

# Equality Through Affirmative Action - Section 15(2)

**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.*

**(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.*[\[1\]](#)

## **Equality Rights: How Sections 15(1) and 15(2) Work Together**

Section 15 of the *Canadian Charter of Rights and Freedoms* requires that the government respect equality rights. The section contains two subsections that work together towards the goal of preventing discrimination and promoting equality for everyone before and under the law.[\[2\]](#) Section 15(1) aims to prevent governments from discriminating based on personal characteristics such as race, sex, or age.[\[3\]](#) Section 15(2) allows governments to establish programs to improve the situation of specific disadvantaged groups, so that equality with all other groups can be achieved.[\[4\]](#)

In order to approach equality for everyone before and under the law, the impact of the law on the individual or group affected must be considered.[\[5\]](#) The concept of equality in section 15 recognizes that not all differential treatment between individuals results in inequality and that treating everyone the same can sometimes lead to serious inequality due to the differences between individuals.[\[6\]](#)

For example, in the Supreme Court of Canada case of *Eldridge v British Columbia (Attorney General)*, the deaf were unable to benefit in the same way as other patients from the government-funded hospital services because of the government's decision to not provide funding for sign language interpreters.[\[7\]](#)

In this case, the lack of sign language interpreters made it difficult for a deaf patient who was giving birth to effectively communicate with her doctor.[\[8\]](#) Her twin babies were taken from her immediately after birth following a medical complication, but no one could effectively communicate the reason to her.[\[9\]](#) The Court stated that the government's failure to provide sign language interpreters for the deaf patient did not allow for equal access to the government-funded hospital services, and was contrary to the equality guarantee of section 15.[\[10\]](#)

## **The Purpose of Affirmative Action Programs in Section 15(2)**

The purpose of including the affirmative action programs in section 15(2) of the *Charter* is to protect government programs that only benefit specific disadvantaged groups from otherwise being viewed as discriminatory under section 15.<sup>[11]</sup> Disadvantaged groups include those that may have been historically marginalized because of their race, sex, age, or mental or physical disability. Section 15(2) allows governments to establish programs that aim to improve the situation of such groups, so that equality with all other groups can be achieved.<sup>[12]</sup>

### **How is Section 15(2) Used?**

The government can use section 15(2) as a defence when an individual or group can show that a government program treats them differently based on personal characteristics.<sup>[13]</sup>

For example, in the Supreme Court of Canada case of *R v Kapp*, non-Aboriginal commercial fishers argued that a government program discriminated against them on the basis of race by granting Aboriginal fishers an exclusive fishing license.<sup>[14]</sup> Even though the non-Aboriginal fishers were able to show that the government gave preferential treatment to Aboriginal fishers because of their race, the program was still allowed because it was a valid affirmative action program within the scope of section 15(2).<sup>[15]</sup> The government was able to show that the program was aimed at improving the situation of the Aboriginal fishers who have been historically disadvantaged.<sup>[16]</sup>

<sup>[1]</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>[2]</sup> *R v Kapp*, 2008 SCC 41 at para 16 .

<sup>[3]</sup> *Ibid.*

<sup>[4]</sup> *Ibid.*

<sup>[5]</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at para 8 .

<sup>[6]</sup> *Ibid.*

<sup>[7]</sup> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624.

<sup>[8]</sup> *Ibid* at paras 6-7.

<sup>[9]</sup> *Ibid* at para 6.

<sup>[10]</sup> *Ibid.*

<sup>[11]</sup> *Kapp*, *supra* note 2, at para 33.

<sup>[12]</sup> *Ibid* at para 16.

<sup>[13]</sup> *Ibid* at para 40.

[\[14\]](#) *Ibid.*

[\[15\]](#) *Ibid.*

[\[16\]](#) *Ibid* at para 58.