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A Vote for R. v. Kapp as the Leading Equality Case of the Past Decade

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R. v. Kapp, 2008 SCC 41 is my nominee for the most significant case of the Aughts decade in the equality rights area. *Kapp* was destined to be a landmark case, if only because it involved the first direct challenge on the enumerated ground of race under the *Charter*'s equality guarantee that was heard by the Supreme Court of Canada. However, because the Court used *Kapp* as a vehicle to substantially and substantively revise its approach to section 15 claims, the decision is even more significant.

First, the Court restated the approach courts are to take to claims under section 15(1) of the Charter, synthesizing the approach in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 to the framework in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and leaving little or nothing of the former. The renewed role of *Andrews* and the new two-part test for equality claims is clearest in this passage from *Kapp* (at para. 17):

The template in *Andrews*, as further developed in a series of cases culminating in *Law* . . ., established in essence 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?

The Court noted (at para. 21) that *Law*'s attempts to use human dignity as a legal test had created several problems. Human dignity, acknowledged (at para. 22) to be an abstract and subjective notion that was often confusing and difficult to apply, had moreover proven to be an additional burden on equality claimants. Despite these negative comments, however, the Court did not specifically ban human dignity from future equality analyses; nor did it overrule *Law*. The Court also conceded that *Law* had been criticized for the formalism of its artificial comparator analysis focused on treating likes alike. Unfortunately, the Court said nothing more about comparator groups in *Kapp*, creating uncertainty about their role in the analysis.

Second, the Court gave independent significance to section 15(2) of the *Charter* in *Kapp*, exploiting an opening left by *Lovelace v. Ontario*, [2001] 1 S.C.R. 950, which had confined it to an interpretative aiding role. The burden of adducing evidence of the purpose of ameliorative laws and programs has been shifted to government under the new section 15(2) approach. *Kapp*'s new approach to section 15(2) - its new role and test for application - may prove to be a

turning point in equality jurisprudence, although the failure of the new approach to accommodate claims of under-inclusiveness must be remedied.

The Alberta connection is not just the obvious one of applying - or not applying - the new framework from *Kapp* to cases of claims under section 15 of the *Charter*. Two subsequent decisions of the Alberta Court of Appeal, *Morrow v. Zhang*, 2009 ABCA 215, and *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239 are examples of that type of connection. But, in addition, it was in a case out of Alberta that the Supreme Court first applied the new analytical framework from *Kapp* to a section 15(1) claim.

Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9, largely dealt with the federal government's treatment of oil and gas royalties under the *Indian Act*, R.S.C. 1985, c.I-5. However, the bands also challenged several sections of the Act that provided for the management of "Indian moneys," and to the extent those sections stopped the Crown from investing or transferring the royalties, the bands argued they violated section 15. The framework used by the Court to analyze this claim was the two-part test from *Kapp*. There is no reference to *Law* in *Ermineskin* at all. The phrase "human dignity" does not appear. Context was said to be the larger social, political and legal context of the impugned legislation, borrowing from *R. v. Turpin*, [1989] 1 S.C.R. 1296. The *Ermineskin* decision therefore provides a strong signal that *Kapp* is now the leading decision in the equality rights area.