The Charter and Civil Law:
Redressing the Harms of Government (In)Action:
A Section 7 versus Section 15 Charter Showdown

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Presented by:
Professor Jennifer Koshan
University of Calgary, Faculty of Law
Calgary, Alberta

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REDRESSING THE HARMS OF GOVERNMENT (IN)ACTION:
A SECTION 7 VERSUS SECTION 15 CHARTER SHOWDOWN

INTRODUCTION

When considering the recent Charter\(^1\) claims of vulnerable individuals and groups seeking to redress the harms of government action or inaction, there are two related trends in the case law on ss.7 and 15 that merit attention. First, the Supreme Court has undertaken new approaches to equality rights under s.15(1) and 15(2) of the Charter, with a marked lack of success of equality rights claims in spite of (or perhaps because of) these new approaches. The cases of Kapp,\(^2\) Withler,\(^3\) and Cunningham\(^4\) will be discussed as illustrations of this trend, along with other cases where s.15 was given short shrift, such as Hutterian Brethren,\(^5\) A.C. v. Manitoba,\(^6\) and Fraser.\(^7\) Second, there has been relative success of Charter claims under s.7 where there is strong evidence of harm to life, liberty or security of the person in circumstances where the government (in)action was arbitrary, grossly disproportionate, or overbroad. The cases of PHS Community Services,\(^8\) Adams,\(^9\) and Bedford\(^10\) reflect this trend, although there are some exceptions, particularly in the area of liberty.\(^11\)

Overall, it appears that s.7 may be overtaking s.15 of the Charter as a tool for vulnerable and disadvantaged persons challenging the harms of government (in)action.\(^12\) If these harms can be framed as violations of life, liberty or security of the person and supported by compelling evidence, this may be a winning strategy for Charter claimants. Not all claims involving government harm can be framed in s.7 terms, however, and the particular harms caught by s.15 must be given their due.

\*Associate Professor, Faculty of Law, University of Calgary.

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\(^9\) Victoria (City) v Adams, 2008 BCCA 1363, aff'd 2009 BCCA 563.


\(^11\) See e.g. Bedford (ONCA), ibid. at paras. 93-94; but see Adams (BCCA), supra note 9 at paras. 104-110.

\(^12\) The text of ss.7, 15 and other relevant constitutional provisions are set out in Appendix A.
SECTION 15 EQUALITY RIGHTS: NEW APPROACHES, THE SAME OLD PROBLEMS

Section 15(1): Equality and Discrimination

For many years the governing approach under s.15(1) was dictated by Law v. Canada (Minister of Employment and Immigration), which established a three step test for claims of discrimination: (1) Whether the purpose or effect of the law or government action imposed differential treatment between the claimant and others; (2) Whether the differential treatment was based on one or more enumerated or analogous grounds; and (3) Whether the law’s purpose or effect was discriminatory. The question of discrimination focused on whether the claimant could show a violation of their human dignity, with several contextual factors relevant to this inquiry:

- Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the claimant(s);
- The correspondence or lack of correspondence between the ground(s) on which the claim was based and the actual need, capacity, or circumstances of the claimant(s);
- The ameliorative purpose or effects of the law upon a more disadvantaged person or group; and
- The nature and scope of the interest affected by the law, i.e. how severe and localized were the consequences of the law for the claimant(s).

The Law case was widely criticized for its mechanical, formalistic approach to s.15(1), the fact that some s.1 considerations had been imported into s.15, particularly through the second contextual factor, and the abstract, subjective and malleable nature of human dignity. These criticisms of Law were acknowledged by the Supreme Court in Kapp, where the Court developed a new approach to equality rights and restated its commitment to substantive rather than formal equality.

Kapp was a case involving the federal government’s Aboriginal fishing strategy, which gave a 24 hour priority licence to fishers from the Musqueam, Burrard and Tsawwassen First Nations on the

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15 Ibid.

16 R. v. Kapp, supra note 2 at para. 22 (per McLachlin CJ and Abella J for the majority (citations to literature omitted)).

17 Kapp, ibid. at paras. 14-17.