Placing Vulnerability at the Centre of Section 15(1) of the *Charter*: A Case Comment on *Inglis v British Columbia (Minister of Public Safety)*

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In order to advance substantive equality under the Charter *through the section 15(1) framework, Canadian courts should shift towards a vulnerability-centric model that focuses on protecting individuals and groups who experience vulnerability based on enumerated or analogous grounds. In adjudicating claims under section 15(1), Canadian courts have occasionally invoked the notion of "vulnerability." However, the courts have yet to engage in a thorough discussion of the term's meaning and implications across specific contexts. This article explores the meaning and contours of "vulnerability" and analyzes the prospect of usefully integrating vulnerability into the section 15(1) framework. This includes a discussion of how the section 15(1) test as currently formulated "falls short," and how the advancement of a juridical theory of vulnerability can remedy several key shortcomings. This article explores vulnerability through the lens of* Inglis v British Columbia (Minister of Public Safety), *examining how a vulnerability-centric model might operate based on lessons learned from* Inglis. *Four themes of vulnerability emerge: resource imbalances, dependency, physical and/or mental condition, and marginalization. This article concludes with the observation that, although the vulnerability-centric model is not without its flaws, its weaknesses are outweighed by its strengths in terms of advancing substantive equality.*

Afin de faire progresser l'égalité réelle selon la Charte *grâce au cadre de l'article 15(1), les tribunaux canadiens devraient adopter un modèle centré sur la vulnérabilité qui accorde la priorité à la protection d'individus et de groupes qui connaissent la vulnérabilité selon des motifs énumérés ou analogues. Au moment de statuer sur des réclamations en vertu de l'article 15(1), les tribunaux canadiens ont parfois invoqué la notion de la « vulnérabilité ». Cependant, ils n'ont pas encore entamé une discussion approfondie de la signification et la portée du terme dans des contextes particuliers. L'auteur de cet article examine la signification et les contours de la « vulnérabilité » et fait l'analyse de la possibilité d'intégrer utilement la vulnérabilité dans le cadre de l'article 15(1). Cela comprend une discussion de la manière dont le critère de l'article 15(1), tel qu'il est formulé actuellement, « ne répond pas aux exigences » et comment l'avancement d'une théorie juridique de la vulnérabilité peut remédier à de nombreux défauts-clés. L'auteur étudie la vulnérabilité par l'entremise d'*Inglis v British Columbia (ministre de la Sécurité publique), *en examinant la façon dont un modèle centré sur la vulnérabilité pourrait fonctionner en s'appuyant sur les leçons apprises d'*Inglis. *Quatre thèmes liés à la vulnérabilité ressortent : un déséquilibre des ressources, la dépendance, l'état physique ou mental et la marginalisation. En conclusion, l'auteur fait l'observation que, bien que le modèle centré sur la vulnérabilité ne soit pas sans défauts, ses forces l'emportent sur ses points faibles sur le plan de l'avancement de l'égalité réelle.*

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Introduction

In adjudicating claims under section 15(1) of the *Charter*,[1] Canadian courts have occasionally invoked the notion of "vulnerability." However, the courts have yet to engage in a thorough discussion of the term's meaning and its implications across specific contexts. Vulnerability is often invoked as self-evident, assumed to be well understood and clear in its meaning. This, however, is not the case.

My principal argument is that in order to advance substantive equality through the section 15(1) framework, legal analysis should shift towards a vulnerability-centric model that focuses on protecting individuals and groups who experience vulnerability based on enumerated or analogous grounds. This necessitates a deeper examination and understanding of the nature of vulnerability. The key step in shaping a vulnerability-centric model is to explicitly recognize vulnerability in what is currently understood to be the second step of the section 15(1) framework: does the impugned distinction create a disadvantage by perpetuating prejudice or stereotyping, *or by imposing or exacerbating the vulnerability of the group or individual in question*?

This argument is important because vulnerability offers a more robust conceptual basis for advancing substantive equality. The current section 15(1) framework has been criticized as being overly complex, difficult to apply, and inadequate in advancing substantive equality.[2] Treating vulnerability as an organizing principle shifts the focus to "narrowing the gap" between the disadvantaged and the rest of society because, at its core, the concept of discrimination is inextricably linked to and driven by vulnerability.

My commentary proceeds as follows. Part I provides a brief summary of the British Columbia Supreme Court case of *Inglis v British Columbia (Minister of Public Safety)*,[3] which offers a useful illustration of how deeper consideration of vulnerability can enhance the section 15(1) analysis. Part II outlines the current framework for that analysis. Part III provides a commentary on how

1 *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*].

2 Patricia Hughes summarizes the criticisms of the section 15(1) jurisprudence, noting that it has been "described as 'unsettled in important and troubling ways'; 'confusing, unpredictable, overly burdensome and excessively formalistic'; and 'bewildering, contradictory, fractured, and despair-inducing'. Put simply, it lacks the coherence to offer serious guidance about how to realize substantive equality 'on the ground'": see Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58 SCLR (2d) 245 at 255. My vision is that coalescing around the concept of vulnerability will lend greater coherence to the section 15(1) jurisprudence.

3 2013 BCSC 2309, [2013] BCJ No 2708 (QL) [*Inglis*].

a fuller recognition of "vulnerability" as a justiciable concept can enrich section 15(1) jurisprudence. It covers three issues in separate sections. Section A explores the meaning of "vulnerability," canvassing leading academic commentary. Section B considers the concept of vulnerability through the lens provided by the *Inglis* case. In particular, the discussion here looks at four aspects of vulnerability that emerge from the facts and reasons in *Inglis*: resource imbalance, dependency, physical and/or mental condition, and marginalization. Section C analyzes how vulnerability can be usefully integrated into the section 15(1) framework and addresses various shortcomings in the section 15(1) analysis. Part IV offers concluding remarks.

I. Summary of *Inglis v BC (Minister of Public Safety)*

The British Columbia Supreme Court's decision in *Inglis v British Columbia* has been hailed as "one of the most significant prisoner rights cases in Canadian history."[4] It is also, however, a hallmark case on the potency of section 15(1) in addressing government action directed at a vulnerable segment of the community. It provides an illustration of how a more vulnerability-centric approach might operate, as well as why such a model might be a welcome development. To be clear, the Court in *Inglis* did not expressly purport to place vulnerability as a central element of section 15(1). I submit, however, that an awareness of vulnerability permeates the analysis, and provides encouragement for future section 15(1) litigants in this regard.

In *Inglis*, Justice Carol Ross considered the constitutionality of the BC government's 2008 decision to close the Alouette Correctional Centre for Women (ACCW). ACCW offered a program allowing provincially incarcerated women[5] and their babies to reside in the institution together (the "Program"). This Program had been in operation successfully since 1973. A mother who would be giving birth during her incarceration could apply to return to ACCW with her baby after delivery. Infants were then permitted to stay with their mothers following birth, which gave them time to bond, breastfeed, and develop a nurturing relationship. Mothers and infants were only permitted to reside together at ACCW if the Ministry of Children and Family Development, acting

4 Lisa Kerr, "Tough Sentencing: Women and Children First", *In Due Course* (blog), online: <induecourse.ca/tough-sentencing-women-and-children-first/>.

5 For a scholarly discussion of the incarceration of women (and particularly women with children), see e.g. Kerr, *ibid*; Barbara H Zaitzow & Jim Thomas, *Women in Prison: Gender and Social Control* (Boulder, CO: Lynne Rienner Publishers, 2003); Jane A Siegel, *Disrupted Childhoods: Children of Women in Prison* (Piscataway, NJ: Rutgers University Press, 2011).

pursuant to the provisions of the *Child, Family and Community Service Act*,[6] concluded that it would be in the best interests of the child to do so. The BC Corrections Branch decided to cancel the Program in 2008, despite the record of successful operation of the Program and its predecessors and an absence of any incidents of harm or injury to infants.[7] To the individuals affected, the decision was devastating.[8] The plaintiffs — five incarcerated women and two of their children — brought a constitutional challenge based on sections 7 and 15[9] on behalf of all provincially incarcerated women who wish to have their babies remain with them while they serve their sentence, and on behalf of the infants of those mothers. In the result, Justice Ross accepted the section 7 and 15 claims and found that the decision to cancel the Program could not be justified under section 1.[10] Justice Ross gave the province six months to reinstitute the Program.[11] The Minister did not appeal the decision, and the provincial government subsequently restored the Program, with BC Corrections stating in 2014 that the Program now complied with the directions from the Court.[12]

II. The current state of the law on section 15(1)

In *Andrews v Law Society of British Columbia*, the Supreme Court of Canada described the guarantee of equality as "the broadest of all guarantees," noting that it "applies to and supports all other rights guaranteed by the *Charter*."[13] The Court in *Andrews* articulated its commitment to the principle of substantive, rather than formal, equality.[14] Whereas formal equality requires that "everyone, regardless of the individual circumstances, be treated in identical fashion," substantive equality "recognizes that in some circumstances it is nec-

6 RBSC 1996, c 46.

7 Justice Ross noted that the Program "represented a significant step forward in the amelioration of the circumstances of the mothers and their babies who qualified": *Inglis*, *supra* note 3 at para 612.

8 See Alexandra Samur, "A Win for Moms with Babies Behind Bars", *The Tyee* (7 March 2014), online: <thetyee.ca/News/2014/03/07/Babies-Behind-Bars/> (Alison Granger-Brown, a recreational therapist at ACCW at the time of the Program's cancellation, commented that "[t]he cancellation of the mother-baby program … really arrested a place where they [the incarcerated mothers] could begin to start changing their lives.")

9 The claimants also brought a section 12 challenge, which was dismissed: *Inglis*, *supra* note 3 at para 505.

10 *Ibid* at para 10.

11 *Ibid* at paras 656-58.

12 "B.C. Jail Complies with Court Order, Relaunches Program for Mothers, Babies", *CTV News* (16 June 2014), online: <ctvnews.ca/canada/b-c-jail-complies-with-court-order-relaunches-program-for-mothers-babies-1.1871446>.

13 [1989] 1 SCR 143 at 185, 56 DLR (4th) [*Andrews*].

14 See *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 at para 711, 28 Imm LR (4th) 1 for a recent application.

essary to treat different individuals differently, in order that true equality may be realized."[15] In *Withler v Canada (AG)*, a unanimous Court confirmed that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?"[16]

In *Law v Canada (Minister of Employment and Immigration)*, Justice Iacobucci, writing for a unanimous Court, identified "human dignity" as the central concern of equality rights, while confirming that section 15(1) required a purposive and contextual approach: "[a] purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach."[17] Although the contextual approach continues to inform our understanding of section 15(1), the use of "human dignity" as the legal test in *Law* proved problematic. In *R v Kapp*, the Supreme Court of Canada noted that human dignity is an "abstract and subjective notion" that is not only confusing and difficult to apply, but also imposes an *additional* burden on equality claimants.[18] *Kapp* shifted the thrust of the inquiry towards "combatting discrimination, defined in terms of perpetuating prejudice and stereotyping."[19]

Writing for five Justices in a divided Court in *Quebec (AG) v A*,[20] Justice Abella re-stated the framework of section 15(1) questions from *Kapp* as follows: (1) Has the government made a distinction based on an enumerated[21] or analogous[22] ground? (2) Does the distinction's impact on the individual

15 *Ibid* at para 712.

16 2011 SCC 12, [2011] 1 SCR 396 [*Withler*].

17 [1999] 1 SCR 497 at 548, 170 DLR (4th) 1 [*Law*].

18 2008 SCC 41 at para 22, [2008] 2 SCR 483 [*Kapp*].

19 *Ibid* at para 24.

20 2013 SCC 5, [2013] SCR 61 [*Quebec v A*] (also known as *Eric v Lola*) (there was a 5-4 split in the decision, with the majority finding that the impugned provisions violated s 15(1). When it came to section 1, however, the court split further, and as a result the impugned provisions were upheld as constitutional. There were four sets of reasons: (1) LeBel J wrote the reasons for judgment (with Fish, Rothstein, and Moldaver JJ concurring), (2) Abella J dissented in the result, (3) Deschamps J also dissented in the result (with Cromwell and Karakatsanis JJ concurring), and (4) McLachlin CJC concurred in the result. Abella J wrote the majority decision on s 15(1), and LeBel J wrote the dissenting decision on s 15(1). While Abella J dissented in the result, her formulation of the section 15(1) framework was accepted by the court).

21 The enumerated grounds include "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability": *Charter*, *supra* note 1, s 15(1).

22 See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 (noting that an analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" at para 13).

or group create a disadvantage by perpetuating prejudice or stereotyping?[23] Justice Abella clarified that prejudice and stereotyping are not discrete elements of the test, but simply *indicia* that may help to identify discrimination.[24] She described "prejudice" as "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member," and "stereotyping" as an attitude "that attributes characteristics to members of a group regardless of their actual capacities."[25] It might be argued that, so described, disadvantage caused by prejudice and stereotyping captures the concept of "vulnerability." I submit, however, that vulnerability is qualitatively different from prejudice and stereotyping, and adds a needed dimension to an understanding of substantive equality.

III. Commentary: Vulnerability, *Inglis*, and a re-shaping of section 15(1)

A. Defining vulnerability

The Merriam-Webster Dictionary defines vulnerable as "capable of being physically or emotionally wounded" or "open to attack or damage."[26] The concept may include susceptibility to harm, which can manifest in countless different ways.[27] Vulnerability is also frequently associated with negative connotations of "need," "risk," or "lacking capacity."[28] It should not be confused with

23 *Quebec v A*, *supra* note 20 at para 324.

24 *Ibid* at para 325, Abella J (note, however, that LeBel J viewed prejudice and stereotyping as "crucial" to the identification of discrimination, though he too acknowledged that they are not the only factors: *ibid* at para 169). See also *Andrews*, *supra* note 13 (defining discrimination as "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society" at 174; the Court also noted that government action "should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another" at 165).

25 *Quebec v A*, *supra* note 20 at para 326, Abella J. Since *Quebec v A*, the Supreme Court has decided one further section 15(1) case: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548. The claim was based on a distinction made on education level, argued to have a disadvantaging impact on the grounds of age. The Court dismissed the claim for lack of evidence of the discriminatory impact.

26 *The Merriam-Webster Dictionary*, *sub verbo* "vulnerability".

27 Kate Brown, "'Vulnerability': Handle with Care" (2011) 5:3 Ethics & Social Welfare 313 at 313.

28 David Mechanic & Jennifer Tanner, "Vulnerable People, Groups, and Populations: Societal View" (2007) 26:5 Health Affairs 1120 at 1120.

weakness,[29] though the implications carried by the terms may overlap in certain circumstances.

Attempts to define vulnerability vary widely in approach and in scope, and the concept plays an important role in many disciplines. Some theorists adopt a broad approach, conceptualizing vulnerability as an innate part of the human condition.[30] This account has appeal because it rests on the compelling premises of underlying mutual dependency and transitory existence. Martha Fineman understands vulnerability as a "universal, inevitable, enduring aspect of the human condition," to which she believes the State should be responsive.[31]

A contrasting and narrower approach views vulnerability as residing in the conditions of specific subjects, rendering them deserving of special consideration, accommodation, and exception.[32]

Mary Neal has summarized the literature on vulnerability as follows: "[V]ulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) ... Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds."[33] Indeed, Neal's observation connects with the etymology of vulnerability, which stems from the Latin *vulnus*, meaning "wound."[34] The capability of being wounded is reflected in the definition offered by Jacob Rendtorff, a professor of ethics and philosophy, who wrote, "The vulnerable are those whose autonomy or dignity or integrity are capable of being threatened."[35]

Vulnerability can arise in the form of what Nancy Fraser describes as "misrecognition," in which "institutionalized patterns of cultural value ... consti-

29 Weakness should be seen as a specific instance and type of vulnerability rather than as a synonym for vulnerability. To illustrate, a powerful corporation may be far from weak, but still vulnerable in a different sense.

30 Julie A Wallbank & Jonathan Herring, "Introduction: Vulnerabilities, Care and Family Law", in Julie A Wallbank & Jonathan Herring, eds, *Vulnerabilities, Care and Family Law* (New York: Routledge, 2014) at 13.

31 Martha A Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008-2009) 20:1 Yale JL & Feminism 1 at 8 [Fineman, "The Vulnerable Subject"].

32 *Ibid.*

33 Mary Neal, "Not Gods but Animals: Human Dignity and Vulnerable Subjecthood" (2012) 33:3 Liverpool LR 177 at 186-87.

34 Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania: University of Pennsylvania University Press, 2006) at 28.

35 Jacob D Rendtorff, "Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity and Vulnerability — Towards a Foundation of Bioethics and Biolaw" (2002) 5:3 Medicine, Health Care and Philosophy 235 at 243.

tute some actors as inferior, excluded, wholly other, or simply invisible — in other words, as less than full partners in social interaction."[36] "Misrecognition" constitutes a sort of social or cultural prejudice. Consequently, some of the likely indicia of vulnerability would include dependence on the State or others, social exclusion or disadvantage, and prejudice or stigmatization. Fraser also identifies "misdistribution" as the state in which "some actors lack the necessary resources to interact with others as peers."[37] This constitutes a form of disadvantaged status.

Considering the range of concepts contained in the term, vulnerability accordingly arises from numerous different sources. The sources may include the individual or the community,[38] each of which may require a different response from the law. It can be framed in a relative sense (e.g., the strong party versus weak party dichotomy) or in an intrinsic sense (e.g., a mental illness that causes vulnerability). Access to resources is also a primary source of vulnerability. Fineman opines that vulnerability is "greatly influenced by the quality and quantity of resources we possess or can command."[39]

In court decisions, vulnerability typically arises in the negative sense (i.e., a weakness, infirmity, disadvantage, etc.). Recently, however, theorists and academic commentators have acknowledged positive aspects of vulnerability. Fineman argues that vulnerability "presents opportunities for innovation and growth, creativity, and fulfilment. It makes us reach out to others, form relationships, and build institutions." [40] Therefore, the law's conceptual understanding of vulnerability should not be restricted to its negative implications, nor should vulnerability be stigmatized or seen as mere "weakness" or "infirmity."

Martha Minow connects the concept of vulnerability to the protection of the law when she asserts, "If the courts ... are denied power to respond to people's vulnerabilities, abuses of public and private power may persist without relief."[41] It is important that the courts (1) have a deep understanding of vulnerability, (2) employ the concept to protect those with vulnerabilities deserving of

36 Nancy Fraser, "Rethinking Recognition" (2000) 3 New Left Rev 107 at 113 [Fraser].

37 *Ibid* at 116.

38 Mechanic & Tanner, *supra* note 28 at 1223-25.

39 Fineman, "The Vulnerable Subject", *supra* note 31 at 10.

40 Martha A Fineman, "'Elderly' as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility" (2012) 20:1 Elder LJ 71 at 101 [Fineman, "Elderly as Vulnerable"].

41 Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithica: Cornell University Press, 1990) at 10 [Minow].

protection, and (3) view vulnerability not as a fixed notion but as an evolving concept that reflects societal norms and *Charter* values.

Dunn and Herring explore the distinction between external (i.e., situational) and internal (i.e., inherent) vulnerability, arguing that there is a stronger case for legal intervention in cases of external vulnerability due to the practicality of removing external harmful influences.[42] But, can such a clear line between internal and external vulnerability be drawn? Being a victim of abuse is both an externally-imposed and internally-reproduced vulnerability. The effect of abuse is so profoundly damaging that it cannot be said to give rise only to external or only to internal vulnerability; it produces both.

This "source" spectrum should not be reduced to a mere internal/external dichotomy. It is true that some vulnerabilities are aptly described as "inherent." For example, a child may have an inherent — though temporary in duration — vulnerability as a result of children's limited worldly experience, mental capacities, etc. Other conditions of vulnerability are not so easily ascribed to external or internal sources. Consider this question in light of the context of incarcerated persons, the issue in *Inglis*. On the one hand, the deprivation of liberty gives rise to "temporary" vulnerability that appears, *prima facie*, to be imposed upon the individual by an "external" force — that is, the state renders the individual vulnerable through various deprivations of rights and freedoms. This overly simplistic description, however, overlooks that incarceration is the result of a multitude of societal, cultural, economic, political, biological, environmental, and other factors. Incarceration may also be merely a single instance of a long chain of detentions, suggesting vulnerability in such a case is far from "temporary." In addition, ex-prisoners have impaired access to social services. Furthermore, it is misguided to think that the effects of incarceration will be confined to the period of incarceration, or that those effects will be felt solely by the incarcerated individual. Hence, a flexible understanding of these terms is required to appropriately discuss vulnerability, and courts should be wary of policing the boundaries within which individuals are deemed "vulnerable" with too rigorous an emphasis on formality. I am not convinced, as Dunn and Herring are, that "internal" vulnerabilities present any less compelling of a case for court intervention, or even that such a distinction can be sustained.

A further insight into how society views vulnerability is the "sinners versus victims" dichotomy.[43] Some conditions may be perceived as self-imposed vul-

42 Jonathan Herring & Michael Dunn, "Safeguarding Children and Adults: Must of a Muchness?" (2011) 23:4 Can Fam LQ 528 at 538.

43 Mechanic & Tanner, *supra* note 28 at 1221.

nerabilities within the control of the individual. These conditions are less likely to receive the public's compassion and may instead be stigmatized. For example, an addict whose vulnerability arises from a deep dependence on drugs may be seen — rightly or wrongly — as morally delinquent and hence undeserving of the law's protection. By contrast, vulnerability arising out of a history of child abuse may be seen as outside one's locus of control and hence more deserving of the law's protection. This issue arose in the argument in the *Inglis* case.

B. Vulnerability through the lens of *Inglis*

Justice Ross found that the decision to cancel the Mother-Child Program violated the equality rights of two groups: (1) "provincially incarcerated mothers who wish to have their baby remain with them while they serve their sentence" and (2) "the babies of those mothers."[44] Crucial to Justice Ross's conclusion on the equality rights issue was her acknowledgement of the compounding role of multiple and intersecting grounds of discrimination in the claimants' circumstances. These grounds included gender, age, disability, and racial origin.[45] Justice Ross described the claimants as being "amongst society's most vulnerable individuals" and as "marginalized persons who have been disregarded and misunderstood in Canadian society."[46] Justice Ross reviewed the four contextual factors outlined in *Law* as revealing discrimination: (1) pre-existing disadvantage, (2) the relationship between the grounds and the claimant's characteristics or circumstances, (3) ameliorative purpose or effects, and (4) the nature of the interest affected.[47] In describing the first contextual factor, which is "probably the most compelling factor,"[48] the Court in *Law* listed "pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group."[49] In my submission, Justice Ross's attention to the vulnerability of the claimants, largely neglected as a factor in previous jurisprudence, brought together her concerns with the intersecting grounds of discrimination.

44 *Inglis*, *supra* note 3 at para 13.

45 *Ibid* at paras 558, 601. With regard to incarcerated mothers, the grounds of discrimination included the enumerated grounds of race, ethnicity, disability and sex: *ibid* at para 562. With regard to infants, the Court reasoned that their status "as children of incarcerated mothers is an immutable characteristic of historic disadvantage, analogous to the grounds listed in s. 15, and as such they are worthy of protection from discrimination based on the status of their mothers": *ibid* at para 567.

46 *Ibid* at para 576. However, we are not told precisely what it means to be vulnerable or to experience vulnerability.

47 *Ibid* at para 515.

48 *Law*, *supra* note 17 at para 63.

49 *Ibid*. Note also that vulnerability arose explicitly in Iacobucci J's reasons in *Law*. See e.g. *ibid* at para 63 ("[i]t is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon [these individuals], since they are already vulnerable").

Four key themes of vulnerability emerge from the discussion in *Inglis*: resource imbalance, dependency, physical and/or mental condition, and marginalization. These four concepts offer a foundation for establishing a vulnerability-centric model of section 15(1). These concepts do not stand in isolation from each other, but interact amongst and amplify one another.

First, vulnerability in the form of *resource imbalances* surfaces as a theme. Justice Ross cited the mothers' "low levels of education and employment" as an example.[50] Although not discussed by the Court, children too suffer from resource imbalances due to the family's economic circumstances, exacerbated by lack of worldly experience and education. The resource imbalances evident in *Inglis* exemplify Fraser's concept of "misdistribution" as the state in which "some actors lack the necessary resources to interact with others as peers."[51] This "disadvantaged status" is a key source (and product) of vulnerability.

Second, the notion of *dependency*[52] arises as a prominent theme. This is most evident in the family context. The set of facts in *Inglis* clearly illustrates the nature of familial dependency. In addressing the effects of the Program cancellation on the mothers and their children, Justice Ross stated that "infants have been and will be separated from their mothers during the critical formative period of their life, interfering with their attachment to their mother, and depriving them of the physical and psychological benefits associated with breastfeeding."[53] Justice Ross acknowledged the emotional and physical vulnerabilities arising out of the unique bond between mother and child, particularly post-partum. Furthermore, the interdependency[54] of family members shapes and is shaped by vulnerability, though this vulnerability should not be confined to the negative sense of the word.[55] Familial dependency leaves one open to harm, but it also encourages the forging of bonds and the building of a web of support and a shelter of resilience, as *Inglis* suggests. The prominence of familial dependency is evident in Justice Ross's observation that female prisoners, as distinguished from male prisoners, are more likely to be imprisoned farther away from their families and thereby suffer from a differential impact

50 *Inglis*, *supra* note 3 at para 5.

51 Fraser, *supra* note 36 at 116.

52 This may include, for example, dependency on the State, on substances or drugs, on a particular resource, on specific social connections, on treatments or medicaments, on ideas or beliefs, etc.

53 *Inglis*, *supra* note 3 at para 11.

54 The courts have failed to satisfactorily acknowledge interdependency. See Minow, *supra* note 41 at 10 (asserting that the "[l]aw has tended to deny the mutual dependence of all people while accepting and accentuating the dependency of people who are 'different.'")

55 See Fineman, "Elderly as Vulnerable", *supra* note 40 at 101.

due to the Program cancellation decision.[56] The notion of dependency may suggest a false dichotomy: on the one side, there is autonomy; on the other, dependency.[57] Such dichotomies are common features in legal thought and rhetoric.[58] Vulnerability is better viewed as a graduated concept rather than a dichotomous one.

Third, *physical and/or mental condition* emerged as important factors in *Inglis,* in the sense that internal and external factors create vulnerability due to our state of embodiment.[59] The observations noted above concerning physical and psychological vulnerability of the mother and child are applicable here. Medical conditions, physiological realities, natural aging processes, and other factors may lead to identifying subjects as "vulnerable." Physical or mental vulnerabilities may fluctuate throughout one's lifespan; vulnerability in this sense is not static. Thus, in *Inglis*, we might see the period of incarceration as a time of "peak vulnerability" for mothers, as their physical or mental condition is markedly more likely to be impaired due to the challenges of living in incarceration. Indeed, Justice Ross made reference to the "many [inmates] with mental health issues"[60] and pointed to the harsh realities of incarceration.

Fourth, *marginalization* surfaces as a theme of vulnerability. Subjects that are socially marginalized are at great risk of "harm." For example, in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, Justice Binnie, writing for the majority, stated that "[s]exuality is a source of profound vulnerability" and that the claimants were treated as "sexual outcasts."[61] Moreover, that marginalized subjects are relatively lacking in political power necessarily implies that their interests and rights may be overlooked by elected officials. This "disadvantaged" status falls within Fraser's notion of "misrecognition" —

56 *Inglis*, *supra* note 3 at 550.

57 This dichotomy is noted in Martha Minow's work:

> Law's usual boundaries distinguish the self from others, the normal group from the abnormal, and autonomous individuals from those in relationships of dependency. With this vocabulary, law has organized perceptions of individuals and of groups and has helped to implement norms curbing responsibility to anyone outside of one's own family.

See Minow, *supra* note 41 at 9.

58 Patricia Williams describes this process as "[t]he hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication": *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991) at 8.

59 See Fineman, "Elderly as Vulnerable", *supra* note 40 at 96.

60 *Inglis*, *supra* note 3 at para 5.

61 2000 SCC 69 at para 36, [2000] 2 SCR 1120, Binnie J.

here, for example, incarcerated mothers and their children appear "invisible" and are hence less than full partners in social interaction.[62]

The perilous conditions of incarceration can lead to vulnerability, and the imposition of such conditions may lead to further stigmatization, isolation, and marginalization. This also suggests that vulnerability can be internalized through external forces. The intervenors' submissions argued for a recognition that vulnerability can be internalized in this manner, and how internalized vulnerability resulted from the impugned government decision:

> [I]t sent a powerful, demeaning message to the mothers whose babies were now being apprehended that they are not safe to be around and that their babies must be protected from them. Many of the mothers come from backgrounds of broken attachment. Apprehending their babies re-opens these wounds from the past, disrupting the mother-baby bond and creating severe and potentially insurmountable hurdles to establishing attachment.[63]

Justice Ross underscored the heightened vulnerability of Aboriginal mothers and their infants, noting the "history of overrepresentation of Aboriginal women in the incarcerated population and the history of dislocation of Aboriginal families caused by state action."[64] This observation uncovers a vital question concerning vulnerability: what are the implications of *externally imposed* vulnerability? In light of the troubling history of the dislocation of Aboriginal families, how should the court react to the subject's vulnerability when that vulnerability is thrust upon the subject?

The intervenors in *Inglis* asserted that the history of drug addiction and substance abuse, *inter alia*, marked a significant factor in the case.[65] A counter-argument to the intervenor's position is that the law, from a policy perspective, should not protect those who are vulnerable as a result of their own lifestyle decisions. Yet, such an argument is unpersuasive for three reasons: first, it assumes that drug addiction, such as that experienced by some of the claimants in *Inglis*, is a personal choice, whereas in reality it may be the circumstances and socioeconomic realities of the subject that leads to addiction; second, the "sinner versus victim" dichotomy oversimplifies the nature of addiction, which is not only scientifically but socially complex; third, even if we accept that addiction arises in part through "choice," we should reject the notion that the law should not protect against vulnerabilities arising at least in part from the

62 Fraser, *supra* note 36 at 116.
63 *Inglis*, *supra* note 3 at para 542.
64 *Ibid* at para 15.
65 *Ibid* at para 544.

locus of control of the subject — the *source* of vulnerability is not the focus, but rather the *impact* of vulnerability on the pursuit of substantive equality.

C. Toward a vulnerability-centric model of section 15(1)

What is the "gap" or "shortcoming" that vulnerability would fill in the section 15(1) analysis? Would recognizing vulnerability more explicitly in section 15(1) lead to differences in substantive outcomes? Four points can be made in response to these questions.

First, vulnerability is qualitatively different from concepts such as disadvantage resulting from prejudice and stereotyping. Failing to acknowledge vulnerability as distinct from these concepts risks minimizing how vulnerability characterizes the human condition and is impacted by State decisions. As Linda McKay-Panos has noted, "The Court's reference to 'prejudice' and 'stereotyping' in *Kapp* has raised concerns because it implies that other ways that people experience disadvantage may not be recognized in this test. For example, sometimes the adverse effects of a law or government action are based on harms other than prejudice or stereotyping."[66]

Second, using vulnerability as a touchstone can lead to better legal outcomes. The analysis of cases in which neither prejudice nor stereotyping is clearly evident would be improved by assessing whether the claimant group was situated in a condition of vulnerability. For an illustration, we can look to *Quebec v A*.[67] In that case, a litigant challenged the constitutionality of several spousal support and property division provisions of the *Civil Code of Québec* because they applied only to married or civil-union spouses, leaving *de facto* (common law) couples outside the ambit of the regime. The section 15(1) claim was advanced on the basis of marital status. Justice LeBel, writing in dissent on the section 15(1) issue but for the majority in the result of the case, concluded that the impugned distinction was not discriminatory because it did not express or perpetuate prejudice, or embody a stereotype.[68] He found that the *de facto* union had become a respected type of conjugality, not viewed unfavourably by Quebec society.[69] Yet, looking through the lens of vulnerability, the exclusion of *de facto* spouses exacerbates the group's vulnerability. *De facto* spouses find themselves outside the ambit of the legal protections at issue — namely, those

66 Linda McKay-Panos, "Equality Case Seems to Have Fractured the Supreme Court of Canada" (27 April 2013), *Law Now* (blog), online: <lawnow.org/equality-case-fractured-supreme-court/>.

67 *Supra* note 20.

68 *Ibid* at para 281.

69 *Ibid* at para 249.

ensuring an equitable division of property and continued financial support at the end of a relationship involving financial interdependence. There is a clear vulnerability that arises from being left to find an alternative.

Third, value lies in refining our understanding of what equality cases are about. The court is "one participant in a conversation that often (inevitably) transcends the Court's contribution."[70] Embedding vulnerability in the section 15(1) analysis makes a strong statement about the connection between equality and vulnerability, and opens a deeper discussion about how to achieve greater equality. That is, it advances the "equality conversation."[71] It sends a message to state decision-makers: the State must be sensitive to the effects of their decisions on vulnerable parties.

Fourth, a vulnerability-centric model also addresses a shortcoming in the intellectual exercise of comparison: comparison necessarily invokes consideration of two subjects *vis-à-vis* one another. As stated in *Andrews*, "[equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."[72] Such a premise necessarily compels the argument to start from the philosophical presumption that it is our differences that are important, not our similarities. As Martha Minow points out, "When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude, to distinguish — to discriminate."[73] This intellectual exercise of comparison fails to recognize a fundamental truth: the deeply interconnected nature of human life. By contrast, a vulnerability-centric model starts from the assumption that we are all inherently interconnected, and from our interconnectedness arises vulnerability.[74]

Justice Abella stated in *Quebec v A*, "If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[75] A shift towards a vulnerability-centric

70 See Hughes, *supra* note 2 at 246.

71 See *ibid* at 246 (discussing how judicial decisions bolster the "equality conversation" over the past three decades); *ibid* at 249 ("while the effect of the Supreme Court's jurisprudence may be ambiguous, the existence of the Charter and public conversations resulting from Charter cases run as a ripple throughout Canadian society").

72 *Andrews*, *supra* note 13 at 164.

73 Minow, *supra* note 41 at 3.

74 These kind of considerations informed the rejection by the Supreme Court of Canada of the "mirror" approach to comparative analysis in *Withler v Canada*, *supra* note 16.

75 *Quebec v A*, *supra* note 20 at para 332, Abella J.

model is consonant with this pronouncement. Protecting the vulnerable is inherently about achieving substantive equality.

In terms of the analytic framework for section 15(1) matters, the appropriate means of shaping a vulnerability-centric model is to incorporate vulnerability into the second stage of the analysis. After determining that the government has made a distinction based on an enumerated or analogous ground, the question should be expressed as follows: does the distinction's impact on the individual or group create a disadvantage either by perpetuating prejudice or stereotyping, *or by imposing or exacerbating vulnerability of the group* in question? This explicitly embeds a consideration of vulnerability in the equality rights framework described by Justice Abella in *Quebec v A*, thereby affirming the law's role in protecting subjects against disadvantage arising out of vulnerability. Note too that the use of "imposing or exacerbating" vulnerability directs the court not to restrict protection to only those who fit the traditional description of being vulnerable. It extends protection also to those whose vulnerability emerges solely in response to government action.

It might be argued that a discussion of the claimant's vulnerability fits better under section 1 justification, rather than section 15(1). To date, vulnerability has been used in gauging the degree of deference shown to government in the justification analysis. Justice Bastarache wrote in his concurring judgment in *M v H*: "[The vulnerability of a group] can be an ambiguous factor in cases involving social legislation since the vulnerability of the included group will often bespeak a higher degree of deference to the government's program, while the vulnerability of the excluded group will support the opposite approach."[76] Shifting considerations of vulnerability entirely to the section 1 stage would, however, leave section 15(1) insufficiently strong in its own right. Seeing vulnerability primarily as a public policy matter to be dealt with at the second stage of the constitutional analysis would not do the concept justice. Our jurisprudence should recognize that vulnerability is part of equality itself, not merely a device for calibrating the strictness of the justification test.

IV. Conclusion

Vulnerability offers a useful organizing principle for opening up equality rights jurisprudence, advancing substantive equality, and remedying shortcomings in

76 [1999] 2 SCR 3 at para 309, 171 DLR (4th). Bastarache J also wrote that "[t]he vulnerability of the group that is excluded by the definition in question is also relevant in assessing the quality of the interest affected by the exclusion, and the degree of deference that is appropriate with respect to other Charter guarantees": *ibid.*

the section 15(1) analysis. This paper has highlighted the need for the courts to grapple with the concept of vulnerability at a deeper level. Vulnerability is a nuanced and complex concept that demands rigorous inquiry. Despite its complexity and ambiguity, vulnerability offers a robust conceptual basis for advancing substantive equality. To reshape the section 15(1) framework into a vulnerability-centric model, considerations of vulnerability should be embedded explicitly in the second stage of the inquiry. By looking through the lens of *Inglis* as an illustration of a judgment with a greater orientation towards vulnerability, this article has explored how a vulnerability-centric model might operate.