Canadian Supreme Court advancing the understanding of substantive equality in constitutional law

On 27 June 2008, the Supreme Court of Canada handed down the decision in the case of R v Kapp, 2008 SCC 41. The case arose as an appeal against the federal government's decision to enhance aboriginal involvement in commercial fishery which led to the Aboriginal Fisheries Strategy. The Strategy resulted in the issuance of a communal fishing licence to three aboriginal bands, permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, and who were excluded from the fishery during this 24 hour period, participated in a protest fishery and were charged with fishing at a prohibited time.

The appellants argued that the Aboriginal Fisheries Strategy violated s. 15(1) of the Canadian Charter of Fundamental Rights and Freedoms, which protects persons against discrimination on the basis of race.

Rejecting this argument, the Supreme Court held by an eight to one majority that the Aboriginal Fisheries Strategy was not discriminatory and did not violate s. 15 of the Charter. The case invoked a detailed analysis of the role and purpose of section 15 of the Canadian Charter and its section 15(2) in particular, which provides that:

“Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
The Court held that s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. It stated that the focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. On the other hand, the focus of s. 15(2) is on enabling governments to pro-actively combat discrimination. Read thus, the two sub-sections are confirmatory of each other. The Court stated that s. 15(2):

“[S]upports a full expression of equality, rather than derogating from it.”

In handing down its decision the Court formulated a legal test for s. 15(2), according to which a programme does not violate section 15 equality guarantees if the government can demonstrate that:

1. the programme has an ameliorative or remedial purpose; and
2. the programme targets a disadvantaged group identified by the enumerated or analogous grounds.

The judgment represents a significant advancement of the notion of substantive equality within the section 15 jurisprudence of Canadian constitutional law. It also sets a benchmark for promoting equality through positive action and should be useful for individuals and organisations wishing to secure substantive guarantees to the right to equality.

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