In this paper, Diana Majury looks at the Supreme Court of Canada’s recent s.15 decision, R. v. Kapp, in a preliminary exploration of the different understandings of equality she sees operating in three different sites (the Supreme Court, equality advocates, and the general public). She looks at the first two sites simultaneously by offering her equality advocate’s critique of the Kapp decision, outlining where the decision falls short of the substantive equality that equality advocates have been theorizing and promoting. She then looks at media responses to the decision, responses that almost unanimously present a formal equality understanding of equality. Recognizing that media coverage provides only a very limited and partial window on public perceptions, the media coverage of Kapp nonetheless raises the spectre that the general public understands equality only to mean formal equality. This conclusion highlights the importance of Rose Vyovodic’s work in combining equality and public education and the need for that work to be continued and expanded.

Dans cet article, Diana Majury examine le récent jugement R. c. Kapp de la Cour Suprême du Canada en rapport avec l’article 15 pour faire une exploration préliminaire des compréhensions diverses de l’égalité qu’elle constate être en jeu dans trois lieux différents (la Cour Suprême, chez les défenseurs de l’égalité et chez le grand public). Elle examine les deux premiers lieux simultanément en présentant sa critique du jugement Kapp en tant que défenseure de l’égalité, exposant en quoi le jugement n’atteint pas l’égalité de fond au sujet de laquelle théorisent et que préconisent les défenseurs de l’égalité. Puis elle examine les réactions médiatiques au jugement, réactions qui présentent presque unanimement une compréhension d’égalité comme égalité formelle. Tout en reconnaissant que la couverture médiatique ne présente qu’une fenêtre très limitée et partielle sur les perceptions du public, la couverture médiatique de Kapp laisse tout de même pressentir que le grand public ne conçoit l’égalité que dans le sens d’égalité formelle. Cette conclusion fait ressortir l’importance de l’œuvre de Rose Vyovodic qui combinait égalité et éducation du public et le besoin que cette œuvre se poursuive et grandisse.

I. THE INSPIRATION

I was honoured to be invited to participate in the symposium in celebration of the life and work of Rose Voyvodic and further to be invited to contribute my paper to this special issue of the Windsor Yearbook of Access to Justice. The symposium was on the life and work of Rose Voyvodic and further to be invited to contribute my paper to this special issue of the Windsor Yearbook of Access to Justice.

* Department of Law, Carleton University.
sium was a very special event, at which family, friends, colleagues, and students, together with others interested in the symposium subject matter, gathered to pay tribute to a very special woman. I reiterate what so many said that day – Rose was a compelling teacher, a persuasive advocate, a tireless activist, a committed feminist, and an unrelenting promoter of social justice. She was a supportive colleague and a dear friend to many, many, many of us.

In thinking about what I could say that would connect with and honour Rose’s academic contributions and interests, I decided that I wanted to do something that combined equality and education, because both were very important to Rose – she interwove them in everything she did. Rose’s work encouraged me to reflect on some equality-related concerns that I have had for some time and to try to shift my thinking from amorphous floating to tentative writing. In this paper, I am venturing into new territory for me – what might be called media studies. At this point, I engage with this material in a preliminary, impressionistic mode in the hope of laying the groundwork for a future and more in-depth study. I want to thank Rose for continuing to be an inspiration, a guide, and a conscience.

II. INTRODUCTION

Most of us who work on s.15 from a social justice perspective have for some time been alternatively bemoaning or deploiring the downward turn that equality rights haven taken in the courts, particularly in the Supreme Court of Canada. The gap between the Supreme Court’s view of equality as compared to that of feminists and other equality advocates seems to be widening. While not all equality advocates share the same view of sections 15(1) and (2), most, if not all, equality advocates are dissatisfied with the Supreme Court’s view of substantive equality as reflected in its recent decisions. At the same time, it seems that the

1 In addition, I want to thank Richard Moon and the rest of the symposium organizers, as well as Windsor Law School and the Windsor Yearbook of Access to Justice for giving us this opportunity to honour Rose and to continue her legacy. I also thank the reviewers of this paper who made extremely helpful suggestions and kind comments. I very much appreciate both. And I thank Reem Bahd for her generous and supportive steerage of this article and its author through the WYAJ process. Finally I thank Erin Richards, my amazing research assistant.


3 There is much writing about this. See e.g. Fay Faraday, Margaret Denike & Kate Stephenson, eds., Making Equality Rights Real: Securing Substantive Equality under the Charter (Toronto: Irwin Law, 2006) and Sheila McIntyre & Sandra Rodgers, eds., Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms (Markham, Ont: Butterworths, 2006).

4 It is difficult to come up with a suitable umbrella term to cover the disparate subordinated groups who do or might want to employ the language of equality and s.15 of the Charter to challenge and resist their subordination. “Equality seeking groups” has become the widely accepted term but I prefer the term equality advocates. Equality seeking has a tone of supplication that I resist.

5 One of the reviewers of this article made the important point that — “Not all equality advocates (people and organizations who endorse greater substantive equality for subordinated groups) share the same view of s.15 (1) and (2)” and suggested that I indicate the equality advocates to whom I am referring. I approach s.15 and the concept of equality from a feminist perspective and this is the literature with which I am most familiar and that I rely upon most extensively. Even among
gap between the Supreme Court’s view of equality and that of the general public, if not widening, is certainly not contracting. I argue in this paper that public understanding of equality, reinforced by mainstream media, remains firmly tied to the notion that equality is about sameness, about being the same and thereby having the right to be treated the same. My experiences in teaching human rights and the Charter to undergraduate students, as well as the overall sense I get from media coverage and from more general conversations relating to “equality” in which I am engaged, lead me to believe that formal equality continues to hold sway as the prevailing understanding of what equality means and looks like.\(^7\)

Based similarly on personal experiences, I think that the general public perception, especially pervasive among young people, is that [formal] equality has been attained and that discriminatory attitudes and practices are rare and isolated; equality is seen by many as out-of-date, both as an aspiration and as a strategy.

Public adherence to the formal equality model may be acting, behind the scenes, as a counter balance to the substantive equality arguments mounted by equality advocates and may be a factor inhibiting the Supreme Court from engaging more fully and creatively with these arguments. There has, in Canada, been insufficient public exploration and debate about the meaning of equality.

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7 By way of examples, I offer two personal situations in which I have been surprised and disturbed by the apparent hegemony of formal equality.

1) My students: most of my current students have grown up under the Charter. Given that the Andrews decision (Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 [Andrews]) that adopted substantive equality was released in 1989, I would have hoped that substantive equality would be second nature to Canadian students from the 90s onward; I would have expected that, at the very least, substantive equality would be a familiar concept. But this is not generally so with my students. Most of the students in my human rights class (a third year undergraduate law course) seem never to have heard of substantive equality. They are shocked and largely resistant when I tell them that equality does not mean treating everyone the same. For example, they mostly understand and agree that girls should be allowed to play on boys’ sports teams. However, most of them are outraged when I suggest that there might be good equality reasons to allow girls to retain segregated teams. To them, keeping girls’ teams and integrating boys’ teams is not equality and would be unfair. It takes a lot to get them to think about a different model of equality, even to consider that equality could be anything other than formal equality. The idea is new to them and seems counter-intuitive.

2) Feminist language: frequently when I am in non-lawyer, feminist gatherings and equality is raised – as a goal, or concept, or strategy – it is roundly rejected. The argument is that it is equity we want not equality. These feminists understand equality exclusively as formal equality and rightly reject it. But they seem to be largely unaware of the hard work that has been done in the context of the Charter to develop the concept of substantive equality as one that integrates equity principles.
As a result public conceptions and sympathies may be at odds with the arguments being put forward by equality advocates.

In this paper, I look at the Supreme Court’s most recent s.15 decision, *R. v. Kapp,* as a way to start to explore the different understandings of equality operating in these three different sites (the Supreme Court, equality advocates, and the general public). I will look at the first two sites simultaneously by offering my equality advocate’s critique of the *Kapp* decision, outlining where I see the decision falling short of the substantive equality that equality advocates have been theorizing and promoting. I will then look at media responses to the decision as providing one very limited and partial window on public perceptions and understandings of equality.¹⁰

III. *KAPP*

In *Kapp,* a decision jointly written by Chief Justice McLachlin and Justice Abella, on behalf of eight of the nine members of the Court (with Justice Bastarache concurring¹⁰), the Supreme Court upheld the constitutionality of a communal fishing licence that granted exclusive salmon fishing rights to members of three Aboriginal Bands – the Musqueam, Burrard, and Tsawassen – for a period of 24 hours. The case was triggered by a group of commercial fishers, the B.C. Fisheries Survival Coalition, who were not designated fishers by either of the three Bands. Coalition members deliberately engaged in fishing during the
24-hour exclusive license period as a “protest,” with the purpose of bringing a constitutional challenge against the communal licence.

The majority of the Supreme Court characterized the Aboriginal fishing licence as an affirmative action program and upheld its constitutionality as such under s.15(2) of the Charter. While from an equality perspective, the constitutionalization of “affirmative action” may be a positive result, this was not the right case for that affirmation. Aboriginal fishing rights are just that – rights, not affirmative action measures – making this case an inappropriate context in which to engage with the issue of affirmative action.11 Diluting the long-standing rights of a people into affirmative action exposes the myopic dominance that inheres in the concept of affirmative action.12 Given this failure, it is not surprising that the equality analysis of the decision is also problematic. It is the equality analysis that I examine in this paper.

The Kapp decision reflects much about the current uncertain and troubled state of equality jurisprudence in Canada, as well as much about the Supreme Court’s ambivalent approach to substantive equality. Media responses to the Kapp decision reflect much about the media’s lack of understanding of, and possibly also lack of sympathy for, the model of substantive equality that feminists and other equality advocates have been advocating since before Andrews.13 Mainstream media response to the result in Kapp – that is to the approval of a [very] short-term, exclusive Aboriginal fishing licence – was strong and negative. The messages given to the public about the meaning of equality in the context of Aboriginal fishing claims were clear – Aboriginal fishers had been given preferential treatment and equality had been violated.

I start my discussion of Kapp, by briefly setting out the jurisprudential equality context in which the decision was made.

A. Equality Context

Kapp seems like a somewhat desperate attempt to re-establish the tenuous judicial unanimity manufactured in 1999, in Law v. Canada (Minister of Employment and Immigration),14 which fractured almost immediately that Law was put to application. In Law, the Supreme Court produced a unanimous s.15 decision intended to unify the Supreme Court and to provide guidance and consistency for future s.15 litigation and decision-making. But the insubstantial Law could not support the weight imposed on it. Right away the Supreme Court fell back into multiple equality judgments and conflicting approaches, the same situation that had existed pre-Law and post-Andrews.15

11 The mischaracterization of the licence as affirmative action, egregious as it is, is not the focus of my paper. Others much better equipped to do so will critique the decision on this issue.
12 While I am a supporter, as well as a beneficiary, of the practice of affirmative action, it is at best a limited, short term strategy to enable usually the most privileged of the group who would otherwise be excluded to gain entry. The concept and need for affirmative action actually reinforce the dominance against which the policy is intended to make inroads.
13 Andrews, supra note 7.
14 Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 [Law].
The ambiguity and contention – both in the courts and in the scholarly literature – that followed the Supreme Court’s first s.15 ruling in *Andrews* have been well documented. Although there were some critiques of *Andrews* at the time, the decision was generally well received, certainly by most equality advocates. Post-*Andrews* critiques made by equality advocates were directed primarily to the courts’ difficulty in defining and living up to the model of substantive equality inducted by *Andrews*. The Supreme Court’s attempt in *Law* to respond to these concerns and to provide solid ground on which to build equality analysis and application has perversely given rise to even greater contention. Unlike *Andrews*, the *Law* decision itself – with its three part test plus four contextual factors, with a primary focus on dignity as the principle underpinning s.15 – has been subjected to extensive and wide ranging criticism.\(^\text{16}\) Despite fears that *Law* would induce formulaic application, it has provided neither certainty nor clarity. In some circumstances, as in *Auton (Guardian ad litem of) v. British Columbia (A.G.)*\(^\text{17}\) claimants find themselves at the level of the Supreme Court losing their claim for failing to meet a case that had not been argued at any of the courts below.\(^\text{18}\) In cases such as *Auton*, the *Law* test moved beyond the realm of uncertainty into unknowability.

Since the debates over its inclusion and wording, there have been s.15 and equality critics and sceptics,\(^\text{19}\) but the history of s.15 jurisprudence and the current equality morass have swelled the ranks of those who are questioning the utility of putting further resources (intellectual and financial) into s.15. This situation is not unique to Canada. A recent book of essays by feminists from Australia, South Africa, the United Kingdom, and Canada, entitled *Rethinking Equality Projects in Law: Feminist Challenges*,\(^\text{20}\) is all about this question:

The many different approaches to the principle of equality have not, however, resolved the real inequalities facing women. The failure to achieve material and psychic equality for women not only brings into question the effectiveness of the principle of equality but also casts serious doubts upon its ability to deliver the promise it once held for women; so much so that some theorists advocate a shift in focus away from equality.\(^\text{21}\)

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16 Much of this criticism was referenced by Chief Justice McLachlin and Justice Abella in notes 1 and 2 in the *Kapp* decision, *supra* note 8.
17 [2004] 3 S.C.R. 657 [*Auton*].
21 Rosemary Hunter, “Introduction: Feminism and Equality” in Hunter, *ibid.*, 3. I am not sure that the source of the failure (or resistance) lies in the principle (i.e. equality) so much as in the fundamental changes that the principle might represent, and which feminists advocate. The kind of changes we seek will inevitably meet resistance, and oftentimes failure, from those who recognize equality as a threat to their privilege and power. I am not sure that changing the language would change the outcome. See Diana Majury “Strategizing In Equality” (1987) 3 Wis. Women’s L.J.
This argument – that, if it can be said to have done anything, equality has done all that it can for oppressed groups – seems to be gaining momentum among some social justice advocates. They posit that it is time to move on, to find other conceptual (and spatial) venues to continue to work against oppression.

Other social justice advocates argue against abandoning equality. In Canada, many equality advocates claim that, rather than moving away, it is time to reconceptualize substantive equality to refrain from trying to reconfigure complex equality claims and analyses to fit the Law boxes, to reject trying to tinker with the Law test, and to move instead, boldly and assuredly, into the discussion of what equality means as a value in Canadian society and in our Charter. The fact that equality is the language enshrined in s.15 of the Charter supports a pragmatic argument for persisting with trying to make the language of equality meaningful and effective for those marginalized and oppressed people who continue to experience multitudes of inequalities in their daily lives and for persisting in trying to craft equality analyses that expose and offer ways out of systemic inequality. In turn, the pragmatic argument needs to be bolstered by new conceptual material that would provide the concreteness and specificity lacking in any abstract concept such as equality.

I have been pretty firmly in the latter, rework equality camp and, while I am still there, the question of whether or not equality is a useful tool/basket/strategy is an ongoing one that needs continual re-evaluation. The Kapp decision should give those who have been equality camp counsellors serious pause for reflection.

B. The Decision in KAPP: Section 15(1)

Given that I want to look at 3 sites of equality understanding in this article, I will refrain from a detailed critique of Kapp. My discussion of the case is intended to provide insight into both the Supreme Court understands of equality and how that differs from the approaches of equality advocates. However, I fear that I sometimes stray into detail; the inequality is so often in the detail.

Kapp is primarily a s.15(2) decision, which is the decision’s most fundamental...
shortcoming.  

**Kapp** provides a strong indication that the Supreme Court is moving away from the *Law* test. The decision re-affirms the centrality of substantive equality to the Supreme Court’s approach to equality claims, a position that the Supreme Court has never wavered from since it was first articulated in *Andrews*. In fact, *Kapp* seems to be sending us back to *Andrews*. In the short section in which it discusses s.15 (1), the Supreme Court reiterates a number of times, the strong connections between *Andrews* and *Law* and then signals a return to the less structured approach of *Andrews*, without explicitly rejecting the more convoluted *Law* test. The Court references much, not all, of the critical literature that has accumulated since *Law*, specifically noting the concerns expressed about the centrality of an abstract and subjective notion of dignity and about the formalism and artificiality of some of the comparator analysis.  

For the many of us who have been critical of *Law*, this aspect of the decision and the shift it suggests seem positive. We are now on notice that the Supreme Court is willing to entertain alternative approaches to s.15, looking to build on the more flexible and open language of *Andrews*. That is the good news of *Kapp*. However, the rest of the *Kapp* decision does not support an optimistic read and undermines the hope sparked by the movement away from *Law*.  

The discussion of s.15(1) in *Kapp* is extremely abbreviated and circumscribed, referencing prejudice or disadvantage on the basis of personal characteristics and erroneous stereotyping as the key features of disadvantaging distinctions, that is the key features of s.15 discrimination. While these were components of *Andrews’s* substantive equality, they were far from its totality. The *Kapp* description significantly narrows the substantive equality of *Andrews* and would dramatically reduce its potential to deal with systemic issues. The critics of *Law* were looking for a more open and responsive approach to substantive equality; *Kapp* delivers a more limited approach.  

Furthermore, the Supreme Court in *Kapp* does not offer any direction or comment on how to apply *Andrews*, nor supply any further elucidation on the elements of substantive equality to be looked for. In the absence of some guidance from the Supreme Court, the uncertainty and contention that have haunted s.15 from its beginning will continue unabated, or even exacerbated. Lower courts are left to flounder until the next s.15 decision from the Supreme Court really only able to continue to apply the *Law* test because, in the absence of further direction, it is still the law.  

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26 See supra note 11 and accompanying text.  
27 Supra note 15.  
28 In *Downey v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, [2008] N.S.J. No. 314 (C.A.), the first s.15 decision released post-*Kapp*, Justice Thomas Cromwell, writing on behalf of the Nova Scotia Court of Appeal, acknowledges the reformulation of the *Law* test in *Kapp* but relies on the Supreme Court’s statement that the “the test remains the same in substance” (at para. 44) and proceeds to apply the full *Law* test with only one further passing reference to the *Kapp* reformulation (at para. 64). Justice Ryan writing the majority decision in *Wither v. Canada (A.G.)*, [2008] BCCA 539 engages the most fully with *Kapp* (at paras. 154-162) outlining the concerns raised with *Law* and the Court’s return to *Andrews*. But in the end, Justice Ryan reverts...
Even a return to the more fulsome original Andrews approach may not actually lead to more positive outcomes for equality litigants. While the Supreme Court’s endorsement of substantive equality has been unwavering, its analysis and decisions have not always been informed by substantive equality. One of the principal critiques of s.15 Supreme Court judgments is the recurring lapse back into formal equality analysis. Until the difference between formal and substantive equality is consistently and clearly recognized and applied by the Supreme Court, the centrality allegedly accorded to substantive equality will continue to list toward formal equality.

In addition, while some of the language of Andrews was very promising, reviews of s.15 cases indicate that Andrews did not generally lead to positive outcomes for equality claimants. Bruce Ryder and his colleagues conducted a quantitative examination of the Supreme Court’s disposition of s.15 claims from 1989 to 2004 a total of 43 decisions, plus a sample of lower court s.15 rulings over the same 15 years totalling 323 additional decisions.29 The review disclosed “that the success rate of section 15 claims at both the Supreme Court and lower courts has increased since the Law ruling compared to the Andrews decade.”30 The authors recognize the crudeness of quantitative measures and wisely caution against reading this as an “indicator of the court’s commitment to upholding equality rights.”31 Nonetheless, this study does potentially undermine the argument that a return to Andrews would be a positive turn for equality advocates. A further interesting, but less surprising, result from the Ryder study is the finding that “the success rate of s.15 claims at the Supreme Court (27.9 per cent) is significantly lower than the average success rate of all Charter claims before the Court” (33-35 per cent).32 This data could be used to support the argument for abandoning equality in favour of more “palatable” or more contemporary concepts.33 However the lower success rate could equally support the analysis that equality claims are the most disruptive or potentially transformative and hence the least likely to succeed. And/or the reasons could relate to the restrictions that the Supreme Court has read into s.15.34 The indeterminateness of equality allows for multiple readings of its shortcoming and failures. Kapp provides much shortcoming fodder for speculation.

In summary, Kapp gives us a narrow reading of Andrews, no guidance for the move away from Law and a bad track record to fall back to – no good news here on the s.15 (1) front.

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30 Ibid. at 113.
31 Ibid.
32 Ibid. at 112.
33 Supra note 21 and accompanying text.
34 See supra note 23.
C. Section 15 (2)

The rest of the majority judgment in *Kapp* focuses on s.15(2), the “affirmative action” section that states that s.15(1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, religion, sex, age or mental or physical disability.

Herein lies the serious bad news of *Kapp*. The Court’s application of s.15(2), giving it independent force to uphold ameliorative programs, and then subjecting those programs to minimal scrutiny in the assessment of their ameliorative-ness, and no scrutiny as to their effectiveness, is by implication a formal equality approach to s.15(1) that defers to government intention under s.15(2). Formal equality and undue deference have consistently been raised as key concerns in the critiques of s.15. While the Court cites the critical literature in its brief discussion of s.15(1), it proceeds to reinscribe the approaches being critiqued in its application of s.15(2).

The Court endorses the cornerstone proposition of *Andrews* that not every distinction is discriminatory, but fails to take the all-important corollary step of determining whether the distinction in the case before them; that is the awarding of the “affirmative action” fishing licence, was discriminatory. They do this despite precedents in which the Supreme Court held that affirmative action programs are not discriminatory. In *Kapp*, the Supreme Court finds that the appellants (coalition fishers charged with fishing at a prohibited time) were “treated differently based on ... race,” that is, that the Government made a race-based distinction. The Supreme Court then invokes the respondent’s affirmative action argument to bypass the rest of the s.15(1) process and go directly to s.15(2). The claimants are not required to prove their claim of discrimination. The issue becomes whether or not the “impugned program” has as its object the amelioration of conditions of a group disadvantaged because of race.

*Kapp* does not adopt the approach taken by the Supreme Court in *Lovelace v. Ontario* that s.15(2) functions as an interpretative aid to s.15(1). However, *Lovelace* represents the substantive equality approach to affirmative action. It is

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35 By this I mean that the implication that affirmative action programs may be not protected by s.15(1) is a formal equality reading of subsection 1.

36 *Kapp*, supra note 8 at para. 29. Herein lies the first analytic slippage that leads the Supreme Court to address this as an affirmative action issue.

37 [2000] 1 S.C.R. 950 [*Lovelace*].

38 According to the Supreme Court in *Lovelace*, “s.15(2) provides a basis for the firm recognition that the equality right is to be understood in substantive rather than formalistic terms” (*ibid* at 1004). While the *Lovelace* Supreme Court does leave the door open to an alternative interpretation, as noted by the Supreme Court in *Kapp*, the *Lovelace* Supreme Court understands the importance of not allowing s.15(2) to circumvent s.15(1) – which is precisely what the Supreme Court did allow in *Kapp*. Justice Iacobucci in *Lovelace* summarizes his thorough analysis of the relationship between s.15 (1) and (2):
as an interpretive aid that s.15(2) reinforces s.15 as a substantive equality provision. The other two interpretative options, either reading s.15(2) as an exemption from s.15(1) or reading s.15(2) as having independent force as the protector of affirmative action programs without reference to s.15(1), imply that s.15(1) substantive equality does not include affirmative action. The adoption of this latter approach by the Supreme Court in Kapp seriously undermines substantive equality, both as a concept and as the meaning of s.15, sending danger signals about the future of substantive equality.

According to Kapp, s.15(2) pre-empts s.15(1), and the standard the Supreme Court sets under s.15(2) is unnervingly low. In order to escape a reversion to s.15(1) review, the government has only to demonstrate that the program has an ameliorative or remedial purpose that targets a disadvantaged group identified by an enumerated or analogous ground. Such a program is then saved from s.15(1) scrutiny. The Supreme Court adopts a purpose-based rather than effects-based interpretation of the object of the program using sincerity and plausibility as standards, consciously affording significant deference to the legislature. According to the decision, it is enough that amelioration is a purpose of the program; it does not have to be the purpose of the program.

The application of s.15(2) to the claim before the Supreme Court was dispensed within six paragraphs, less than half a page. Unlike the Law test which has led to lengthy applications, the test set out in Kapp for the application of s.15(2) seems likely to produce short decisions. The deference accorded to government programs would require little from the government in the way of justification or from courts in the way of review. While affirmative action is a defining feature of substantive (in contrast to formal) equality, it is a complex area. Affirmative action programs cannot be supported or upheld simply because they are asserted to ameliorate disadvantage. Affirmative action programs may overtly favour one sub-group over another and the effect, even the reason for, that preference may be discriminatory. 39 Intersectionality means that the most privileged members of a disadvantaged group will be the most likely to benefit from an affirmative action program. 40 Programs will only be effective if they are designed with this problem in mind. While, from a substantive equality perspective, it would be undesirable for governments to shy away from affirmative action because it is too complicated, it would be equally undesirable for governments simply to devise band-aid or quick-fix programs and label them affirmative action. These programs need to

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40 Thus white women have been the primary beneficiaries of sex based affirmative action plans, while men of colour have been the primary beneficiaries of race based affirmative action programs, leaving racialized women to fall through the fissure. This was the situation that gave rise to the concept of intersectionality. See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chicago Legal F. 139; Nitya Iyer, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25; and Carol Aylward, Canadian Critical Race Theory: Racism and the Law (Halifax: Fernwood Publishing, 1999).
be the best they can be, which means serious government attention to the issues and conditions, as well as the people, they are ameliorating, and then serious judicial scrutiny to ensure that the programs are not merely tokenistic in nature.

D. Conclusion on Kapp

Even though the result in Kapp is positive, the interpretation, as well as the application, of s.15(2) in this case undermine substantive equality, casting a negative shadow back over the little that was said about s.15(1) in the earlier part of the decision. There is no equality analysis, substantive or otherwise, with respect to s.15(2). There is a perfunctory test and substantive deference. Government programs that have an ameliorative or remedial purpose, or that target a disadvantaged group identified by an enumerated or analogous ground will be upheld under s.15(2) and protected from a substantive equality review under s.15(1).

Equality advocates are articulating serious and multiple concerns with the Supreme Court’s decision in Kapp. Amidst what overall has been a negative response to Kapp, the one potentially positive thing that the decision has done is to move away from the confines and problems of the Law test, leaving the door open to a new approach for assessing whether there has been a breach of s.15.41 But the Supreme Court in Kapp offers no guidance on what this new approach might look like. In fact, the Court itself clearly needs guidance. There is a lot of creative thinking and advocating needed in order to take advantage of this opportunity to pursue a more effective and fulsome approach to substantive equality.

As will be discussed in the next section, the mainstream media also responded negatively to the Kapp decision. The negative media response, however, was not because the Kapp analysis took the substance out of substantive equality as social justice Kapp critics see it. The predominant media response was premised on an antipathy to affirmative action, often articulated in staggeringly strong terms and firmly grounded in formal equality. In their discussion of the Kapp decision, the media does not advert to substantive equality, by name or in terms of content.42 This limited and antagonistic perspective was the principal window on the case provided to the general public.

While there is a significant gap between the Supreme Court’s decision and the analysis put forward by equality advocates, there is an equally significant gap between the decision and public understanding of equality, to the extent that public understanding can be said to be reflected in the media response to Kapp. The history of the Supreme Court’s backtracking on equality in response to charges of judicial activism should make us pay serious attention to how these issues are portrayed in the media and the impact that portrayal has in shaping public


42 The one exception I found is an opinion piece written by lawyer John Carpay who represented the Japanese Canadian Fishermens Association in their intervention before the Supreme Court in Kapp. In his description of the decision, he does reference substantive equality but when he does so he puts substantive in scare quotes: “the Supreme Court of Canada gave its stamp of approval to racially segregated commercial fisheries in British Columbia, and it did so in the name of ‘substantive’ equality.” John Carpay, “Dividing the Catch” National Post (22 July 2008) A14.
perceptions that may in turn translate into pressure on the Supreme Court. The mainstream media response to the Kapp decision indicates that our creativity and strategizing need to focus much more broadly than just on the courts, that we need to pay more heed to public portrayals and perceptions of equality. Any new equality strategy should include generating a hefty component of public engagement with the meaning and issues of equality.

IV. MEDIA RESPONSE TO KAPP

I conducted an internet search for English language print media responses to the Kapp decision. From its inception, the Kapp case attracted considerable media attention, particularly in British Columbia where the case originated. At the level of the Supreme Court, the case sparked news articles, editorials, commentaries, and letters to the editor in major and local newspapers across the country. The news articles are largely descriptive, often very short, with brief quotes from the Kapp decision. Many of the articles also include a short quote or quotes from both an Aboriginal leader and a leader of the fishers’ protest group. There were considerably more news articles that quoted the protesters exclusively than articles that quoted only Aboriginal leaders. While generally not overtly negative, the language of the news articles carries hints of unfairness, referring to the program as a “jump start” or a “head start for native bands” and depicting “non-native fishermen” as left behind, forced to “remain at the dock.” The longer versions of the news articles tend to be more negative, venturing

43 My research assistant, Erin Richards, actually conducted the search for me. She used various databases in her search for news articles on Kapp: Canadian Newsstand, CBCA Current Events, Factivia, and First Nations Periodical Index. My intention was to locate every news-type item written on Kapp. Because I was only looking at one case, I did not restrict my search to major newspapers as is often done in media analyses. See e.g. Florian Sauvageau, David Schneiderman & David Taras, The Last Word: Media Coverage of the Supreme Court of Canada, (Vancouver: UBC Press, 2006), where the researchers in their excellent media study of a year in the life of the Supreme Court, analyzed the content of six newspapers and four television networks. My interest in looking at media responses was sparked by my horror at the coverage of Kapp in my local newspaper – see Meagan Fitzpatrick, “Aboriginals land top court’s support in dispute over exclusive fishing rights: Disputed program deemed affirmative action” The Ottawa Citizen (28 June 2008) A5.

44 The Kapp internet search produced over one hundred ‘hits.’ These included news wire items and press releases, in addition to the range of pieces that appeared in newspapers. Many of the news items and columns are duplicates, appearing in whole or in part in a number of different newspapers. And while not a direct duplicate, many pieces are by the same author with very similar content. It would therefore be difficult to quantify exactly how many pieces (different or the same) on Kapp appeared in how many different newspapers. My intention in this article is to provide an overview of the media coverage rather than a comprehensive quantitative or even qualitative account.

45 See for example, Fitzpatrick, supra note 43. Fitzpatrick includes a number of quotes from Phil Eidsvik, head of the B.C. Fisheries Survival Coalition. Shorter versions of this same article appeared on the same day in National Post, Nanaimo Daily News, The Windsor Star, and Times-Colonist (Victoria, B.C.).

into explicit gainsaying of affirmative action. These news items are also not very informative – they do not tell us much about the case or the reasons for the decision. Because the Supreme Court itself did not provide much information or analysis, the absence of it in the media coverage is really no surprise. Having misdirected itself to affirmative action as the justification for the fishing licence, the Supreme Court failed to take the opportunity to explain the rationale of affirmative action to the public, that is to explain affirmative action as a substantive equality measure. By and large, this failure to inform and educate translates in the media into rejection of affirmative action.

The editorials, commentaries and letters in response to the Kapp arguments and decision are almost all extremely negative, some even vitriolic. The Kapp decision is described as bizarre and riddled with errors, an "orwellian interpretation of s.15." References to, and quotes from, George Orwell abound. The Supreme Court is decried, labelled as supporting racial discrimination and legitimizing racial bias. The decision is described as shameful and the government is accused of “practising racial profiling.” Section 15(2) is referred to as the “racial-quotas-are-OK section of the Charter” and as the “affirmative action provision in the Charter that protects an otherwise unconstitutional program.” The program at issue is described as “divisive and discriminatory” as “the racist system for allocating fishing rights.” Quotes from Phil Eidsvik, director of the B.C. Fisheries Survival Coalition, describe the Supreme Court of Canada decision as “absolutely a blight” and the ideas it promotes as “absolutely evil.”

Support for exclusive Aboriginal fishing rights is seen as inimical to equality. In an opinion piece in the National Post, Susan Martinuk describes the decision as “subjugating Canada’s principles of equality to what they term ‘a higher social purpose.’” In a letter to the National Post editor, the government is accused of giving “lip service to the concept of the equality of its citizens.” Section 15(2) is portrayed as in conflict with s.15(1).

Perhaps this negative response should not be surprising. Aboriginal fishing rights are largely misunderstood and resented. Affirmative action is highly controversial in Canada, as in the United States. Large numbers of people are

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48 Leonard Stern, “Court decision legitimates racial bias” The Vancouver Sun (19 July 2008) C5.
49 Mark Milke, “The West’s economy: a rerun of That 70’s Show?” Calgary Herald (13 July 2008) A8. There are a number of references in these news articles that equate affirmative action with racial quotas, an outdated and inaccurate stereotype of affirmative action that is irrelevant to the issues in Kapp.
52 Stern, supra note 48.
53 Jessica Kerr, “Fisheries Coalition to lobby PM to stop native-only fishing” Delta Optimist (2 July 2008) 3.
56 Supra note 50.
vehemently opposed to affirmative action, unwilling to even countenance the possibility that such programs might be necessary or that they are considered as equality promoting measures by their supporters.\textsuperscript{57} The ‘opinion media’ creates and reinforces negative descriptions of affirmative action. Affirmative action continues to be described as reverse discrimination and seen as antithetical to equality. The simplistic formal equality analysis that posits affirmative action as unfair is easy to write and easy to understand. It resonates with traditional notions of what equality is all about. The public gets little information about the more complex substantive equality analysis that underpins affirmative action.\textsuperscript{58}

I do not think, however, that the vehement response to \textit{Kapp} is just a reaction against affirmative action. Affirmative action may be the button pusher, but I think this negative response reflects a deeply entrenched belief in and commitment to formal equality in the minds and hearts of the Canadian public. I think that, for most people in Canada, equality is premised on sameness and mandates treating people the same. Our twenty, post-\textit{Andrews} years of substantive equality as the meaning of s.15 have not changed this. I am not sure that they have even made a dint in the hegemony of formal equality.\textsuperscript{59}

\textbf{V. CONCLUSION}

As equality advocates, many of us have directed our arguments and analysis almost exclusively within the rarefied atmospheres of the courts and of academic literature. In retrospect, we were wildly successful in \textit{Andrews} with the uptake of the concept of substantive equality.\textsuperscript{60} The Supreme Court showed bold leader-

\textsuperscript{57} See e.g. Abigail Bakan & Audrey Kobayashi, “Affirmative Action and Employment Equity: Policy, Ideology, and Backlash in Canadian Context” (2007) 79 Studies in Political Economy 145 at 146-147 who argue that Canadian employment equity policy was a concessionary response to the virulent backlash against affirmative action in the United States. They describe “a complex process in which the politics of concession resulting from anticipated backlash coalesced… result[ing] in a downward spiral of retreat on the part of employment equity advocates in the face of overt and increasingly confident ideological and political backlash.” See also George E. Curry, ed., \textit{The Affirmative Action Debate} (New York: Addison-Wesley Publishing Inc., 1996).

\textsuperscript{58} As noted previously, the Court itself shies away from complex substantive equality analysis, so I do acknowledge that it would not really be fair to expect the media to provide it.

\textsuperscript{59} One of the reviewers of this article expressed concern – in a very gentle supportive way – about my unsubstantiated assertions here and elsewhere in this article. S/he suggested that in order to make these claims, it would be important to find harder evidence than my limited anecdotal teaching and other experiences (supra note 7). While I appreciate the importance of ‘evidence’, I have decided to leave my thinking supported only by the limited anecdotes and conjecture that I provide. I am not able at this time to undertake a comprehensive review of the literature on public perceptions of equality and that type of review was not really my intention with this article. In the absence of a thorough review, I would merely be looking for references to cite in support of my claims – which might actually give greater weight than I intend, to what I am saying here. As I outlined at the beginning, this “think piece” started from my impressions gathered over some time, galvanized into somewhat deeper thinking by my outraged response to the media coverage of \textit{Kapp} in conjunction with the invitation to participate in the symposium in celebration of the life and work of Rose Voyvodic and my desire to do something that would link directly to her work in equality and in education.

\textsuperscript{60} There were many critiques of the \textit{Andrews} decision at the time and after – my own included
ship in that decision and equality advocates have been pushing them to do more of the same, to build on the promise of that decision and to really commit to a transformative notion of substantive equality. But we have not engaged the public in the discussion and debates; the public is largely unaware of them and, from that lack of information comes apparent resistance. Without greater public understanding of the issues at stake and the goals before us, I fear that the impasse in the courts will continue. Courts are reluctant to move much beyond common sense understandings of the concepts they are working with. And the common sense view of equality is still formal equality.

Equality advocates criticize *Kapp* for reinforcing formal equality and undermining substantive equality, even as it upholds an erroneously labelled ‘affirmative action’ program. The mainstream media criticizes *Kapp* for not enforcing formal equality. These are opposite ends of the spectrum positions clammering for public attention and judicial endorsement. Equality advocates are losing ground with the courts, in part because we have never grounded substantive equality with the general public. Media depictions of formal equality resonate with public understandings. I do not think the public knows or would understand what equality advocates are talking about in these cases, in part because substantive equality is more complicated and difficult to explain and understand, but mostly because it is a relatively new idea and they have not heard much, if anything, about it. It is here that our work needs to be directed. We need to dislodge the public notion that formal equality is equality, and make the public aware that there is another, more fulsome, more substantive notion of equality, an understanding of equality that is actually enshrined in our *Charter*.

We have perhaps reached the wall in our ability to effect change through s.15 in the courts at this time. I suggest that we go to the other end of the spectrum – to create some greater receptivity in the public for the idea of substantive equality. This in turn might make the courts more receptive to more bold and creative s.15 arguments and perhaps also make us more bold in the arguments we make. Public openness to these arguments is not there at present, not because people are opposed to substantive equality, but because they have no idea what it is. At this point, I am not even talking about persuading people of the benefits of substantive equality. I am talking about making people aware that there is an alternative to formal equality, and that substantive equality is also equality. We cannot have the debate about specific cases and issues until there is a better public understanding of the terrain on which those debates are taking place.

Given the current state of our media and other institutions, as well as government funding cut backs of equality groups and government resistance to equality advocacy, it is a tough time to think about how we might go about this engagement with the public. But that is a tough question for another time. What I

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61 Karin Van Marle, “Haunting (In)equalities” in Hunter, *supra* note 20, 142 at 142, describes “a vision of a vibrant public space and political action” as necessarily at the centre of an equality that
would say for now, and in conclusion, is that I know that Rose Voyvodic will be with us in spirit in this work. But, I do so wish we had Rose literally by our side. This was Rose’s strength, her passion, her commitment – teaching the tough issues, making education always be equality advocacy and equality advocacy always be education. This was her gift and this is her challenge to us.