

Law, State, & Citizen Class 8 - Lecture

Equality

Outline for Today:

1. Equality and the Charter
 - Relationship between the two. Formal and substantive equality.
2. Equality's conundrums.
 - Challenges and ethically quagmires.
3. An overview of the SCC's approach to s.15:
 - Andrews (1989)
 - Law (1999)
 - Kapp (2008)
 - Three most important cases to understand how the SC approaches section 15 of the charter, we need preceding cases to understand Kapp.
 - Equality as a legal ethical principle enshrined in section 15 has been one of the most tricky challenges of the charter.
 - We can see how case law has evolved and transitioned away from formal equality to substantive equality and arguably back to formal and now to a differently defined version of equality.
 - Kapp decision connects with indigenous issues.

Equality and the Charter: s.15:

15:

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
 - These are particular attributes. It says in particular not exclusively.
 - If you notice class is missing from this list.
- (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.
 - One of the challenges of equality law, is if you are not careful it means you you are not able to pursue the creation of substantive equality in the present because doing so perhaps means treating different groups differently.

Equality's Contentious Meanings:

- What is equal treatment?
 - Formal
 - "Similarly situated"
 - You treat similarly situated persons the same.
 - It starts comparative groups - is this group similarly situated like this group if so they should be treated the same.
 - Substantive
 - Differential treatment can be justified.
 - Inequality has skyrocketed.
 - We are reaching such levels of inequality in democratic western societies that we are going backwards.
 - When inequality reaches a certain level - meritocracy starts to break down. It's bad for society. Equality is crucial for individuals who have suffered discriminatory treatments but it is something that effects us all. Society stops functioning once we've reached that point.
- Historical and theoretical debates
 - Aristotle:

- “Distributive justice” (socially just allocation of goods).
 - That doesn’t mean everyone gets the same, it has to be socially just.
- Rousseau:
 - ‘Natural’ (in)justice (e.g. health) vs. ‘social’ (in)justice (e.g. property.)
 - All kinds of injustices, they are broken in two these two groups.
 - Some people have better health and live longer - therefore natural justice.
 - Social injustice is distribution of private property, some people have better housing.
 - But we know that untrue, health comes from what you can eat and exercise and not everyone has that luxury.
- Marx:
 - Materialist analysis of inequalities under capitalism.
 - Equality is central to Marx. He was a critique of capitalism.
 - Material equality and material inequality is at the core of an marxist jurisprudence.
- John Rawls: Justice as a blend of:
 - (1) Equality of basic rights.
 - (2) Compensation to address social & economic inequalities.
 - This is a pragmatic/liberal approach in which the existence of social inequalities is recognized and then basically you need subsection two of s.15 - you need amelioration. Identify inequalities and do your best to fix them.

A Brief History of S.15 Decisions:

- Analytical framework for s.15 has undergone significant revision:
 - 1982: Charter
 - But section 15 isn’t there.
 - 1985: s.15 comes into effect.
 - This 3 year delay gives the governments enough time to bring legislation into conformity with charters equality provisions.
 - 1989: first s.15 decision: Andrews.
 - Didn’t create much of a test but affirms a shift from formal to substantive equality.
 - Gives you ethically/ideological direction.
 - 1999: Law
 - Created multi-step framework
 - Heavily criticised.
 - Tries to fix lack of a test. They said they were not going to create a test but they ended up doing just that.
 - 2008: Kapp
 - Revisited the test and took a different approach.

Andrews v. Law Society of British Columbia:

- In Andrews, the Supreme Court heard the claim of a British lawyer who sought to practise law in British Columbia but was barred from doing so because he was not a Canadian citizen
- Court faced the dual challenge of defining the rights set out in section 15(1)
 - i) How to establish the contents of an equality guarantee?
 - ii) How to identify discrimination?
- The decision is known for the Court’s rejection of “formal equality” in favour of what would come to be known as “substantive equality”.

Andrews (Continued): Formal vs. Substantive equality:

- Formal equality:
 - Laws are applied in a similar manner to all those who are “similarly situated”.
 - But can result in inequality:
 - Bliss v. Attorney General of Canada (1979): claimant argued that she was discriminated against on the basis of sex because her pregnancy disentitled

her to unemployment benefits. The Court dismissed her claim, because all pregnant persons were treated alike.

- Because all pregnant people are treated alike - there no inequality here. But there is. You can't treat all groups of people the same, it's not a guarantee of justice.
- In Andrews this approach was held to be "seriously deficient".
- Principle of treating likes alike could have been used to justify Hitler's Nuremberg laws or the racial segregation decision of Plessy v. Ferguson_of 1896.

Andrews (Continued): Formal vs. Substantive equality:

- Substantive equality:
 - "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. [The purpose of s.15] **has a large remedial component.**" (Andrews)
 - MacIntyre did not use the term, but this view of equality became known as "substantive equality".

Andrews (Continued): Discrimination:

- Andrews also provided a definition of discrimination:
 - "a distinction, **whether intentional or not** but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society."
- Rejected formal equality in favour of substantive equality, but Andrews did not provide a formal test for deciding s.15 claims.
 - Gives you an ethical kind of decision but no formal test.

Law v. Canada [1999] 1 SCR 497:

- After Andrews 30+ SC deacons on s.15, but:
 - S.15: "Perhaps the charters most conceptually difficult provision"
 - Law para. 2.
- Unsuccessful claim brought by a young widow, Nancy Law, against two provisions of the Canada Pension Plan.
- The provisions allow for spouses to receive survivor benefits if, at the time of their spouse's death, they are over the age of 35, or disabled, or have dependent children.
- Ms. Law was 30, able-bodied and childless: was denied a survivor's benefit. She alleged that the provisions were discriminatory on the basis of age.

Laws v. Canada [1999] 1 SCR 497:

- "I think it sensible to articulate the basic principles under s.15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the Charter must be **purposive** and **contextual**. The guidelines which I review below are just that – points of reference ..." (para. 6)
- Unfortunately they did create a mechanical test.
- But, impact the opposite: the creation of a rigid and complex text.

What they set to do is set out to do in law is articulate some principles as a guideline for analysis.

- If it was to mechanistic all sorts of situations the test had not envisioned would slip through the cracks.

Law v. Canada: Formalization of the Test:

- Test developed in Law:
 1. The challenged law imposes (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons;

- Pension plan in Law (the case) - put a disadvantage on her based on her age.
- 2. The disadvantage is based on a ground listed in **or analogous to** a ground listed in s. 15; and
 - Age is on the list in section 15. (Even If not in the list, still doable).
- 3. The disadvantage also constitutes an **impairment of the human dignity** of the claimant.
 - How do you detect if your human dignity is imparted?
 - The case of law was unsuccessful.
- Claimant to prove each comment of balance of probabilities.
- Each component included various subparts.

Law v. Canada: Formalisation of the Test:

- 1. Imposing a disadvantage (2 part)
 - i) How to detect a disadvantage?
 - Is there direct or indirect discrimination? (In Law claimant alleged a direct disadvantage based on age)
 - ii) How to demonstrate distinction between claimant and others?
 - “Comparator group”
 - In Law survivors aged 35 or older.

Law v. Canada: Formalisation of the Test:

- 2. Listed or analogous grounds:
 - Seven listed, known as “enumerated grounds”:
 - Race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
 - List not exhaustive — an open list.
 - Andrews - SC recognized citizenship as an analogous ground.
 - Analogous grounds?
 - “immutable, difficult to change, or changeable only at unacceptable personal cost”
 - Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, para. 60
 - Citizenship, sexual orientation, marital status, Aboriginality-residence have been recognized as analogous grounds.

Law v. Canada: Formalisation of the Test:

- 3. Impairment of human dignity.
 - Claimants had to establish that their human dignity was impaired by the imposed burden or withheld benefit
 - Four factors:
 1. Pre-existing disadvantage, stereotyping, prejudice or vulnerability.
 2. Correspondence between claim and the claimant’s need.
 - This is tricky. Nancy Law had to demonstrate she needs the benefits so much if she didn’t get it her human dignity is impaired.
 3. Ameliorative purpose or effect of the impugned law.
 4. Nature and scope of the impugned law.

Law v. Canada: Legacies:

- Much Criticism!!
- Because:
 - The human dignity test.
 - Comparator groups.
 - The return to a formal equality perspective.
- Small Group Activity:
 - Look again at slide 12: what do you think are the strengths and weaknesses of the Law 3-part test?

Kapp: The Beginning of the end of the Law test:

- There was much critique that the Law test was an unfair barrier to equality claimants: R. v. Kapp (2008) moved away from the rigidity of the Law test.
 - Tries to remedy this.
- Kapp: claim brought by a group of mostly non-Aboriginal commercial fishermen who challenged certain licences issued under the federal Aboriginal Fisheries Strategy.
 - They argued that the Strategy, which granted additional fishing rights to three First Nations, discriminated against the commercial fishers on the basis of race.
 - They were unsuccessful in their claim.
- Outcome: The Court:
 1. Reaffirmed its commitment to substantive equality.
 2. Distance itself from the human dignity components of the Law test.
 3. Established a much more prominent role for section 15(2), which protects ameliorative programs from claims of discrimination.

R. v. Kapp (2008):

- Reaffirmed substantive equality
 - “Criticism has [...] accrued for the way Law has allowed the formalism of some of the Court’s post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focused on treating likes alike.” (Kapp, para. 22)
- Revisited “human dignity”
 - Placed an additional burden on s.15 claimants.
- “Amelioration” — a role for s.15(2).
 - Clearly anticipated by section 15(2).

R. v. Kapp (2008):

- S. 15(2):
 - “seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups.”
 - Kapp, para. 33.
- S. 15(2):
 - “tells us, in simple, clear language, that s.15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s.15.”
 - Kapp, para. 38.
 - In effect subsection 2 in the Kapp decision is conceived as something that protects and ensures legitimacy of policy that is dubbed reversed discrimination.
- S. 15(2):
 - In effect, protects what is sometimes dubbed “reverse discrimination”.

R. v. Kapp (2008):

- S.15(2) Test:
 - “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.”
 - Kapp, para. 41
 - This is the test to establish whether or not something falls foul of section 15.

R. v. Kapp (2008):

- Kapp did not openly reverse Laws, the SC never again applied the Laws test.
- Kapp Referred to the Andrews “template”:
 - “(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?”
 - Kapp, para. 17.

S.15 Conclusion:

- Section 15 has been a vexing one for the courts.
 - Significant changes since Andrews (1989).
 - Commitment to substantive equality a theme, although this waned in the wake of the Law decision.
 - Kapp moved away from the rigid Law test which scholars argued acted as an impediment to s.15 claims.
 - Its clear how law really did create this additional hurdle - this human dignity test.
 - However, the changes established in the Kapp decision have yet to result in a single successful s.15 claim at the SC.