Meaningless Mantra: Substantive Equality after *Withler*

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This article examines the contribution made by the Supreme Court of Canada's decision in Withler v Canada (Attorney General) *to equality rights jurisprudence under section 15(1) of the* Canadian Charter of Rights and Freedoms. *The Court's approach to issues concerning substantive equality, the use of comparative analysis and comparator groups, and the role and application of the contextual factors from* Law v Canada *are addressed. The authors raise concerns about the Court's narrow definition of discrimination, its return to the language of "relevance", the ways in which the Court imports section 1 justification considerations into the section 15(1) analysis, and the Court's lack of attention to the broader context beyond the benefits scheme at issue, including its lack of attention to the gender and class dimensions of the case. Overall, the authors conclude that although the Court has repeatedly stated a commitment to the principle of substantive equality in its section 15(1)* Charter *decisions,* Withler *is another example in a long line of cases that fails to give effect to that principle.*

Les auteures de cet article examinent la contribution de l'arrêt de la Cour suprême du Canada dans Withler c. Canada (Procureur général) *à la jurisprudence en matière de droits à l'égalité selon le paragraphe 15(1) de la* Charte canadienne des droits et libertés. *Elles abordent l'approche de la Cour des questions liées à l'égalité réelle, l'utilisation de l'analyse comparative et de groupes de comparaison, ainsi que le rôle et l'application des facteurs contextuels dans* Law c. Canada. *Elles soulèvent des inquiétudes par rapport à la définition retreinte que la Cour donne à la discrimination, son retour au langage de « l'intérêt », les moyens auxquels la Cour importe des considérations liées au motif du paragraphe 1 en l'analyse du paragraphe 15(1) et son manque d'attention à l'égard du contexte plus général au-delà du régime de prestations en jeu, y compris les dimensions de la cause portant sur les sexes et les classes. Dans l'ensemble, les auteures concluent que, bien que la Cour ait déclaré à plusieurs reprises son engagement envers le principe de l'égalité réelle dans ses arrêts visant le paragraphe 15(1) de la* Charte, *la cause* Withler *constitue un exemple de plus dans une longue série de causes où on ne réussit pas à donner effet à ce principe.*

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Death Benefits shrink
For age-related reasons
All equal near death[1]

I. Introduction

It has been over twenty-five years since section 15 of the *Canadian Charter of Rights and Freedoms* came into force.[2] Over this period there have been several key Supreme Court of Canada decisions on section 15, notably *Andrews v Law Society of British Columbia*,[3] *Law v Canada (Minister of Employment and Immigration)*,[4] and *R v Kapp*.[5] Through these cases, the Supreme Court has developed an approach to section 15 that has consistently purported to recognize the principle of substantive equality, but it has rarely applied section 15 so as to give effect to that principle.[6] The Court has begun to acknowledge some of the critiques of its equality rights jurisprudence, as evident in *Kapp*, where the Court adverted to the problems with *Law*'s abstract, subjective focus on human dignity, and the risks of an overly technical and formalistic approach to section 15(1).[7]

However, *Kapp* left some questions unanswered.[8] Because *Kapp's* focus was the proper approach to section 15(2), the *Charter's* affirmative action pro-

1 Simon Fodden, "Supreme Court of Canada Opinion Haiku," online: Slaw <http://www.slaw.ca/2011/03/08/supreme-court-of-canada-opinion-haiku/>. This poem is a comment on *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler SCC*].

2 *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*].

3 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*].

4 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*].

5 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

6 The high water mark of substantive equality was arguably the Court's decision in *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 [*Eldridge*]. In Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15," in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada Inc, 2010) 183 at 183 ["Unequal to the Task"], the author notes that the term "substantive equality" was not actually used by the Court until *Eldridge*.

7 *Kapp*, *supra* note 5 at para 22.

8 For comments on *Kapp*, see e.g. Diana Majury, "Equality Kapped; Media Unleashed" (2009) 27(1) Windsor Yearbook of Access to Justice 1; Sophia Moreau, "*R. v Kapp*: New Directions for Section 15" (2008–2009) 40 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; Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*" (2010) 47 Alta L Rev 927 ["Courting Confusion"]; "Unequal to the Task," *supra* note 6. See also Bruce Ryder & Taufiq Hashmani, "Managing Charter Equality Rights:

vision, these questions relate largely to section 15(1).[9] First, what would be the role of comparator groups in the section 15(1) analysis? Earlier cases such as *Hodge v Canada (Minister of Human Resources Development)*[10]and *Auton (Guardian ad litem of) v British Columbia (Attorney General)*[11] gave significant weight to choosing the appropriate comparator group (the so-called "mirror comparator"), but *Kapp* had little to say on this subject.[12] Second, how should discrimination be defined, and what role should the contextual factors from *Law* play in the discrimination analysis? *Kapp* suggested that stereotyping and prejudice were the predominant forms of discrimination, and mapped out how *Law's* four contextual factors—(1) the pre-existing disadvantage of the claimant group; (2) the degree of correspondence between the law's differential treatment and the claimant group's actual needs and circumstances; (3) whether the law has an ameliorative purpose or effect; and (4) the nature of the interest affected—continued to be relevant to stereotyping and prejudice.[13] However, *Kapp* did not define stereotyping or prejudice and left unclear the extent to which the challenged law or program had to perpetuate pre-existing prejudice and stereotyping.[14] These questions remained unanswered in several cases following *Kapp*, where section 15 arguments were raised but were dealt with rather perfunctorily by the Court.[15]

Withler v Canada (Attorney General)[16] is the Court's most important section 15 case since *Kapp*. In *Withler*, the Supreme Court tackled some of these

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The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989–2010" (2010) 51 SCLR (2d) 505 at 515–18 ["Managing Charter Equality Rights"] (noting the "unsettled state" of section 15 case law through and including *Kapp*).

9 *Kapp* also left unanswered some questions relating to section 15(2), including the question of how underinclusive ameliorative programs should be dealt with under that subsection. This issue was dealt with in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, where the Supreme Court affirmed a deferential approach to ameliorative programs even when they exclude certain disadvantaged groups.

10 *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357 [*Hodge*].

11 *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657 [*Auton*].

12 The Court recognized the problems with "an artificial comparator analysis focussed on treating likes alike" in *Kapp*, *supra* note 5 at para 22, but it did not go beyond this acknowledgement.

13 *Kapp*, *supra* note 5 at para 23, citing *Law*, *supra* note 4 at paras 62–75.

14 See "Courting Confusion," *supra* note 8 at 940.

15 *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 [*Ermineskin*]; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 [*AC v Manitoba*]; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*]. For comments on the section 15 aspect of these cases, see "Managing Charter Equality Rights," *supra* note 8 at 519–525; "Courting Confusion," *supra* note 8 at 933–937 and *infra* note 132; "Unequal to the Task," *supra* note 6 at 216–217.

16 *Withler SCC*, *supra* note 1.

questions, in particular those relating to comparator groups and the role and application of the contextual factors from *Law*. However, the Court in *Withler* reignited other debates from earlier section 15(1) decisions, such as the role of relevance under section 15[17] and the extent to which sections 15 and 1 of the *Charter* should be kept analytically distinct.[18] And, although the Court appeared to signal its continued willingness to be attentive to academic commentary and critique of its equality rights decisions,[19] it is questionable whether it actually took these critiques to heart.

This comment will analyze the Supreme Court's decision in *Withler* to assess its impact on section 15 jurisprudence and the Court's stated commitment to substantive equality.[20] Part II sets out the facts and lower court rulings in the case. We go into some detail on the lower court decisions as they establish the key questions for the Supreme Court's judgment, which we will turn to in Part III. Part IV will offer our commentary on *Withler* and our thoughts on future challenges for the courts in their section 15 *Charter* decisions.

II. Facts and Lower Court Rulings

(a) The Facts

Withler involved two class action challenges to federal legislation. The *Public Service Superannuation Act*[21] and the *Canadian Forces Superannuation Act*[22] provide benefits to federal civil servants and to Canadian Forces members, respectively, and to their families. These include benefits both during employment and after retirement and, in particular, survivor benefits for spouses and dependants of plan members after the plan member's death. Survivor ben-

17 This issue dates back to the 1995 equality rights trilogy, where the Supreme Court was split on whether section 15 should focus on "irrelevant personal characteristics". See *Miron v Trudel*, [1995] 2 SCR 418; *Egan v Canada*, [1995] 2 SCR 513; *Thibaudeau v Canada*, [1995] 2 SCR 627.

18 This was a major critique of *Law*, *supra* note 4. See e.g. Beverley Baines, "*Law v Canada*: Formatting Equality" (2000) 11(3) Const Forum Const 65 at 72 ["Formatting Equality"]; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can Bar Rev 299 at 327–32 [Martin]; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada Inc, 2006) 95 ["Deference and Dominance"]; Bruce Ryder, Cidalia C Faria & Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 SCLR (2d) 103 [Ryder, Faria & Lawrence].

19 *Withler SCC*, *supra* note 1 at para 59.

20 We take a doctrinal approach in this case comment due to the increasing complexity of section 15(1) jurisprudence, although we do discuss some issues pertaining to equality theory (e.g. how to conceptualize the harms of discrimination, at notes 128–30; e.g. the need for an intersectional analysis of the grounds claimed, at notes 164–66).

21 RSC 1985, c P 36 s 47(1).

22 RSC 1985, c C 17, s 60(1).

efits under both Acts include a supplementary death benefit ("SDB") which provides for a lump sum payment to a plan member's designated beneficiary at the time of the plan member's death. The SDB is valued at twice the plan member's salary at the time of their death or the termination of their employment. Under both Acts, so-called "Reduction Provisions" take effect when the plan member attains a certain age. Section 47(1) of the *Public Service Superannuation Act* reduces the value of the SDB by ten percent for each year after the plan member exceeds the age of 65, and section 60(1) of the *Canadian Forces Superannuation Act* reduces the value of the SDB by ten percent for each year after the plan member exceeds the age of 60.[23]

The Reduction Provisions were challenged under section 15(1) of the *Charter* as being contrary to the guarantee against age discrimination by Hazel Ruth Withler and Joan Helen Fitzsimonds, the representative plaintiffs in each of the two class actions. The plaintiffs sought a declaration that the Reduction Provisions violated section 15(1) of the *Charter* and were of no force or effect, as well as a monetary judgment for the reductions in the SDB, valued at $2,308,000,000 for surviving spouses of civil servants and $285,000,000 for surviving spouses of armed forces members.[24]

The comparator groups that the courts in *Withler* said they were using were different from the subgroups *within* those comparator groups that the courts actually used in their analysis. Because of this, and because the courts "offset" the reduction of the SDB against the increase in survivors' pensions,[25] more details about those pensions and the relationship between the pensions and the SDB over time are necessary before the courts' judgments can be understood.[26]

Part of the package of benefits available to spouses of plan members is a survivor's pension.[27] The survivor's pension pays up to half the amount of the

23 *Withler SCC*, *supra* note 1 at paras 4-6.

24 *Ibid* at para 10. The Civil Service Plan had a surplus of $2,570,000,000 in 2008 and the Canadian Forces Plan surplus was $196,700,000 in 2008. See *Withler SCC* [Factum of the Appellants], online: Supreme Court of Canada at para 22 <http://www.scc-csc.gc.ca/factums-memoires/33039/FM010_Appellants_Hazel-Rueth-Withler-and-Joan-Helen-Fitzsimondsection.pdf> [Factum of the Appellants].

25 *Withler SCC*, *supra* note 1 at para 77.

26 The following details are based on *Withler SCC* [Factum of the Respondent], online: Supreme Court of Canada at paras 2, 4, 9-12, 14, 24, 25, 69, 73 and 80 < http://www.scc-csc.gc.ca/factums-memoires/33039/FM020_Respondent_Attorney-General-of-Canada.pdf> [Factum of the Respondent] and on the Factum of the Appellants, *supra* note 24 at paras 13, 15, 16, 19, 23 and 32. Some of the information is incomplete, however, so its overall accuracy is not assured.

27 Health care was also included, providing a maximum of $15,000 toward nursing care if prescribed by a physician and nothing for home care or long term care. See Factum of the Appellants, *supra* note 24 at para 32.

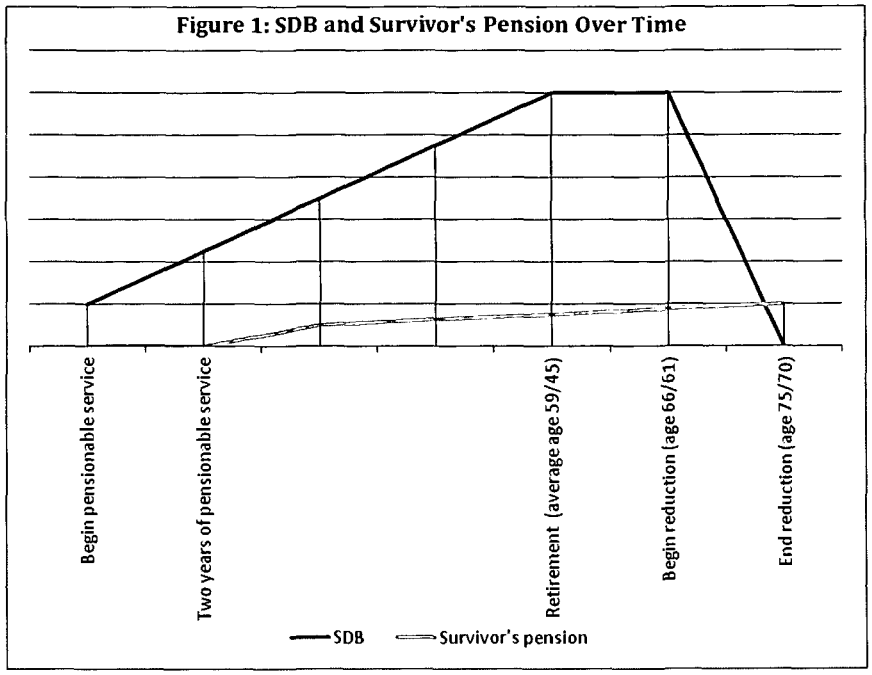
plan member's pension. Mrs. Withler, for example, received a survivor's pension of about $1,287 a month and Mrs. Fitzsimonds received about $1,215 a month. There is no survivor's pension for a spouse when the plan member dies within the first two years of their pensionable service. After the first two years, the amount of the plan member's pension, and therefore the amount of the survivor's pension on the plan member's death, begins as a relatively small amount and then increases with each year of pensionable service. The maximum—save for increases thereafter due to indexing—is reached on the plan member's retirement (or permanent disability). The average age of retirement for civil servants is 59 and the average age of retirement for Canadian Forces members is 45, after 25 years of pensionable service. Both the plan member's pension and the survivor's pension typically grow substantially between two years of pensionable service and retirement of the plan member, normally over a 25- to 40-year period.

The SDB appears to be available immediately on entering pensionable service. As its amount is twice the plan members' annual salary, it starts out at quite a large amount and then grows in value until the retirement of the plan member. It holds that value from the date of the retirement and until the Reduction Provisions are engaged. For the average civil servant, the SDB is at its maximum value while he or she is age 59 to 66 and for the average Canadian Forces members, while he or she is age 45 to 61.

There are, therefore, at least five different groups within the time span covered by the survivor's pension and SDB, as represented graphically in Figure 1 below.[28] First, in the first two years of pensionable service, a spouse[29] would have no survivor's pension but a fairly substantial SDB. Second, for the usually lengthy period of time between two years of service and retirement, both the SDB and survivor's pension increase to their maximum. Third, both benefits continue at their maximum (plus indexing for the pension) until the Reduction Provisions apply. Fourth, while the Reduction Provisions apply, there is a ten-year period when the SDB loses ten percent of its value each year, but the survivor's pension continues to increase modestly (with indexing). Fifth, at the end of the Reduction Provisions' application, there is no SDB (although there is a $10,000 or $5,000 paid-up benefit), but the survivor's pension continues to grow modestly. The claimants belonged to either the fourth or the fifth group.

28 While Figure 1 attempts to represent the relative amounts of the survivor's pension and the SDB over time, and to show why there are at least five different groups, it cannot be an accurate representation of the facts because there are not enough facts available in the factums and, more importantly, because a lump sum payment and an income stream are not commensurate values.

29 We are assuming that the spouse is the plan member's SDB beneficiary throughout.



(b) Trial Decision

At trial, Justice Nicole Garson of the British Columbia Supreme Court dismissed both actions.[30] Applying the then-governing approach to section 15(1) of the *Charter* in *Law*,[31] she found that the challenged law formally differentiated between the claimants and others based on the age of their deceased spouses, and that this distinction was based on a protected ground, namely age.[32] She then turned to the final stage of analysis from *Law*, the question of whether the differential treatment of the claimants amounted to discrimina-

30 *Withler v Attorney General of Canada*, 2006 BCSC 101 [*Withler BCSC*]. Standing was contested by the government through all three levels of court. Justice Garson in the British Columbia Supreme Court held in favour of the claimants on this issue, finding that "where the target of the impugned provision is the plaintiff and it is the plaintiff who suffers the discrimination associated with her spouse's age, the plaintiff should have standing:" *Ibid* at para 92. The majority in the Court of Appeal did not address the standing issue. The Supreme Court of Canada dealt with it only briefly, approving of Justice Garson's reasoning and noting that it was the claimants who suffered the impact of the impugned law, not the plan members: *Withler SCC*, *supra* note 1 at paras 27-28.

31 *Law*, *supra* note 4 at para 88, provided the following three-step test for section 15(1): "(A) whether a law imposes differential treatment between the claimant and others, in purpose or effect; (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee."

32 *Withler BCSC*, *supra* note 30 at paras 104-105.

tion. It was at this stage that Justice Garson identified the appropriate comparator group. She had some difficulty with the comparator group put forward by the claimants —"all civil servants and members of the armed forces who received the full SDB, not reduced on the basis of age"— given the diverse nature of both groups.[33] However, she ultimately agreed that this group was the most appropriate comparator.[34] The comparator group accepted by Justice Garson was thus made up of the first, second and third groups from Figure 1 lumped together, although her focus was on the first group and the more junior end of the second group who, compared to the claimants, had a smaller survivor's pension and a larger SDB.

Justice Garson analyzed the legislative framework in some detail, noting that the SDB had to be examined within its overall context, including the other benefits provided for under the legislation.[35] She focused extensively on the purpose of the SDB, and concluded that the purpose varied with the age of the plan member:

> At the younger ages it provides a limited stream of income for unexpected death where the surviving spouse is not protected by a pension. At older ages the purpose of the SDB is for the expenses associated with last illness and death.[36]

The different purposes were tied to different characterizations of the SDB. The claimants had argued the SDB was akin to a death benefit and the Attorney General had argued it was group term life insurance. Justice Garson treated the characterization as important because reduction provisions are common in term life insurance, where they are allowed by provincial human rights legislation.[37] Finding that the SDB was life insurance,[38] and relying on the greater survivor's pension that the claimants received in comparison to members of the comparator group (to compensate for the reduced SDB),[39] Justice Garson held that the Reduction Provisions did not discriminate against the claimants.

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33 *Ibid* at para 110. It seems clear that the comparator group should be the spouses of the civil servants and members of the armed forces who received the full SDB, not reduced on the basis of age, and not the civil servants and members of the armed forces themselves. The SDB is paid on the death of plan members, i.e., on the death of the civil servants and members of the armed forces.

34 *Withler BCSC*, *supra* note 30 at para 108.

35 *Ibid* at para 122.

36 *Ibid* at para 170.

37 *Ibid* at paras 118-119, 135-136.

38 *Ibid* at para 160.

39 Justice Garson stated that "[w]hen compared to the comparator group, although they receive a lesser SDB [the claimants] receive a greater survivor's pension": *Ibid* at para 161. However, based on the evidence before her this would not be true of the entire comparator group, as explained in Figure 1 and Part II(a) above.

Considering the first contextual factor from *Law,* Justice Garson found that, based on the evidence before her, elderly Canadians were not "economically disadvantaged on average as compared to all other age groups."[40] As for *Law*'s second contextual factor, she found that the availability of survivors' pensions and other benefits to older claimants meant that the law did not fail to take into account their actual circumstances.[41] The SDB was found to have an ameliorative purpose for younger employees in terms of their benefit coverage, although Justice Garson acknowledged that this was likely not the kind of ameliorative purpose intended to be caught by *Law*'s third contextual factor.[42] *Law*'s fourth contextual factor was also found to work against the claimants, as the impact of the Reduction Provisions was seen as not particularly severe by Justice Garson—in fact, the claimants were seen to be more advantaged than "other seniors" when the entire benefit package was considered.[43] Finally, *Law*'s overarching question of whether the claimants' human dignity was demeaned by the Reduction Provisions was answered in the negative, again based largely on the overall scheme of the legislation.[44]

(c) Court of Appeal Decision

The *Kapp* decision was rendered after the claimants' appeal was heard but before *Withler* was decided by the British Columbia Court of Appeal.[45] Writing for the majority, Justice Catherine Ryan (with Justice Mary Newbury concurring) upheld Justice Garson's decision, holding that she had made no reversible errors in her findings of fact or application of section 15(1) of the *Charter.* Perhaps most crucially, the majority upheld Justice Garson's findings with respect to the shifting purpose of the SDB, dependent on a plan member's age, and her findings as to the entire package of benefits available to survivors and the role of the SDB within that package.[46]

Kapp was not seen by the majority to obviate the need for comparison or a "correct comparator."[47] Justice Ryan rejected the claimants' argument on appeal that the trial judge should have used a narrower comparator, namely "those who were in receipt of both the full supplementary death benefit

40 *Withler BCSC, supra* note 30 at para 147; see also para 158.

41 *Ibid* at para 159.

42 *Ibid* at para 160. Justice Garson presumably added this caveat because the third contextual factor was intended to capture ameliorative programs targeted at disadvantaged groups. See *Law, supra* note 4 at paras 72, 88.

43 *Withler BCSC, supra* note 30 at para 161.

44 *Ibid* at paras 164-171.

45 *Withler v Canada (Attorney General),* 2008 BCCA 539, 87 BCLR (4th) 197 [*Withler BCCA*].

46 *Ibid* at para 167.

47 *Ibid* at para 168.

and a survivor's pension."[48] The majority thought that this revised comparator strayed too far from the claimed ground of discrimination, age, whereas the original comparator more appropriately "mirrored" the circumstances of the claimants with respect to the benefits they were seeking.[49] Like Justice Garson, the comparator group accepted by the majority comprised the first, second and third groups from Figure 1. The majority thereby included those who had no survivor's pension, as well as those whose survivor's pension was maximized.

The majority also found that the trial judge had not erred in her application of the comparator, nor in her application of the contextual factors from *Law*, which were still seen as relevant post-*Kapp*.[50] The key contextual factor was said to be the second, i.e. the correspondence between the impugned legislation and the claimants' actual needs and circumstances.[51] The majority found that the legislation, "while not a perfect fit for each individual, did not meet the hallmarks of discrimination given that it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan."[52] While it did not say so directly, the majority seemed to be indicating that the Reduction Provisions did not operate on the basis of stereotyping.[53] The majority also found that the trial judge had not misapplied the other contextual factors from *Law* in light of the evidence before her.

Justice M. Anne Rowles's dissent departed from the majority's decision on several key issues. First, Justice Rowles found that a narrower comparator group should have been used. She pointed out what was implicit in the original comparator group put forward by the claimants, namely that the appropriate comparator was "all civil servants and members of the armed forces who received a full SDB, not reduced on the basis of age, and *who are eligible for a survivor's pension.*"[54] This comparator group was made up of the second and third groups from Figure 1, although Justice Rowles's focus was on the third group. This comparator was found to more closely compare to the claim-

48 *Ibid* at para 169 (emphasis in original).

49 *Ibid* at para 170.

50 *Ibid* at para 162.

51 *Ibid* at para 176.

52 *Ibid* at para 181.

53 *Ibid at para* 156. (After citing the two kinds of discrimination relied upon in *Kapp*, *supra* note 5, the majority indicated that stereotyping was "largely, though not solely, at issue in the case at bar").

54 *Withler BCCA*, *supra* note 45 at para 32 (emphasis added). See also paras 31 and 45. As was the case with the formulation of the comparator group by the trial judge (see *supra* note 33), it seems clear that the comparator group should be the spouses of the civil servants and members of the armed forces. It also seems likely Justice Rowles intended to narrow her comparator group even more than she did, confining it to the subgroup of group 3 who were receiving a maximum survivor's pension and a maximum SDB, as explained in Part II(a) and Figure 1, above.

ant group in that both groups had the same need for the SDB to cope with the costs of last illness and death. Making explicit what was implicit focused comparison on the SDB and its purpose and not on the long-term income replacement needs satisfied by the survivor's pension.[55]

Justice Rowles also found that the comparator that was chosen by the trial judge was applied inconsistently in her analysis, likely because it was too broad.[56] For example, when looking at *Law*'s first contextual factor, whether the claimants experienced pre-existing disadvantage, Justice Garson compared the claimant group to "the 'universe of elderly persons,' 'all other age groups,' the 'statistical average' and 'the general population'."[57] According to Justice Rowles, the trial judge thereby lost focus on the appropriate question of whether the claimants, as older surviving spouses, experienced disadvantage based on their age,[58] and held that there was "ample evidence in the record to establish that seniors as a group suffer from pre-existing disadvantage and vulnerability based on their economic well-being."[59] Justice Rowles found that the same problem occurred in Justice Garson's analysis of the second contextual factor, where she compared the claimants to "the entire under age 65 population" in terms of the correspondence between their actual needs and the reduced benefits.[60] Justice Rowles indicated the appropriate approach as follows:

> An application of the revised comparator group would render the fact that members of the claimant group receive survivor's pensions and other government benefits under the Plans irrelevant. The resulting comparison would reveal two groups of surviving spouses receiving similar pensions and benefits, with one group subject to the Reduction Provisions and the other group not, solely on the basis of the age of their spouse. In light of the fact that the trial judge accepted that the purpose of the legislation is to provide for the costs associated with last illness and death, and that the costs of last illness increase dramatically with age in each decade over 65, the logic of reducing the benefit provided on the basis of age becomes questionable.[61]

Justice Rowles also disagreed with the degree to which Justice Garson took the government's balancing of the public interest into account in her analysis of *Law*'s contextual factors. For Justice Rowles, the public interest was a matter for the government to invoke under section 1 of the *Charter* when seeking

55 *Ibid* at para 35.
56 *Ibid* at para 50.
57 *Ibid* at para 47, citing *Withler BCSC*, *supra* note 30 at paras 140 and 158.
58 *Withler BCCA*, *supra* note 45 at para 64.
59 *Ibid* at para 67.
60 *Ibid* at para 48, citing *Withler BCSC*, *supra* note 30 at para 149.
61 *Withler BCCA*, *supra* note 45 at para 52.

to justify its violation of equality rights, rather than a matter that went to whether the law was discriminatory.[62]

On the third contextual factor from *Law*, Justice Rowles found that the Reduction Provisions did not have an ameliorative purpose or effect, since the claimant group was "more disadvantaged in terms of their ability to cover the costs associated with last illness and death than those who are not subject to the reductions (i.e., the comparator group)."[63] Lastly, Justice Rowles disagreed with the trial judge's decision that the SDB was largely an economic interest and therefore less indicative of discrimination, finding that "the economic nature of the interest in this case is highly associated with physical and mental integrity interests as well."[64] Overall, she found that the government had not provided the SDB in a non-discriminatory manner, and had therefore violated section 15 of the *Charter*.

Justice Rowles went on to hold that the government could not justify its violation of section 15 under section 1 of the *Charter*. She found that the true objective behind the Reduction Provisions was "to save money in providing less benefit to spouses beyond the age of 60 or 65 so that more funds are available to spouses under the age of 60 or 65."[65] This was not seen to be a pressing and substantial basis for violating the claimants' section 15 rights.[66] The government's section 1 case also failed at the rational connection stage, given the arbitrariness of providing reduced benefits to the claimants.[67] The existence of a "significant" government surplus in the SDB account indicated that the Reduction Provisions were not minimally impairing,[68] nor did the benefit of making more funds available to spouses of younger plan members outweigh the negative impact on the claimants' rights.[69] Justice Rowles would have allowed the appeal and given the government eight months to consider how to amend the legislation to bring it into compliance with section 15 of the *Charter*.[70]

62 *Ibid* at paras 79-82.

63 *Ibid* at para 86.

64 *Ibid* at para 89.

65 *Ibid* at para 113.

66 *Ibid* at para 126, Justice Rowles found that *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 [*NAPE*] had created a narrow exception to the general rule that financial considerations are not a sufficient basis for justifying the violation of a *Charter* right, and that the exception (circumstances of fiscal crisis) did not apply in this case at para 123.

67 *Withler BCCA*, *supra* note 45 at para 129.

68 *Ibid* at paras 135-139.

69 *Ibid* at paras 140-141.

70 *Ibid* at paras 143-4.

III. Supreme Court of Canada Ruling in *Withler*

Chief Justice Beverley McLachlin and Justice Rosalie Abella — also the joint authors of the majority decision in *Kapp* — wrote the judgment of the unanimous nine member Supreme Court in *Withler*, dismissing the claimants' appeal on the basis that there was no violation of section 15(1) of the *Charter*.[71]

In its introduction, the Court zeroed in on the need to address comparison and mirror comparator groups as the issue dividing the lower courts.[72] The Court also expressed its commitment to substantive equality at this stage, calling it the "animating norm" and the "central issue" in all equality rights cases, and acknowledging that a mirror comparator analysis may lead to formal equality.[73] However, the Court went on to note as part of its stage-setting that where the disputed benefit "is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries."[74]

The Court accepted the dual purpose of the SDB itself: that it was "[f]or younger plan members, to insure against unexpected death at a time when the deceased member's surviving spouse would be unprotected by a pension or entitled to limited pension funds" and, for older members, "to assist surviving spouses with the costs of the plan member's last illness and death."[75] Despite this dual purpose, the Court characterized the SDB as "akin to life insurance"[76] even while later acknowledging it "acts as group life insurance" for younger employees only.[77]

The Court commenced its analysis of the equality claim by citing the definition of discrimination from *Andrews*,[78] and stating the test for section 15(1)

71 *Withler SCC*, *supra* note 1. The government had cross-appealed on the issue of standing, and while the Supreme Court did not find it necessary to deal with the issue, given its decision on section 15(1), it found that the trial judge's decision was "just" and "correct" at para 28.

72 *Ibid* at para 2. See also para 55 (describing comparison using mirror comparator groups as the "critical jurisprudential issue in this appeal").

73 *Ibid* at para 2.

74 *Ibid* at para 3. This dual focus on comparison using mirror comparator groups and on the appropriate method of analysis in cases where the impugned provision is part of a broad government benefit scheme is echoed several times in the judgment. See also paras 25 and 81.

75 *Ibid* at para 5.

76 *Ibid.*

77 *Ibid* at para 76.

78 *Ibid* at para 29, citing *Andrews*, *supra* note 3 at pp. 174-75. The Court also referenced more recent cases such as *Kapp*, *supra* note 5, *Ermineskin*, *supra* note 15, *AC v Manitoba*, *supra* note 15, and *Hutterian Brethren*, *supra* note 15.

from *Kapp*: "(1) does the law create a distinction that is based on an enumerated or analogous ground? and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[79] Section 15 was said to protect "every person's equal right to be free from discrimination," and discrimination was defined as either the perpetuation of prejudice or disadvantage or stereotyping on the basis of protected grounds.[80] These two concepts were then explained further: perpetuation of disadvantage was said to occur "when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group,"[81] and stereotyping was said to occur when "the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group."[82]

The Court also reaffirmed a contextual approach to section 15(1), one that should focus on "the actual situation of the group and the potential of the impugned law to worsen their situation."[83] As in *Kapp*,[84] but without mentioning *Law*, the Court mapped *Law*'s four contextual factors to the concepts of perpetuation of prejudice and stereotyping. For cases involving broad benefit schemes, the Court recast the third contextual factor, stating that "where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis."[85]

Before turning to the issue of comparators, the Court took the opportunity to reiterate the importance of a substantive equality approach. Substantive equality, according to the Court, "asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group."[86] Substantive equality was said to require not formal comparison with a similarly situated group, "but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group."[87] Substantive

79 *Withler SCC*, *supra* note 1 at para 30, citing *Kapp*, *supra* note 5 at para 17.
80 *Withler SCC*, *supra* note 1 at paras 31-32.
81 *Ibid* at para 35.
82 *Ibid* at para 36.
83 *Ibid* at para 37.
84 *Kapp*, *supra* note 5 at para 23.
85 *Withler SCC*, *supra* note 1 at para 38.
86 *Ibid* at para 39.
87 *Ibid* at para 40.

equality was also acknowledged to demand analysis of the actual impact of the impugned law on the claimants.[88]

On the role of comparators, the Court reaffirmed the statement in *Andrews* (and virtually every subsequent case) that equality is a comparative concept.[89] After reviewing its jurisprudence on comparators from *Andrews* to *Kapp*,[90] the Court acknowledged its agreement with the concerns raised by commentators about a mirror comparator approach: the definition of the comparator group may predetermine the outcome and "eliminate" or "marginalize" the factors indicative of discrimination;[91] the search for a mirror comparator may invoke a sameness approach to equality and ignore intersecting grounds of discrimination;[92] and the need to establish the appropriate comparator may impose an unfair burden on claimants, as the correct mirror group may be subject to dispute and changed by the court, leaving the claimants without a sufficient evidentiary basis for their claim.[93]

However, the Court indicated that comparison still has a role to play throughout the section 15(1) analysis. It noted that at step (1), a comparative approach helps to determine whether there is a distinction between the claimant and others based on a protected ground. There is no need to "pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination"; rather, the claimant need only show that she is deprived of a benefit that others have or that she is burdened in a way that others are not, based on an enumerated or analogous ground.[94] In its first acknowledgment of indirect discrimination in quite some time,[95] the Court recognized that this would be more difficult in adverse effects claims, where the law is neutral on its face

88 *Withler SCC, supra* note 1 at paras 37 and 39.

89 *Ibid* at para 41.

90 *Ibid* at paras 45-53.

91 *Ibid* at para 56, citing Peter Hogg, *Constitutional Law of Canada*, vol 2, 5th ed. Supp, looseleaf (updated 2010, release 1) (Scarborough, ON: Carswell, 2007) 55-34.

92 *Ibid* at paras 57-58, citing Daphne Gilbert, "Time To Regroup: Rethinking Section 15 of the *Charter*" (2003), 48 McGill LJ 627; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993), 19 Queen's LJ 179; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 CJWL 37.

93 *Ibid* at para 59, citing Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 Windsor YB Access Just 111 at 138; Margot Young, "Blissed Out: Section 15 at Twenty," in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada Inc, 2006) 45 at 63.

94 *Ibid* at paras 62-63.

95 There is no mention of adverse effects discrimination in *Kapp, supra* note 5, or any of the Court's subsequent section 15 decisions.

but has a negative impact on particular groups based on protected grounds, and suggested that evidence of historical or sociological disadvantage may be helpful in such cases.[96]

At step (2), the Court indicated that comparison may be useful in establishing the perpetuation of disadvantage or stereotyping by comparing the claimants' situation within the legislative scheme and more broadly to that of others.[97] The Court also clarified that not all the contextual factors from *Law* will necessarily be pertinent at step (2), and warned against using a "rigid template" at this stage. Instead, courts should be open to new factors, and overall, should be attentive to the "larger social, political and legal context" of the claim as stipulated in *R v Turpin*.[98] The Court repeated its view that "[i]n cases involving a pension benefits program such as this case, 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. ... Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered."[99]

Turning to the application of this approach to the facts of the case, the Court agreed with the courts below that the case clearly involved a distinction on the basis of an enumerated ground, age. The claimants were subject to a reduced SDB because of the age of their spouses at the time of death, while surviving spouses of plan members who died before they reached the prescribed ages were not subject to the reduction. This satisfied step (1) of the test for section 15(1).[100]

The Court began step (2) of the section 15(1) analysis by identifying the relevant contextual factors in the case. It reiterated that the purpose of the Reduction Provisions within the overall benefit scheme was a "central consideration," as was the allocation of resources and legislative policy goals.[101] The question was "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."[102] The Court held that Justice Garson had appropriately compared the claimants with multiple other groups at this stage, and that such broad comparison was in fact necessary where a "broad reaching

96 *Withler SCC*, *supra* note 1 at para 64.
97 *Ibid* at para 65.
98 *Ibid* at para 66, citing *R v Turpin*, [1989] 1 SCR 1296 at para 45 [*Turpin*].
99 *Withler SCC*, *supra* note 1 at para 67.
100 *Ibid* at paras 68-69.
101 *Ibid* at para 71.
102 *Ibid.*

benefits scheme" was at issue.[103] It also held that Justice Garson and the majority of the Court of Appeal had properly found that within the overall scheme of benefits, and given the different purposes of the SDB for younger and older spouses, the Reduction Provisions did not fail to account for the claimants' actual circumstances.[104] Further, although the trial judge had found that the costs of last illness and death increased with the plan member's age, "the record did not show that the claimant spouses were unable to meet funeral or last illness expenses."[105]

As for the dissent of Justice Rowles, the Court responded to it in two short paragraphs. It stated that her approach "illustrate[d] how reliance on a mirror comparator group can occlude aspects of the full contextual analysis that section 15(1) requires. It de-emphasized the operation of the Reduction Provisions on the death benefit in the context of the entire plan and lifetime needs of beneficiaries."[106] This, according to the Court, resulted in "a failure to fully appreciate that the package of benefits, viewed as a whole and over time, does not impose or perpetuate discrimination."[107]

Overall, the Court concluded that the trial judge and Court of Appeal majority had not erred in their methodology or assessment of evidence, and upheld their decisions that the Reduction Provisions did not violate section 15(1) of the *Charter*.[108] There was no need to consider section 1 of the *Charter* in the circumstances.

IV. Commentary

In this Part, we have organized our comments to follow the order in which the issues were discussed by the Supreme Court in *Withler*. We therefore deal first with the concept of substantive equality, the definition of discrimination, the Court's critique of comparators, and the Court's treatment of the purpose of the legislation, all as matters of general principle. We then discuss *Law*'s contextual factors, emphasizing, as did the Court, the second and third contextual factors, and some additional contextual considerations, including the absence of a gender analysis and the presence of some class-based assumptions in the Court's decision. We then turn to the relationship between section 15 and section 1 of the *Charter* and, in particular, the Court's consideration of

103 *Ibid* at para 72.
104 *Ibid* at paras 74, 76.
105 *Ibid* at para 75.
106 *Ibid* at para 81.
107 *Ibid.*
108 *Ibid* at para 82.

relevance—both topics related to the Court's use of *Law*'s contextual factors. Next we briefly discuss the Court's silence on the relationship between section 15(1) and section 15(2) in this case. We conclude with three procedural points: the Court's "review for error" approach, its use of its post-*Kapp* decisions which only perfunctorily considered section 15(1), and its refusal to overrule its earlier decisions now considered wrong.

We begin with the very reason for the guarantee of equality rights in section 15 of the *Charter*. The Supreme Court referred to substantive equality extensively in *Withler*; indeed, the Court appears to have reaffirmed its commitment to the goal of substantive equality and the remedying of substantive inequality more often in this case than in any other of its section 15 decisions.[109] But what does the Court mean by substantive equality? In *Withler*, it stated that equality "protects every person's equal right to be free from discrimination."[110] This "freedom from" understanding emphasized the prevention of discrimination, but the idea of promoting equality was absent. Both the prevention of discrimination and the promotion of equality were seen as the purpose of section 15 in *Law*.[111] *Kapp*, in giving independent status to section 15(2), introduced the idea that section 15(1) "is aimed at preventing discriminatory distinctions . . . [as] one way of combatting discrimination," whereas section 15(2) "is aimed at helping disadvantaged groups improve their situation".[112] In *Withler*, the Supreme Court appears to have confirmed *Kapp*'s bifurcation of these goals between subsections (1) and (2), thereby unduly narrowing the purpose of section 15(1).

This apparent narrowing of section 15(1)'s goal to an anti-discrimination purpose takes us to the next issue, namely the Court's definition of discrimination. As in *Kapp*,[113] the Court in *Withler* described discrimination as involving two concepts: the perpetuation of prejudice or disadvantage of group members based on protected personal characteristics, and stereotyping based on these characteristics that does not correspond to the claimants' actual circumstances or attributes.[114] The Court did not go much beyond *Kapp* in at-

109 *Withler SCC*, *supra* note 1. The phrases "substantive equality" and "substantive inequality" appear seventeen times in this relatively short (84 paragraph) judgment.

110 *Ibid* at para 31.

111 *Law*, *supra* note 4 at para 51 ("It may be said that the purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.")

112 *Kapp*, *supra* note 5 at para 16.

113 *Ibid* at para 17.

114 *Withler SCC*, *supra* note 1 at paras 30, 32.

tempting to provide a more detailed explanation of these two concepts. For example, it defined "perpetuation" and not "disadvantage" when it stated that "[p]erpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group."[115] Neither is there any talk of prejudice in this explanation, leaving us to wonder if the focus is to be on disadvantage alone, or if disadvantage is thought to include prejudice, and what the Court might mean by prejudice.[116]

As for the second kind of discrimination, the Court stated that it occurs when "the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group."[117] If this was intended to be a definition of stereotyping, it is rather tautological, although perhaps it is an attempt to distinguish between discriminatory and non-discriminatory stereotyping. It is also a fairly narrow definition of stereotyping in its focus on correspondence with needs and circumstances; essentially, *Law*'s second contextual factor becomes the definition of stereotyping in *Withler*. It is odd that there is no mention of presumed or attributed characteristics based on group membership in the Court's discussion of stereotyping.[118]

The Court also broached the connection between stereotyping and pre-existing disadvantage in *Withler* by noting that although stereotyping will typically result in the perpetuation of prejudice and disadvantage, this will not always be the case. According to the Court, "it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the group, s. 15 may be found to be violated even in the absence of proof of historic disadvantage."[119] Stereotyping therefore appears to be the only way that new disadvantages are created.

The question of whether section 15(1) claimants must show pre-existing disadvantage dates back to *Turpin*,[120] but it was elaborated upon in *Regina*

115 *Ibid* at para 35, citing *Turpin*, *supra* note 98 at para 47.

116 In Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54 UTLJ 291 at 302 ["The Wrongs of Unequal Treatment"], the author defined prejudice as "a belief in the inferiority of a certain individual that leads him to be seen as unworthy of a benefit."

117 *Withler SCC*, *supra* note 1 at para 36.

118 *Andrews*, *supra* note 3 at 175. Moreau, in "The Wrongs of Unequal Treatment," *supra* note 116 at 298, defined stereotyping as "any generalization or classification that one group of people treats as though it captured an essential feature of certain individuals, and which this group takes to render unnecessary any individualized consideration of their characteristics or circumstances."

119 *Withler SCC*, *supra* note 1 at para 36.

120 *Turpin*, *supra* note 98. In *Turpin*, an Ontario man charged with murder who wanted to be tried by

v Hess; Regina v Nguyen.[121] In *Turpin*, Justice Wilson held that "in most but perhaps not all cases" only historically disadvantaged groups can be discriminated against.[122] Justice McLachlin (as she then was), writing for those in dissent on the section 15(1) issue in *Hess*, found the impugned provision infringed section 15(1) but was saved by section 1, stating that *Turpin* appeared to characterize discrimination more restrictively than did *Andrews*: "*Andrews* lays down that it is sufficient to establish a violation of s. 15 to show that a distinction is drawn on the enumerated or analogous grounds, and that the distinction results in a burden being placed on the complaining individual or group."[123] *Turpin*, on the other hand, seemed to require that one should, in addition, "look for a disadvantage peculiar to the 'discrete and insular minority' discriminated against, to determine if it suffers disadvantage apart from and independent of the particular legal distinction being challenged."[124] Nevertheless, Justice McLachlin concluded in *Hess* that independent disadvantage was not an absolute requirement of section 15(1).

The reformulation of the *Andrews* test in *Kapp* to emphasize perpetuation of disadvantage appeared to raise the requirement for pre-existing dis-

judge alone challenged the *Criminal Code* provisions that required trial by judge and jury when an accused was charged with murder in all provinces except Alberta.

121 *R v Hess*; *R v Nguyen*, [1990] 2 SCR 906 [*Hess*]. *Hess* involved a challenge to the *Criminal Code* offence of having intercourse with a person less than 14 years of age, which defined the offence as one solely perpetrated by male offenders against female victims. The Court split 4:3 on the section 15 issue, with Justice Wilson, writing for the majority, finding there was no violation of section 15(1) because *Andrews* required more than a distinction that defined a group by reference to a characteristic enumerated in section 15(1). Justice McLachlin, writing for the dissent on the section 15 issue, found the impugned provision infringed section 15(1) but was saved by section 1.

122 *Turpin*, *supra* note 98 at para 45 ("A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged"). Writing for a unanimous court, Wilson J found the distinction based on an accused's province of residence was not discriminatory because persons charged with murder and resident outside Alberta did not constitute a disadvantaged group in Canadian society.

123 *Hess*, *supra* note 121 at para 76. It might also be noted how different Justice McLachlin's summary of *Andrews* is in this decision, which was rendered one year after *Andrews*, than it is in *Kapp*, rendered twenty years later.

124 *Hess*, *supra* note 121 at para 77, quoting *Turpin*, *supra* note 98 at para 45. See also Helena Orton, "Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*" (1990) 19 Man LJ 288 (discussing how and why the Court's early jurisprudence confined the equality guarantee to individuals and groups who have had unequal access to social, economic, political and legal resources, i.e., those who are disadvantaged). See also Anne F Bayefsky, "A Case Comment on the First Three Equality Rights Cases Under the *Canadian Charter of Rights and Freedoms*: *Andrews*, Workers' Compensation Reference, *Turpin*" (1990) 1 Sup Ct L Rev (2d) 503 (arguing that *Turpin* introduced a form of reasonableness analysis into section 15 by adding a consideration of the societal place of the claimant group).

advantage again.[125] Although the Court in *Withler* may have attempted to resolve this debate, its continuous and sometimes inconsistent use of the word "perpetuating" as a modifier of disadvantage, prejudice and, sometimes, stereotyping shows a lack of clarity on this issue.[126] Further, if the Court's intent was to say definitively that section 15(1) claimants need not be members of historically disadvantaged groups, we would have expected some analysis of the implications of this approach for substantive equality.[127]

Apart from the definitions of and interplay between disadvantage, prejudice and stereotyping, it must also be noted that these three terms comprise a fairly narrow understanding of discrimination. It has been argued that discrimination should also be seen to encompass harms related to oppression, vulnerability, powerlessness, marginalization, devaluation, and stigmatization.[128] In addition to being too narrow, a definition of discrimination that focuses on disadvantage, prejudice and stereotyping may not be sufficiently attentive to adverse effects discrimination, given the often intentional nature of the former and the often unintentional nature of the latter. Although the Court recognized indirect discrimination in *Withler*, its suggestion that such cases will be harder to prove is discouraging,[129] as are recent Supreme Court dismissals of adverse effects claims.[130]

125 In one of the first cases to apply *Kapp*, the Nova Scotia Court of Appeal interpreted it as requiring, as a fourth step, proof of disadvantage existing apart from and independent of the legal distinction being challenged. See *Hartling v Nova Scotia (Attorney General)*, 2009 NSCA 130. The test applied by MacDonald JA required the claimants to prove: (1) a distinction (2) based on enumerated or analogous grounds (3) that disadvantaged the claimants (4) in a way that perpetuated prejudice or stereotyping at (paras 59-65).

126 See e.g. *Withler SCC*, *supra* note 1 at para 56, where "perpetuates" seems to modify both prejudice and stereotyping.

127 See e.g. the Supreme Court's decision in *Trociuk v British Columbia (AG)*, 2003 SCC 34, [2003] 1 SCR 835 where a section 15(1) sex-discrimination claim brought by a man was successful. See also the critique of this decision by Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the *Law* Equality framework and *Trociuk v British Columbia (Attorney General)*" (2004) 16 CJWL 165.

128 "Courting Confusion," *supra* note 8 at 937, citing *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 (Factum of the Intervener Women's Legal Education and Action Fund at para 17), online: LEAF <http://www.leaf.ca/legal/facta/2004-newfoundland.pdf#target>. See also Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination," in Fay Faraday, Margaret Denike, & M Kate Stephenson, eds, *Making Equality Rights Real. Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 99 at 103 [*Making Equality Rights Real*], who argues that "there are stronger and more politically accurate umbrella terms than "disadvantaged" for the situations of the groups in question: dispossessed, disempowered, demonized, dehumanized, degraded, debased, demeaned, discredited."

129 *Withler SCC*, *supra* note 1 at para 64.

130 See for example *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391; *Hutterian Brethren*, *supra* note 15.

One decidedly positive aspect of the Supreme Court's decision in *Withler* is its willingness to revisit the role of comparators in the section 15(1) analysis. It is not surprising that the Court used *Withler* as the vehicle to do so given the disagreement about comparators in the lower courts and given that one of the interveners in the case, the Women's Legal Education and Action Fund (LEAF), had urged the Court to examine the problems with mirror comparators.[131] The Court's reference to the critical commentary on comparators and its synthesis of that commentary are a useful contribution to the section 15(1) jurisprudence. The Court correctly identified the main problems with mirror comparators — including their potential to introduce a formal equality approach and mask true discrimination, their failure to account for intersecting forms of discrimination, and the burden they place on claimants — and its rejection of the search for one correct mirror comparator is a welcome development in light of these problems.

However, it seems ironic that the use of a mirror comparator in this case, as exemplified in the judgment of Justice Rowles at the British Columbia Court of Appeal,[132] actually led to a finding of discrimination. What explains this seeming contradiction between critique and practice? Justice Rowles's decision focused on the Reduction Provisions and the ways in which they worked to the disadvantage of surviving spouses on the arbitrary basis of age. This arbitrariness — another word for lack of correspondence between the claimants' actual needs and the impugned legislation (*Law*'s second factor) — could be best highlighted by comparing the position of surviving spouses caught by the Reduction Provisions with those who were also eligible for maximum survivor's pensions, yet for whom the SDB had not been reduced.[133] Both groups of surviving spouses needed unreduced death benefits to cope with the costs of last illness and death (which may in fact have been more pronounced for the older surviving spouses), yet the Reduction Provisions operated to deny the survivors whose spouses had been over 66 (or 61) at their death the full benefit of the SDB. Justice Rowles was critical of the lack of logic inherent in this

131 *Withler SCC* (Factum of the Intervener Women's Legal Education and Action Fund at para 2), online: LEAF <http://leaf.ca/wordpress/wp-content/uploads/2011/03/LEAF-Intervener-Factum-Withler-SCC.pdf> ["LEAF Factum in *Withler SCC*"].

132 See *Withler BCCA*, *supra* note 45. The majority also stipulated one correct mirror comparator, but used groups both broader and narrower than their chosen comparator group at (para 170).

133 This would be the third group as explained in Part II(a) and Figure 1, above, i.e., those whose spouses had been civil servants between age 59, the average age of retirement, and age 66—or Canadian Forces members between age 45, the average age of retirement, and age 61—when they died. This is only part of the comparator group that Justice Rowles accepted, but it is quite clearly the group she intended to narrow her focus to, because she was trying to make variations in survivors' pensions irrelevant.

scenario, and the way that this comparison refuted the government's position that those referred to as "older spouses" had less need for full SDBs in light of their receipt of pension benefits.[134] Put another way, the "offset" that the Supreme Court of Canada wrote about between the SDB and pension benefits is only evident when comparing the claimants with the first and second groups from Figure 1;[135] it is non-existent when comparing them to the third group as Justice Rowles did. This arbitrariness was suggestive of stereotyping (or perhaps marginalization) and thus amounted to discrimination on the basis of age.[136]

Although there are real risks to insisting on a mirror comparator analysis in every case, and real advantages to the flexible approach to comparators that the Court gave support to in *Withler*, there will be cases where the use of a mirror comparator group may actually help to expose discrimination. A flexible approach to comparison should allow the use of a mirror comparator, a number of different comparisons, or no comparison at all, depending on which of these approaches is a useful way to examine if there is discrimination in the case at hand.[137]

In addition to constantly insisting that equality is a comparative concept, the Court has consistently called for a contextual approach to the analysis of section 15(1) claims.[138] The Court's approach to context in *Withler*, however, is another major problem with its discrimination analysis. As noted earlier, *Law*'s contextual factors continue to be front and centre in step (2) of the Court's section 15(1) analysis. Most problematic is the Court's continued focus on the overarching purpose of the law, which is often connected to its focus on *Law*'s second contextual factor (correspondence between the law and the claimants' needs and circumstances).[139] This tendency was exacerbated in *Withler* by the Court's new mandate that broad benefit schemes require ex-

134 *Withler BCCA*, *supra* note 45 at para 52.

135 *Withler SCC*, *supra* note 1 at para 77.

136 *Withler BCCA*, *supra* note 45 at para 82.

137 In some cases, no comparator group (mirror or otherwise) might be needed. See e.g. Moreau, "The Wrongs of Unequal Treatment," *supra* note 116 at 298 and 302, who argues that stereotyping and prejudice do not necessarily involve comparative analysis. However, *Withler* is an example of how comparison may actually help to draw out stereotypical assumptions in some circumstances. For another example, see *Morrow v Zhang*, 2009 ABCA 215, 454 AR 221, and the comment on that case in "Courting Confusion," *supra* note 8 at 938-944. See also Beverley Baines, "Equality, Comparison, Discrimination, Status," in *Making Equality Rights Real*, *supra* note 128, 73, who argues that comparison is essential to dismantling gender status hierarchies that subordinate women.

138 See e.g. *Turpin*, *supra* note 98 at para 46.

139 See e.g. *Withler SCC*, *supra* note 1 at paras 67, 71, 77.

plicit consideration of the allocation of resources and legislative policy goals.[140] According to the Court, "[t]he question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme."[141] Those reading this sentence out of context could be forgiven for thinking that this was the Court's description of a section 1 analysis, which examines whether the violation of a *Charter* right can be justified based on the purpose of the law, its impact on the *Charter* rights in question and a balancing of other interests.[142]

It is frustrating that the Court did not give clearer reasons for stating that the focus of the discrimination analysis should be on the purpose of the SDB within the overall legislative scheme. The most the Court said by way of explanation was that the SDB was part of a comprehensive benefit scheme "in which people pool resources for the benefit of all."[143] According to the Court, "[s]uch plans cannot be looked at without considering the full picture of what they do for all members."[144] Why that picture should be considered under section 15(1) rather than section 1 was not explained. The Court appears to have created a separate analytical approach for cases where the impugned provision is part of a broader scheme of benefits. In all such cases henceforth, it appears that the ameliorative effect of the broader scheme on the multiple other groups it benefits or may potentially benefit and the balancing of multiple interests in the government's design of the benefits package (i.e., the allocation of resources and the government's policy goals) must play a role in the section 15(1) analysis.[145]

As we noted when summarizing the Supreme Court's decision,[146] the Court accepted dual purposes for the SDB, but characterized it as life insurance, a characterization that only applies for younger plan members. Why the SDB could have only one purpose and could not serve different purposes through plan members' lives is unclear. The Court's approach is also reminiscent of the demand for one true mirror comparator group in *Hodge* and *Auton*. The historical evidence in *Withler* suggested that the aim of the SDB

140 *Ibid* at paras 67, 71.

141 *Ibid* at para 71.

142 See Jennifer Koshan & Jonnette Watson Hamilton, "'Terrorism or Whatever': The Implications of *Alberta v Hutterian Brethren of Wilson Colony* for Women's Equality and Social Justice," in Sheila McIntyre & Sanda Rodgers, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada Inc, 2010) 221 at 230-247 for commentary on the Supreme Court's most recent revamping of the section 1 analysis.

143 *Withler SCC*, *supra* note 1 at para 74.

144 *Ibid.*

145 *Ibid* at paras 38, 67, 71 and 72.

146 See text accompanying notes 74-76, above.

was to provide a benefit akin to group term life insurance to civil servants and Canadian Forces personnel when they were just starting their careers and had not built up much of a pension and to provide funds to survivors to pay the expenses arising out of the last illnesses and death of plan members who had retired[147]—expenses that increased with age and at a time when a plan member's income was lower.[148] Both purposes seem relevant to determining whether there is discrimination when the SDB is reduced for some, but not all, of the spouses of plan members who died after their retirement.

While it focused on both the purposes of the SDB and the broader benefits scheme as part of its section 15(1) analysis, it is noteworthy that the Supreme Court never specified or examined the purpose of the impugned Reduction Provisions themselves. The federal government was quite forthright about the purpose of those provisions from their point of view: unreduced SDBs would be "financially prohibitive . . . either because of the contribution required from younger employees or the tax attribution if it's employer paid."[149] Justice Rowles, in dissent in the Court of Appeal, found the purpose of the Reduction Provisions to be "to save money in providing less benefit to spouses beyond the age of 60 or 65 so that more funds are available to spouses under the age of 60 or 65."[150] Despite these considerations, however, the Supreme Court never examined the purpose of the impugned Reduction Provisions. This was the purpose that actually mattered the most under section 15(1), as a law with either an unconstitutional purpose or effect will be seen to violate the right in question.[151] In *Withler*, the Supreme Court focused on the wrong purpose, and paid insufficient attention to the effects of the Reductions Provisions on the claimants.[152]

Purpose is also a relevant consideration in the context of *Law*'s third contextual factor, whether the law has an ameliorative purpose or effect on a more disadvantaged group. The Court's treatment of this factor in *Withler* is also cause for concern. As already noted, the Court stated that "where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to

147 *Withler BCSC*, *supra* note 30 at paras 113-117.

148 *Ibid* at para 154.

149 Factum of the Respondent, *supra* note 24 at para 85. See also *Withler BCSC*, *supra* note 30 at paras 2, 76 and 90.

150 *Withler BCCA*, *supra* note 45 at para 113.

151 See *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295.

152 *Withler SCC*, *supra* note 1. Although the Court concluded at para 76 that the law "is discriminatory neither in purpose nor effect," its actual analysis of effects was absent, except for a brief mention at para 75 of Justice Garson's finding that the claimants "were better equipped than most Canadians to meet their expenses".

balance will also colour the discrimination analysis."[153] Later in the decision, the Court referred to the third factor from *Law* simply as "impact on other groups."[154] This restatement of *Law*'s third contextual factor strays far from *Law*'s focus on amelioration of the position of more disadvantaged groups.[155] Although this factor was modified in subsequent cases to avoid claims of relative disadvantage,[156] amelioration of *disadvantage* of another group was still an essential component of the factor. It is difficult to think of the younger plan members who receive an unreduced SDB as historically disadvantaged, let alone more disadvantaged than the elderly claimants.[157] This contextual factor should not have been seen as relevant in *Withler*.

While on the subject of context, another substantive concern with the Court's judgment in *Withler* is its complete lack of attention to gender. At trial, Justice Garson recognized that all of the representative plaintiffs were women, and she noted the ways that the SDB had been aimed at widows historically.[158] In its factum, LEAF argued that age and sex discrimination (and the interrelation between the two) were at play.[159] The Supreme Court failed to acknowledge LEAF's argument that "the impugned provisions, while worded in a gender-neutral way, disproportionately affect elderly single women, a group that is vulnerable and more marginalized than many other groups in society."[160] This lack of attention occurred in spite of the manner in which the case was argued by the claimants,[161] and is ironic given that one of the reasons the Court rejected a mirror comparator approach was because it "overlooks the fact that a claimant might be impacted by many interwoven grounds of discrimination".[162] Surely gender was an important part of the context that the Court should have weighed in its analysis?[163]

153 *Ibid* at para 38.

154 *Ibid* at para 66.

155 *Law*, *supra* note 4 at para 72.

156 See *Lovelace v Ontario*, [2000] 1 SCR 950 at paras 58-59, 85.

157 See *Law*, *supra* note 4 at para 95, and *Gosselin v Québec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 at paras 33-4 (per the majority), where the Court found that young persons were not socially or economically disadvantaged. In *Withler*, surviving spouses of plan members with few years of pensionable service might be disadvantaged in the context of the benefits package, but most would not be seen as disadvantaged in the broader social, political and economic context. In any event, these considerations belong in section 1, not section 15(1).

158 *Withler BCSC*, *supra* note 30 at paras 15, 22.

159 LEAF Factum in *Withler SCC*, *supra* note 131 at paras 8, 22.

160 *Ibid* at para 22.

161 Factum of the Appellants, *supra* note 23 at paras 36, 37, 51.

162 *Withler SCC*, *supra* note 1 at para 58.

163 The failure to recognize the gendered aspects of age discrimination also occurred in *Law*, *supra* note 4. See Denise Réaume, "*Law v Canada (Minister of Employment and Immigration)*, Women's Court of Canada [2006] 1 W. C. R. 147," (2006) 18 CJWL 147 at 149.

Neither does the Court question what appear to be class-based assumptions. The government had acknowledged that the Reduction Provisions "assume[d] that people who have reached a normal age for retirement have the benefit of the wealth and pension accumulated over the course of their years of public service, or combined public service and other employment, and have made provisions for any of their dependants."[164] That some of the claimants "had acquired and retained assets while others had not" was presented as a matter of personal choice,[165] and not as the result of incurring, for example, uninsured health expenses during a spouse's lengthy illness. As LEAF argued, the reduction in the SDB assumes that older civil servants or armed forces members saved significant amounts of easily liquidated assets to provide for their spouses and other dependants.[166] These assumptions about plan members might not be true for any number of reasons, and might not be relevant to the claims of the spouses, but the assumptions were not addressed by the Court.

Although Justice Rowles was accused of ignoring context by the Supreme Court,[167] she combined both a mirror comparator approach within the four corners of the legislation and a broader contextual approach that looked at the place of the claimants' group in society in reaching her conclusion that the Reduction Provisions were discriminatory. Justice Rowles also considered the claimants' pre-existing disadvantage and the nature and scope of the impact that the Reduction Provisions had on them (*Law*'s first and fourth contextual factors), and at these stages she looked more broadly at their circumstances as elderly members of society. For example, Justice Rowles was critical of Justice Garson's finding that the claimants were not members of a vulnerable group, and the emphasis the trial judge placed on evidence which showed that the economic well-being of the elderly had improved over time.[168] Justice Rowles also noted her concern that the Reduction Provisions were "premised on the assumption that older surviving spouses can readily draw on their pensions with little or no consequence." However, "by requiring surviving spouses to

164 Factum of the Respondent, *supra* note 25 at para 89.

165 *Ibid* at para 24. For critiques of arguments based on the notion of choice, see e.g. Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in *Making Equality Rights Real*, *supra* note 128 at 209; Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15," in *Diminishing Returns*, *supra* note 18 at 115. See also David Schneiderman, "Universality vs. Particularity: Litigating Middle Class Values under Section 15" in *Diminishing Returns*, *supra* note 18 at 367 (arguing that Canadian constitutional law, including section 15 decisions of the Supreme Court, are infused with middle class values).

166 LEAF Factum in *Withler SCC*, *supra* note 131 at para 25.

167 *Withler SCC*, *supra* note 1 at para 81.

168 *Withler BCCA*, *supra* note 45 at paras 67-72.

use their pensions to compensate for receiving a reduced death benefit, the law exacerbates their income vulnerability, which is the very harm against which survivor's pensions are meant to protect."[169]

The type of context considered by Justice Rowles is the type of context we expect to see when the question is whether a distinction drawn on a protected ground is discriminatory. Her focus was the impact of the impugned provision on the claimants, based on the broader social, political and economic context. As noted above, the Supreme Court paid little attention to the broader context, and also ignored the impact or effect of the Reduction Provisions on the claimants. Instead, it focused on factors such as the allocation of resources and the government's policy goals, which belong in section 1.

The relationship between section 15 and section 1 had been regarded as the central issue by many commentators prior to the Court's first section 15 decision.[170] *Andrews* was seen to resolve the issue by being emphatic about the need for analytical separation between section 15 and section 1, in part because of who bears the burden of proof in relation to each.[171] The importation into section 15(1) of section 1 considerations was a major critique of the *Law* decision, centred primarily around *Law*'s second contextual factor, correspondence (which accounts for arbitrariness, typically a section 1 matter at the rational connection stage).[172] Some thought that the Court's decision in *Kapp* had corrected *Law* and returned to *Andrews*' insistence on analytical separation,[173] but this interpretation now seems incorrect. The Court's focus in *Withler* on the broad purpose of the overall scheme, its correspondence to the claimants' needs, and the balancing of interests within section 15 also ignored other *Charter* rulings critical of this approach.[174]

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169 *Ibid* at para 92.

170 See Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990-1991) 4 CJWL 407 at 411 (reviewing the major themes in the *Charter* literature prior to *Andrews*).

171 *Andrews*, *supra* note 3 at 178 and 182; *Miron v Trudel*, *supra* note 17 at 485-86, per McLachlin J. See also Sheila McIntyre & Sanda Rodgers, "Introduction: High Expectations, Diminishing Returns—Section 15 at Twenty," in *Diminishing Returns*, *supra* note 18 at 7.

172 See "Formatting Equality," *supra* note 18 at 72; Gilbert, *supra* note 91 at para 15; Martin, *supra* note 18; Martha A McCarthy & Joanna L Radbord, "Foundations for 15(1): Equality Rights in Canada" (1999) 6 Mich J Gender & L 261 at 265; "Deference and Dominance," *supra* note 18; Ryder, Faria & Lawrence, *supra* note 18.

173 *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153 (the British Columbia Court of Appeal made a point of seeing *Kapp* as correcting *Law* on the need for this analytical separation and stated that the law had been brought back to *Andrews* on the relationship between the two sections at paras 115-116).

174 See e.g. *Lavoie v Canada*, 2002 SCC 23, [2002] 1 SCR 769 at paras 47-8; *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76 at para 97 (per Binnie J, dissenting in part); *Canada (AG) v Hislop* (2004), 573 OR (3d) 685, 246 DLR (4th) 644 (CA) at

Related to the analytical blurring between sections 15 and 1, and as problematic, is the Court's return to the language of relevance in *Withler*. This occurred in one of its descriptions of substantive equality: "It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are *relevant considerations* under the circumstances."[175] This sort of approach was explicitly rejected by the Supreme Court in *Andrews*[176] and *Turpin*.[177]Again, there is no acknowledgment in *Withler* of the critique of this approach and the way that it instantiates a similarly situated, formal equality model and imports section 1 considerations into section 15.[178]

The Court also failed to mention the interplay between section 15(1) and section 15(2) in *Withler*, despite its focus on the ameliorative impact of the SDB on other groups in this case. In *Kapp*, ameliorative impact was dealt with primarily under section 15(2) of the *Charter*, although the Court left open the possibility that it might still have a role to play under section 15(1) on the question of "whether the effect of the law or program is to perpetuate disadvantage."[179] In *Withler*, the only thing the Court states about that role is that "[w]here the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis."[180] However, the Court looked at the ameliorative effect of the larger benefits scheme on others, and not at the ameliorative effect of the impugned law on others. Considering the ameliorative effect of the larger benefits scheme on others has little to do with determining whether the effect of the law is to perpetuate

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para 54, all cited in *Withler BCCA*, *supra* note 45 at paras 80-81.

175 *Withler SCC*, *supra* note 1 at para 39 (emphasis added). See also the reference to relevant personal characteristics at para 59.

176 *Andrews*, *supra* note 3 at 178 and 182.

177 *Turpin*, *supra* note 98 at paras 37 and 40 ("ensure that each right be given its full independent content divorced from any justificatory factors applicable under section 1 of the *Charter*,")("test of whether a distinction is 'unreasonable,' 'invidious,' 'unfair' or 'irrational' imports limitations into s. 15 which are not there. It is inconsistent with the proper approach to s. 15 described by McIntyre J in *Andrews*").

178 See e.g. David M Beatty, "The Canadian Conception of Equality" (1996) 46 UTLJ 339 at 354-56; Fay Faraday, Margaret Denike, & M Kate Stephenson, "Introduction: In Pursuit of Substantive Equality" in *Making Equality Rights Real*, *supra* note 128 at 13; Marie-Adrienne Irvine, "A New Trend in Equality Jurisprudence?" (1999) 5 Appeal 54 at 60; Martin, *supra* note 18 at 316 and 327; Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" in *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*, *supra* note 6 at 155-156.

179 *Kapp*, *supra* note 5 at para 23.

180 *Withler SCC*, *supra* note 1 at para 38. Section 15(2) was not engaged in *Withler* because its ameliorative programs must target disadvantaged groups identified by enumerated or analogous grounds, following *Kapp*, *supra* note 5 at para 41.

the disadvantage of those challenging the law. The Court seems to be suggesting that amelioration is relevant under section 15(1) when the impugned law is a part of a larger benefits scheme and those whose condition is being ameliorated by the larger benefits scheme are members of a group which may or may not be disadvantaged, whereas amelioration is relevant under section 15(2) when the impugned law is a targeted program, even within a larger benefits scheme, and those whose condition is being ameliorated by the targeted program are members of the disadvantaged group that is targeted. There is no distinction between these two scenarios. It is merely a matter of whether the Court looks at the beneficiaries of the more targeted benefit (e.g., the SDB) within a larger benefits scheme (e.g., the pension scheme) or whether they look at the beneficiaries of the larger scheme. Not only is there no elaboration of the role of amelioration in section 15(1), but we see, once again, the importation of section 1 considerations into section 15.

Finally, on the more procedural and pragmatic matters of precedential value and direction to lower courts, we have three concerns. First, the decision reads like a judicial review for errors when the Court turns to the application of law to facts. The Court paraphrased and quoted Justice Garson's decision at length, and then merely added that "[w]e see no basis on which to fault the trial judge's contextual analysis and its affirmation by the majority of the Court of Appeal."[181] Given that Justice Garson decided the case under the *Law* analytical framework before *Kapp* was handed down, and given *Kapp*'s critiques of the method of analysis in *Law*, the Court's conclusion that "the reasons of the trial judge and the majority of the Court of Appeal disclose no error in methodology" is inexplicable.[182]

Second, it is disconcerting that the cases decided by the Supreme Court after *Kapp* which dealt with section 15(1) claims in a perfunctory manner—*Ermineskin*,[183] *AC v Manitoba*[184] and *Hutterian Brethren*[185]—are cited as authoritative on the equality guarantee.[186] It is true that the Supreme Court purported to conduct a complete substantive section 15(1) analysis in *Ermineskin*, but the equality analysis is relatively brief and does little more than apply *Kapp* to the facts in *Ermineskin*.[187] There is nothing that can be learned about

181 *Withler SCC*, *supra* note 1 at para 79.
182 *Ibid* at para 82.
183 *Supra* note 15.
184 *Ibid.*
185 *Ibid.*
186 *Withler SCC*, *supra* note 1 at paras 29, 31 and 66.
187 See "Courting Confusion," *supra* note 8 at 933-937.

how to present or decide an equality claim from *AC v Manitoba* or *Hutterian Brethren*.

Third, it is concerning that the Court continues to revise its analytical approach to section 15(1) without ever overruling or even really disapproving of its earlier judgments on the aspects of those judgments that have now been reversed. Thus, although *Kapp* cast grave doubts on the role of human dignity in section 15 cases and *Ermineskin*, *AC v Manitoba* and *Hutterian Brethren* never even mentioned the phrase, *Law* was never overruled despite the role human dignity played as the linchpin of its approach. The necessity of formulating the one true mirror comparator group is now gone, but *Hodge* and *Auton*'s insistence on that approach is merely minimized in *Withler*, with the Court acknowledging their application of a mirror comparator approach but stating the real emphasis in the two cases was on contextual factors, especially the correspondence factor.[188] The Court's revisionist approach to its own history will undoubtedly continue to cause further confusion among counsel, lower courts and law students.

V. Conclusion

The Supreme Court has purported to recognize the critiques of its earlier section 15 decisions in cases like *Kapp* and *Withler*. However, these cases can at best be seen as tinkering with section 15(1). In *Kapp*, the Court may have moved away from *Law*'s problematic use of human dignity, but it left the contextual factors from *Law* intact, and narrowed the definition of discrimination.[189] In *Withler*, the Court moved away from the mirror comparator approach of *Hodge* and *Auton*, yet in affirming the trial judge's more "flexible" approach to comparators and her broad focus on the overall purpose of the legislative scheme, the Court perpetuated some of the problems it claimed to acknowledge. This made it very difficult for the claimants to show that they had been deprived of a benefit in a way that was discriminatory, in part because they were carrying the burden of section 1 within section 15(1).

What the Supreme Court has not done is to take the more fundamental critiques of its section 15 jurisprudence to heart. Commentators have repeatedly argued that the Court does not seem to understand or refuses to take a truly substantive approach to equality rights.[190] Substantive equality, the

188 *Withler SCC*, *supra* note 1 at 51.

189 On the other hand, *Kapp* did more than tinker with section 15(2) of the *Charter* by giving it independent force in the section 15 analysis. See *supra* note 5 at paras 37-41.

190 See e.g. Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" in *Diminishing Returns supra* note 18 at 315-316; Diana Majury, "Introducing the Women's Court

mantra of section 15 that the Court has repeatedly invoked, needs to become less of an abstract meditation on equality and more of a concrete practice of equality. Until the Court is willing to come to terms with the critique of its section 15(1) approach, equality rights claims will continue to be very difficult to mount and prove.[191]

of Canada" (2006) 18 CJWL 1 at 2; "Deference and Dominance," *supra* note 18 at 113; McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s," *supra* note 178 at 131; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror on the Wall, What's the Fairest of Them All?" in *Diminishing Returns*, *supra* note 18, at 149; "Managing Charter Equality Rights," *supra* note 8 at 532-538; "Unequal to the Task," *supra* note 6 at 183-185.

191 See "Deference and Dominance," *supra* note 18 at 99; "Managing Charter Equality Rights," *supra* note 8.