliorative provision protecting an enumerated minority

⁸⁶ *Bliss v Canada (AG)*, [1979] 1 SCR 183, 92 DLR (3d) 417, rev'd *Brooks v Safeway Canada*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

⁸⁷ Or, in the alternative, an event which is much more likely to happen to a woman (i.e. the beginning of a CRDO period).

⁸⁸ *Miceli-Riggins*, *supra* note 2 at para 111.

⁸⁹ See also Jonnette Watson Hamilton & Jennifer Koshan, “The Supreme Court of Canada, Ameliorative Programs, and Disability: Not Getting It” (2013) 25:1 CJWL 56.

⁹⁰ *Lovelace v Ontario*, 2000 SCC 37, [2001] 1 SCR 950.

⁹¹ *Kapp*, *supra* note 4 at para 41.

group. *Miceli-Riggins*, on the other hand, concerned a challenge to an underinclusive ameliorative provision. The Supreme Court considered a similarly underinclusive provision in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*.⁹² In that case, Alberta's *Metis Settlements Act*⁹³ provided that voluntary registration under the *Indian Act* precluded membership in a Métis settlement. Members of a Métis community in Alberta were registered as Status Indians in order to obtain medical benefits under the *Indian Act*.⁹⁴ As such, the challenged *MSA* provisions deprived them of their Métis status for the purposes of qualifying for the *MSA*'s ameliorative provisions. The claimants argued that this was in breach of the *Charter* guarantees of equality (section 15), liberty (section 7) and freedom of association (section 2(d)).⁹⁵ The Supreme Court ruled that the section 15 claim must be dismissed as the provision was protected by section 15(2). The Court stated that where the government relies on section 15(2) to defend a 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.⁹⁶

The Court concluded:

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 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.⁹⁷

The Court noted that a distinction will not be considered to be in service

⁹² *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 [Cunningham].

⁹³ *Metis Settlements Act*, RSA 2000, c M-14 [MSA].

⁹⁴ *Indian Act*, RSC 1985, c I-5.

⁹⁵ The rulings concerning the claimants' s 2(d) and s 7 rights are not considered here, but ultimately the claimants were unsuccessful on all three challenges.

⁹⁶ *Cunningham*, *supra* note 92 at para 44 [citations omitted].

⁹⁷ *Ibid* at para 45 [citations omitted].

of or advancing an ameliorative goal if, for example, in its pursuit of said goal, "the state chooses irrational means".⁹⁸

On its face, the drop-out (CRDO) and proration provisions can be described as having "an ameliorative or remedial purpose" and they clearly target disadvantaged groups which are included in the enumerated or analogous grounds under section 15(2). 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 provision, if (as I speculate) there is no clear reasoning for the exclusion of maternity/child care responsibilities, it would be difficult to argue that the exclusion was rational and that it advanced the objective of the program. Consequently, the provision may not be protected under section 15(2). However, a final conclusion must await clarification by the Supreme Court of the role of section 15(2) in relation to underinclusive ameliorative programs.

C. Reasonable Limits – Section 1

This article has argued above that the proration provision could be found to be in breach of section 15. However, had the FCA found that the provision was discriminatory under section 15, the provision could still have been upheld under section 1 of the *Charter* as a reasonable limit that could be demonstrably justified in a free and democratic society. In order to be justified under section 1, the provision would have to satisfy the test from *R v Oakes*.⁹⁹ Chief Justice Dickson (as he was then) established this well-known test which first requires that the objective of the law being challenged be "pressing and substantial in a free and democratic society".¹⁰⁰ The second part of Chief Justice Dickson's test involved a proportionality analysis, divided into three elements:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".¹⁰¹

It seems very unlikely that this rather minor provision of a complicated social benefits scheme could be shown to address a "pressing and substantial" objective or that it could satisfy the other aspects of the test, given that it seems

⁹⁸ *Ibid* at para 46.

⁹⁹ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes* cited to SCR].

¹⁰⁰ *Ibid* at 138–39.

¹⁰¹ *Ibid* at 139 [citations omitted]. For a recent application of the test, see McLachlin CJC's analysis in *Québec v A*, *supra* note 4 at paras 432–49.

most likely that pregnant women were excluded by inadvertence rather than for any clear rationale. Consequently, it seems unlikely that the FCA would have upheld the proration provision of the *Plan* under section 1.

VI. Conclusion

The Supreme Court in *Kapp* and subsequent cases has attempted to respond to the criticisms which have been levelled against its *Law* analysis, and in particular the concept of human dignity, which served as the legal test for section 15 violations in its earlier jurisprudence. The response was to restate the Court's "commitment to substantive equality",¹⁰² but – as shown in cases such as *Miceli-Riggins* – it is clear that this attempt, however praiseworthy, has not been successful. It would be difficult to argue that achieving the goal of substantive equality through the legal system is any easier now than it was in 2008. 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 seven years, except that there is possibly less clarity as to the correct approach to apply.

This uncertainty 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.¹⁰³ In light of the differing opinions in *Québec v A*, one might suspect that some of the lack of clarity arose from divisions within the Court itself. If the worthy objectives outlined in *Kapp* are to be achieved, a further and clearer restatement of the law is required.

Furthermore, 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 stressing the need for judicial restraint. Of course, few would suggest that perfect correspondence is necessary, and courts in the United States 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 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.¹⁰⁴

¹⁰² *Kapp*, *supra* note 4 at para 14.

¹⁰³ The more things change, the more they stay the same.

¹⁰⁴ See e.g. *Downey v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 65, 169 ACWS (3rd) 999, leave to appeal to SCC refused, 32822 (11 December 2008); *Harris*, *supra* note 12, leave to appeal to SCC refused, 33091 (9 July 2009).

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