

2008

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Citation Information

Gilbert, Daphne. "The Silence of Section 15: Searching for Equality at the Supreme Court of Canada in 2007." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 42. (2008).
DOI: <https://doi.org/10.60082/2563-8505.1163>
<https://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/17>

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The Silence of Section 15: Searching for Equality at the Supreme Court of Canada in 2007

Daphne Gilbert*

I. INTRODUCTION

The initial impetus behind this article was to carry out a year-in-review-style analysis of key developments in the Supreme Court's 2007 cases on section 15 of the *Canadian Charter of Rights and Freedoms*.¹ As those who have followed the Court's equality jurisprudence might anticipate, this project is complicated by the fact that section 15 developments in the Court's 2007 rulings were implicit or incidental, not overt. The Equality Rights provision was only referred to in four cases, and in each instance the Court's reasoning was very brief, amounting at best to a handful of paragraphs. To undertake the usual kind of case-by-case analysis that is standard in year-in-review articles would, in these circumstances, make for a very brief (and perhaps somewhat depressing) bit of scholarship. While the Supreme Court may have been subdued in its equality rights jurisprudence in 2007, equality-seekers should not ignore what did (or did not) happen in the past year. The absence — or perhaps even avoidance — of equality analysis at the Supreme Court demands as much scrutiny as years past when the Court made section 15 its focus.

The last significant equality decisions were decided in the 2004 term, and those cases radically changed the landscape of section 15 litigation.² Equality claimants are still dealing with the fall-out. Perhaps

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

² In 2004 the Supreme Court decided *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.) [hereinafter "*Auton*"], *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.) [hereinafter "*Hodge*"], *Newfoundland Treasury Board v. N.A.P.E.*, [2004] S.C.J. No. 61,

the Supreme Court is taking a step back to let the dust settle. This 2007 year-in-review is, therefore, less concerned with the task of analyzing the Court's legal reasoning, *obiter dicta* and decision-making on section 15, in favour of exploring instead the Court's apparent evasion of equality analysis in the past year. This paper seeks to investigate the subtexts of what *did not* happen at the Supreme Court in 2007 with respect to section 15, and inquires into the consequences of that silence for equality-seeking groups in Canada.

Part II of the paper will begin by considering the explicit section 15 analysis in 2007, by reviewing in brief the cases of *Charkaoui v. Canada (Citizenship and Immigration)*,³ *Canada (Attorney General) v. Hislop*,⁴ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*⁵ and *Baier v. Alberta*.⁶ The Court's refusal to engage in any substantive equality analysis in these cases closes the door to future equality claims (perhaps even slamming the section 15 door shut for now), thereby narrowing the utility of section 15, both as a normative tool and as a practical legal mechanism for realizing equality. The fact that the Court did not acknowledge equality implications in any of the 2007 cases is a troubling indication of where it is in its thinking on section 15. Part III then places the 2007 developments (such as they are) into the context of the Supreme Court's post-*Law*⁷ jurisprudence in section 15. Equality advocates, intervenors, academics and litigants, faced with such superficial analysis, had reason to despair in 2007; this part of the paper will chronicle three urgent challenges facing equality litigants as we move forward in coming years.

[2004] 3 S.C.R. 381 (S.C.C.) [hereinafter "*N.A.P.E.*"]; *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 (S.C.C.) and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.) [hereinafter "*Canadian Foundation for Children, Youth and the Law*"]. Each of these cases individually contributed to significant developments in s. 15 analysis. Together they represent a dramatic departure from the equality values and principles established by the Court in earlier decisions. See *infra*, at note 8 for a brief description of these four cases.

³ [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter "*Charkaoui*"].

⁴ [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 (S.C.C.) [hereinafter "*Hislop*"].

⁵ [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*B.C. Health Services*"].

⁶ [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.) [hereinafter "*Baier*"].

⁷ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"]. The *Law* decision set out the Court's unified position on how s. 15 should be analyzed. A controversial decision when issued, it had been refined and narrowed significantly in the years following. The 2004 year offered dramatic developments to the *Law* formulation. While less startling, more recent decisions, including the *Hislop* case, *supra*, note 4, mark a shift in the Court's focus from substantive to formal equality models.

II. SECTION 15 IN 2007

None of the four cases that expressly mentioned section 15 offered any substantive development in how we understand or approach equality rights under the Charter. This might be something for which many of us are quite grateful, given the rapid and unfortunate developments in section 15 over the past few years.⁸ The Court's brevity however, is still

⁸ The 2004 cases each represented a significant blow to equality litigants and advocates. The four main s. 15 decisions that year precipitated new challenges, as detailed below. These decisions combine to impose significant restrictions on the availability and utility of equality analysis at the Supreme Court:

- (i) The *Hodge* decision added a further step to the s. 15 test developed in the *Law* case. In *Hodge*, the Supreme Court entrenched the comparator group as essential to each of the three steps in the *Law* analysis (see *Hodge*, *supra*, note 2, at para. 17). Justice Binnie set out the criteria for identifying the appropriate comparator group as follows (at para. 23):

The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*.

- The language of "mirrors" evokes the "similarly situated" test that had been discredited by earlier s. 15 jurisprudence as leading only to a formal equality analysis.
- (ii) The *Auton* decision, *supra*, note 2, which followed *Hodge*, reaffirmed the emergence of the "similarly situated" approach to equality analysis, and also illustrated the significant burden the comparator group step now places on claimants. In *Auton*, the claimants had their comparator group changed by the Supreme Court in a way that altered the essence of their claim. The comparator group chosen by the Court compared the claimants right out of the health care benefit they sought, by juxtaposing them with a group that was also excluded from health care coverage.
- (iii) In *N.A.P.E.*, *supra*, note 2, the Supreme Court agreed that the Newfoundland government's decision to abandon a Pay Equity Agreement breached the s. 15 rights of women workers. However, this was held to be justified under s. 1 of the Charter because of the province's state of fiscal emergency at the relevant time. There have been many critiques launched against the *N.A.P.E.* decision, including complaints about the low burden of proof (and paucity of required evidentiary record) to substantiate the fiscal crisis, and the fact that a government was allowed to make budgetary arguments on the backs of women workers (as opposed to choosing a non-Charter violating way of dealing with the emergency).
- (iv) The decision in *Canadian Foundation for Children, Youth and the Law*, *supra*, note 2, illustrated the problems in analyzing dignity under the *Law* formulation. A majority of the Court found that a *Criminal Code*, R.S.C. 1985, c. C-46 provision that justified the "reasonable" use of force by parents and teachers against children, did not violate a child's dignity. The dignity analysis in *Law* was assessed on a subjective/objective basis and asked whether a reasonable person, possessing all the same characteristics and in the same circumstances as the claimant, would be demeaned or devalued by the impugned legislation. The Court added a further qualifier, noting (at para. 68), "Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child's sense of dignity." This reasoning compounds the dignity challenge. Not only must the legislation be assessed from the point of view of a reasonable child who might be subject to physical "correction" by a parent or teacher,

a cause for concern. What little it did say on equality did nothing to improve the state of affairs in equality litigation, and its failure to elaborate further on a theoretical or jurisprudential approach to section 15 leaves us stuck in the quagmire of the 2004 decisions. We begin then with a brief summary of each of the four section 15 cases decided by the Supreme Court in 2007.⁹

1. *Charkaoui v. Canada (Citizenship and Immigration)*

In *Charkaoui*, the Court concluded its section 15 analysis in three short paragraphs.¹⁰ The claimant argued that provisions of the *Immigration and Refugee Protection Act*¹¹ discriminated against non-citizens, contrary to the Charter. The impugned provisions allowed the Minister of Citizenship and Immigration, and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident was inadmissible to Canada on the ground of security concerns (or other listed grounds), leading to the detention of the person named in the certificate. If a judge determined the certificate to be reasonable, the named person should be removed from Canada with no appeal possible. The Supreme Court found that the process violated section 7,¹² but did not find a violation of section 15 of the Charter. Relying on its earlier decision in *Chiarelli*,¹³ the Court

but that reasonable child must be understood to already feel disempowered and vulnerable. It is difficult to imagine how that analysis can be described with adequate precision for trial judges or carried out with any degree of principle.

⁹ In “Supreme Court of Canada Constitutional Cases 2007: Defining Access to Justice” (2008) 42 S.C.L.R. (2d) 517, Patricia Hughes notes that there were other cases with possible equality dimensions at the Supreme Court of Canada in 2007, though they were not framed or argued as s. 15 cases. These include *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, 2007 SCC 54 (S.C.C.) and *Alliance for Marriage and Family v. A. (A.)*, [2007] S.C.J. No. 40, 2007 SCC 40 (S.C.C.). The Court also decided a significant statutory human rights case in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] S.C.J. No. 15, [2007] 1 S.C.R. 650 (S.C.C.). The *VIA Rail* decision also had equality issues at play, though they were not framed as Charter arguments.

¹⁰ *Supra*, note 3, at paras. 129-31.

¹¹ S.C. 2001, c. 27 [hereinafter “IRPA”].

¹² On the s. 7 issue the Court concluded (*id.*, at para. 65):

... the secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government’s case. This, in turn, undermines the judge’s ability to come to a decision based on all the relevant facts and law.

This violated s. 7 of the Charter and could not be saved by s. 1.

¹³ *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711 (S.C.C.) [hereinafter “*Chiarelli*”].

reasoned that section 6 of the Charter (Mobility Rights)¹⁴ explicitly permits differential treatment of citizens and non-citizens in deportation matters. In *Chiarelli*, Sopinka J. concluded:

... [section] 6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.¹⁵

In *Charkaoui*, however, the claimant did not argue that deportation of non-citizens was *per se* unconstitutional. Rather, he focused instead on the particular ways in which this scheme operated, arguing that two aspects of the legislative process were unconnected to deportation and hence subject to section 15 scrutiny. This disconnect would mean that the holding in *Chiarelli* on section 6 of the Charter should have no impact on the section 15 argument.

The claimant focused on the indefinite possibility of detention inherent in the way the legislation was implemented. Deportation could be impossible, either because it is indefinitely postponed or legally impossible (if, for example, the subject would be deported to face torture), or because deportation is practically unlikely because the Minister decides to hold a person indefinitely on security grounds. If the detention is not leading to a removal order, it goes beyond immigration matters to constitute discrimination against non-nationals. In essence, the claimant argued that the IRPA scheme permitted the Minister to indefinitely detain a suspected non-national terrorist in a way that could never be constitutional if the suspect was a Canadian citizen. If the lengthy detention was not intended to lead to deportation, it should constitute a violation of section 15 on the grounds of national or ethnic origin, race or an analogous ground.

¹⁴ The relevant parts of s. 6 read:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
- (a) to move to and take up residence in any province; and
 - (b) to pursue the gaining of a livelihood in any province.

¹⁵ *Id.*, at 741.

The Supreme Court rejected this argument without going into any detail, concluding:

Even though the detention of some of the appellants has been long ... the record on which we must rely does not establish that the detentions at issue have become unhinged from the state's purpose of deportation. More generally, the answer to these concerns lies in an effective review process that permits the judge to consider all matters relevant to the detention ...¹⁶

This is all that the Court could muster on the section 15 issue. It did not interrogate the distinction argued by the claimant. The reference to the need for an “effective review process” imports section 1 justificatory arguments into this very brief section 15 mention.

2. *Canada (Attorney General) v. Hislop*

The *Hislop* case was the only 2007 decision that was based squarely on section 15. *Hislop* was a class action challenge to amendments to the *Canada Pension Plan*¹⁷ that extended survivor benefits to same-sex partners. Under section 44(1.1) of the CPP, eligibility for survivor benefits was limited to same-sex partners whose “spouse” died on or after January 1, 1998. The claimants challenged section 44(1.1), along with three other sections of the amended legislation, arguing that the under-inclusive amendments violated section 15. The substantive section 15 analysis is sparse in *Hislop*, in part because the only argument advanced by government on section 15 was a comparator group analysis that the Supreme Court summarily rejected. The Court acknowledged that the choice of comparator group is “essential” to the question of differential treatment.¹⁸ The government chose a comparator group based on a temporal distinction (which would not be an enumerated or analogous ground), arguing that at issue was the legislative distinction between survivors whose partners died before January 1, 1998 and those whose partners died on or after that date. The Court redefined the chosen comparator group and concluded:

It is the purpose of the *MBOA* itself that determines the appropriate comparator group. What must be compared is the subset of same-sex

¹⁶ *Charkaoui, supra*, note 3, at para. 131.

¹⁷ *Canada Pension Plan*, R.S.C. 1985, c. C-8.

¹⁸ *Hislop, supra*, note 4, at para. 37.

survivors that remains excluded from the *CPP* survivor's benefits, i.e. those whose partners died before January 1, 1998, and similarly situated opposite-sex survivors.¹⁹

In this brief comparator group discussion in the majority opinion, the disheartening tangential lesson is the Court's repeated assertion that the choice of a comparator group is an essential component in the assessment of differential treatment for the purposes of section 15. For those who have struggled with the consequences of the 2004 *Hodge* decision,²⁰ which affirmed the centrality of comparator groups to any section 15 claim, *Hislop* confirms that the *Hodge* analysis was not simply an unfortunate blip on the equality radar.

The primary significance of *Hislop* lies in the Court's conclusions on the appropriate remedy. The Court set out guiding principles for the application of retroactive Charter remedies.²¹ There is one particular part of the remedies discussion that has important equality ramifications: the point of difference between the majority and concurrence in *Hislop* on whether the Court's 1999 decision in *M. v. H.*²² marked a "substantial change in the law" in same-sex equality rights. In *M. v. H.*, a majority of the Supreme Court held that the exclusion of same-sex couples from the definition of "spouse" in the Ontario *Family Law Act* violated section 15. In *Hislop*, the majority characterized *M. v. H.* as a watershed moment²³ — a clear shift in the law from the Court's position in *Egan*²⁴ four years earlier. Justice Bastarache disagreed, and looked at the split decision in *Egan*, and lower court judgments both before and after *Egan* as indications that support for same-sex equality rights was building and gaining momentum long before the Court's decision in *M. v. H.*²⁵ This point of contention is extremely significant to *Hislop* as it provided the basis on which the majority was able to forgive the government's failure to extend benefits equally to same-sex couples. The Court fashioned a test for the prospective and retroactive award of remedies that asks first

¹⁹ *Id.*, at para. 38.

²⁰ *Supra*, note 2.

²¹ For a thorough discussion of the *Hislop* decision from a Charter remedies focus see Daniel Guttman, "*Hislop v. Canada: A Retroactive Look*" (2008) 42 S.C.L.R. (2d) 547.

²² [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.).

²³ *Hislop, supra*, note 4, at para. 110.

²⁴ *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) [hereinafter "*Egan*"]. In *Egan*, a slim majority of the Court held a definition of "spouse" that reserved *Old Age Security Act* benefits to opposite-sex couples did violate s. 15 but could be saved under s. 1 of the Charter.

²⁵ *Hislop, supra*, note 4, at paras. 147-57.

whether a substantial change in the law has occurred through the judicial decision.²⁶ If there has been a substantial change in the law, other issues like fairness to the litigants, good faith reliance by government and the need to respect the constitutional rule of legislatures will be considered in deciding whether to award a retroactive remedy.²⁷

By reaffirming — even reifying — its position as the ultimate arbiter of constitutional rights, the Court took an unusual posture in the ongoing debate around legislative and judicial dialogue. It is well settled that the Constitution gives ultimate authority to the courts in deciding whether a law conforms to constitutional dictates. The Supreme Court has repeatedly emphasized however, that this power is muted by an ongoing responsive conversation with legislatures. While the Supreme Court may pronounce a law unconstitutional, governments are free to respond with legislation that overcomes the constitutional deficiency. It is also true that in most cases, courts are pronouncing on the minimum constitutional floor of legislative action. This could certainly be one way of seeing the *Egan* decision, as described by Bastarache J. The Court's view in *Hislop* that its decision in *Egan* relieved the government from any further obligation to legislate a same-sex benefit scheme is an extraordinarily deferential posture to governmental inaction. While this may make for greater constitutional certainty (from the Court's point of view), it is not principled from an equality perspective.²⁸ Justice Bastarache (disagreeing with the majority on this point) argued in *Hislop*:

[G]iven the contradictory decisions both before and after *Egan*, the closeness of the decision in that case, and the difficult nature of the issues at stake, it is difficult to see *Egan* as definitively establishing what the Constitution required. The reality is that it was for a time unclear exactly how s. 15(1) would apply to same-sex couples. The judicial process can be slow. It took time for this Court and others to articulate the correct constitutional principles to be applied to legislative exclusions of same-sex couples. That does not mean that

²⁶ *Id.*, at para. 99.

²⁷ *Id.*, at para. 100.

²⁸ At a conference to celebrate the launch of the Women's Court of Canada, Bruce Porter spoke about s. 15 and the lack of progressive remedies. See Bruce Porter, panelist on "Living up to the Charter: Government Accountability in the Court Room", *Re-writing Equality*. University of Toronto (March 7, 2008). Webcast available on the University of Toronto Faculty of Law conference website, online at: <http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/13/0/0/0&contentId=1707>.

this Court was upsetting established law when it handed down its decision in *M. v. H.*²⁹

Defining the correct approach to retroactive Charter remedies is especially significant in equality cases where claims present the threat of financial obligations for governments, and where the courts are concerned with cut-off dates and claimant-group certainty. The majority's approach in *Hislop* gives the Court the ultimate say in pronouncing on what is, or is not, a discriminatory practice. Given the nature of judicial processes, such an emphasis on judicial authority allows governments extra months and even years to perpetuate constitutional wrongs (without the risk of financial consequences) even when they should have known legislative change was both required and inevitable.

3. *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*

B.C. Health Services is a decision with significant equality ramifications, even though its section 15 reasoning was neither substantive nor lengthy. The appellants challenged provisions of Bill 29, British Columbia provincial legislation that invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. The case was primarily argued under the section 2(d) Freedom of Association clause of the Charter. The section 15 claim was based on several interrelated, enumerated and analogous grounds including: sex, employment in the health care sector, and status as non-clinical workers. The trial judge noted that the workers affected by Bill 29 were almost all women, working in jobs stereotyped as “women’s work”.³⁰ The Supreme Court of Canada found that Bill 29 did not amount to differential treatment based on a personal characteristic, because the adverse effects of the legislation related “to the type of work [the claimants] do, and not to the persons they are”.³¹

²⁹ *Hislop*, *supra*, note 4, at para. 157.

³⁰ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2003] B.C.J. No. 2107, 2003 BCSC 1379, at paras. 161-63 (B.C.S.C.) [hereinafter “*B.C. Health Services*, Trial Decision”].

³¹ *B.C. Health Services*, *supra*, note 5, at para. 165.

B.C. Health Services is a disappointing opinion from an equality perspective, given the Court's cursory, one-paragraph dismissal of the equality claim, in a situation where all levels of court acknowledged that the workers affected were women doing "women's work". The failure to unpack that reality in a more complicated equality analysis is problematic, both for the case itself and for what it indicates about the Court's broader approach to section 15. Had the Court simply declined to analyze the case under section 15, one might conclude that it was avoiding a complicated equality analysis because it saw the opportunity to rest its decision on another, much simpler, analysis. It did not make that choice, however, and instead offered a hollow endorsement of the trial judgment without bothering to interrogate the problematic assumptions underlying that decision.

The Court still struggles with both the theory and practice of intersectionality and the possibility that equality claims can be, and often are, based on more than one ground.³² The Supreme Court in *B.C. Health Services* simply accepted the trial judge's reasoning that the impugned legislation segregated different sectors of employment in accordance with long-standing labour practices, and not for any nefarious reasons. The trial judge's reasons were lengthier on this point, and while she clearly did not support the discrimination claim, she did reference the possibility that occupational status could be an analogous ground.³³ Justice Garson quoted L'Heureux-Dubé J. in *Dunmore*³⁴ and *Delisle*.³⁵ In *Delisle*, L'Heureux-Dubé J. argued:

[O]ccupation and working life are often important sources of personal identity, and there are various groups of employees made up of people

³² A good example of how the Supreme Court has struggled with intersectionality is its decision in *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.). *Gosselin* was decided on the basis of the enumerated ground of "age" and McLachlin C.J.C. in fact described the *Gosselin* and *Law* (*supra*, note 7) situations as "strikingly similar". The factual bases of the two cases were completely different. *Gosselin* was a challenge by an impoverished, psychologically troubled and socially disadvantaged woman to a provincial welfare scheme. *Law* was a challenge by a young self-employed widow to a survivor benefits scheme. The only similarity between the two cases was the age of the claimants. The Court could describe them as similar because its equality analysis proceeded only on the simple enumerated ground of age, uncomplicated by gender, class or other factors. For further elaboration on this point, see Daphne Gilbert, "Substance without Form: The Impact of Anonymity on Equality-Seeking Groups" (2006) 3:1 UOLTJ 225.

³³ *B.C. Health Services*, Trial Decision, *supra*, note 30, at para. 179ff.

³⁴ *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.).

³⁵ *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.).

who are generally disadvantaged and vulnerable. Particular types of employment status, therefore, may lead to discrimination in other cases, and should be recognized as analogous grounds when it has been shown that to do so would promote the purposes of s. 15(1) of preventing discrimination and stereotyping and ameliorating the position of those who suffer social and political disadvantage and prejudice.³⁶

In fact, the statistics in *B.C. Health Services* are quite shocking, as described in the trial judgment:

There is no dispute that the majority of workers affected by Bill 29 are female. 98% of nurses in British Columbia are women. 85% of HEU [Hospital Employees Union] members are women. 90% of BCGEU [British Columbia Government Employees Union] workers in the community subsector are women. Many health care workers are immigrants or members of visible minorities. 27% of HEU members self-identify as members of visible minorities in comparison to 18% of British Columbia as a whole.³⁷

Justice L'Heureux-Dubé's reasoning in *Delisle* seems directly analogous, or arguably applicable, in *B.C. Health Services*. Similarly in *Dunmore*, she reiterated her belief that occupational status could be an analogous ground arguing:

In this case, there is no doubt that agricultural workers, unlike the RCMP officers in *Delisle*, do generally suffer from disadvantage, and the effect of the distinction is to devalue and marginalize them within Canadian society. Agricultural workers "are among the most economically exploited and politically neutralized individuals in our society" and face "serious obstacles to effective participation in the political process" ...³⁸

Women workers in stereotypically gendered occupations are likewise a historically disadvantaged group who suffer both social and political consequences. The political powerlessness is particularly evident here given this targeted legislative initiative. If these female-dominated unions had political clout, surely they would have been able to hold the government to its negotiated agreements. The intersecting oppressions of

³⁶ *Id.*, at para. 8, quoted by Garson J. in *B.C. Health Services*, Trial Decision, *supra*, note 30, at para. 173.

³⁷ *B.C. Health Services*, Trial Decision, *id.*, at para. 161.

³⁸ *Dunmore*, *supra*, note 34, at para. 168 (emphasis in original).

gender and occupational status were worthy of greater analysis by the Court.

The Supreme Court's most egregious failing in its limited equality analysis in *B.C. Health Services* is its apparent unwillingness to conceptualize the case as one of adverse effects discrimination. Given an obviously segregated workforce, one wonders why an analogous ground argument was even necessary under section 15. It is apparent on the facts that the case could have been analyzed as a straight adverse effects sex discrimination claim, avoiding the need to contemplate an intersectional analysis. The overlapping grounds however, certainly add a nuanced dimension to the discrimination claim; dismissing the section 15 claim outright on the basis that occupational status is not a personal characteristic in this overtly gendered context is very simplistic reasoning.

4. *Baier v. Alberta*

At issue in *Baier*³⁹ was the constitutionality of provincial legislation that prohibited school board employees from running in an election and serving as school board trustees. The case was primarily argued and decided as a Freedom of Expression case and the appellants failed to show a violation of section 2(b). However, the appellants also argued that they faced discrimination, as compared to municipal employees, on the analogous ground of occupational status. The Court rejected the section 15 claim in one paragraph, holding that the occupational status at issue here did not meet the criteria outlined in *Corbiere*⁴⁰ for finding an analogous ground. The appellants were not part of a discrete and insular minority, their occupation was not a suspect marker of discrimination, nor was their occupation an immutable characteristic.⁴¹

Although the section 15 reasoning in *Baier* is short, it is not particularly objectionable on the facts. A majority of the Court has never agreed that occupational status constitutes an analogous ground. The dicta by L'Heureux-Dubé J. in *Delisle* and *Dunmore* that opened the door to that possibility, likely does not apply to this category of workers. School board employees are not a gendered, politically vulnerable group,

³⁹ [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.).

⁴⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.).

⁴¹ *Id.*, at para. 13.

nor are they historically marginalized or exploited. *Baier* can be distinguished in this respect from *B.C. Health Services*.

III. CONCERNS REGARDING THE POST-LAW SECTION 15 JURISPRUDENCE

To the extent that the Supreme Court said anything at all about section 15 in 2007, it did nothing to address or dispel the criticism that the Court's recent equality cases have engendered. Since 2004 — a watershed year in which the Court decided *Hodge*,⁴² *Auton*,⁴³ *N.A.P.E.*,⁴⁴ the *Same-Sex Marriage Reference*⁴⁵ and the so-called “Spanking Law” case of *Canadian Foundation for Children, Youth and the Law*⁴⁶ — academics, intervenors and litigants have been assessing the “damage” to efforts to foster and promote substantive equality within the framework of the 1999 *Law* decision. Outside of the Supreme Court, it is commonly understood that the cumulative effect of the 2004 decisions was to mark a significant retreat from a substantive model of equality analysis to a formal model of treating “likes” alike and “unalikes” differently. There have been numerous workshops and volumes of scholarship on the demise of section 15's potential,⁴⁷ however three areas are of particular concern, particularly in light of the Court's 2007 silence on equality. First is the ongoing debate on the content that should be given to the idea of “human dignity”, the touchstone of equality analysis after the *Law* decision.⁴⁸ Second is the increasing prominence of

⁴² [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.).

⁴³ [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.).

⁴⁴ [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.).

⁴⁵ [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 (S.C.C.).

⁴⁶ [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

⁴⁷ Two recent edited collections on the evolution of s. 15 are Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006); and Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) [hereinafter “*Diminishing Returns*”]. Each of these collections came together after weekend-long workshops on the dismal plight of equality litigation. In March 2007, the Women's Court of Canada was launched with a conference and the publication of a special issue of the *Canadian Journal of Women and the Law* (2006) 18(1) C.J.W.L., containing six rewritten Supreme Court decisions on s. 15. There have also been many other academic papers and panels at conferences.

⁴⁸ In *Law*, Iacobucci J. offered a “specific, albeit non-exhaustive, definition” of human dignity which included the realization of personal autonomy, feelings of self-respect and self-worth, physical and psychological empowerment; and a concern with the way an individual legitimately feels when confronted with a particular legislative goal (see *Law*, [1999] S.C.J. No. 12, [1999] 1

comparator groups as the central feature of the section 15 model of analysis. Third is the relationship between section 15 and section 1. Even though the equality analyses were brief, each of these existing areas of concern was exacerbated by the Supreme Court's decisions in 2007.

1. Dignity

The usefulness of "dignity" as a defining feature of section 15 has been both defended and decried.⁴⁹ It seems clear that human dignity is an important, indeed even obvious part of assessing equality. What is unclear is how an analysis of a concept as nebulous as dignity can or should be done. The Supreme Court of Canada has struggled with what dignity means, and the case law is at best unhelpful and at worst harmful to any notion that section 15, as currently interpreted, can in fact promote human dignity in practice. The 2007 equality cases did not contain any dignity analysis. *Baier*⁵⁰ and *Charkaoui*⁵¹ never passed the initial stage of the *Law*⁵² analysis requiring claimants to demonstrate differential treatment on an enumerated or analogous ground. *Hislop*⁵³ was only argued on the basis of the disputed comparator group and the government conceded the law infringed the claimants' dignity. In *B.C. Health Services*, the Supreme Court agreed that there was no differential treatment based on a personal characteristic and concluded: "... we see no reason to depart from the view of the trial judge that these effects on health care workers, however painful, do not, on the evidence adduced in this case, constitute discrimination under s. 15 of the *Charter*."⁵⁴ While this does not mean the Court would have found a dignity infringement had the analysis proceeded, the passing reference to "painful" effects of legislative action is indicative of one of the problematic aspects of

S.C.R. 497, at para. 53 (S.C.C.)). The Court said these characteristics should be analyzed from a subjective-objective point of view, taking into account the claimant's own feelings as experienced by a "reasonable" claimant sharing the same experiences: *id.*, at paras. 59-61.

⁴⁹ See, e.g., Peter Hogg, "What Is Equality? The Winding Course of Judicial Interpretation" (2005) 29 S.C.L.R. (2d) 39; Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in *Law*, 2002" (2003) 20 S.C.L.R. (2d) 93; Sophia R. Moreau, "The Promise of *Law v. Canada*" (2007) 57 U.T.L.J. 415; Denise G. Réaume, "Discrimination and Dignity" (2003) 63 Louisiana L. Rev. 645.

⁵⁰ *Supra*, note 39.

⁵¹ [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

⁵² *Supra*, note 48.

⁵³ [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 (S.C.C.).

⁵⁴ *B.C. Health Services*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at para. 166 (S.C.C.).

adjudicating dignity under *Law*. It remains unclear what goes into the definition of “human dignity” in section 15, and while describing an experience as “painful” might be misconstrued by claimants as sympathy, or perhaps as condescension from the Court, its exact legal consequences are vague. Similarly emotive language was used by the lower courts. At the trial level the judge described the claimants as “aggrieved”⁵⁵ and at the Court of Appeal the claimants were acknowledged to be “angry”.⁵⁶ Neither of the lower court judgments considered the legislation to be dignity-infringing.

2. Comparator Groups

The second controversial point in section 15 jurisprudence exacerbated in 2007 is the rising prominence of comparator groups.⁵⁷ In *Hislop*⁵⁸ the comparator group issue was the only substantive section 15 argument advanced by the government. The Court was quickly dismissive of the government’s argument that a comparator group based on a temporal distinction was appropriate. It instead looked at the purpose of the amendments in question and acknowledged that the core comparison should be based on the decision to treat same-sex couples differently from opposite-sex couples in allocating benefits before a certain date (January 1, 1998). In the *Hislop* case, this is certainly the more appropriate comparator, though what is unfortunate is the Supreme Court’s adherence to the need for a single comparator group model of analysis. The rigidity of the *Hodge*⁵⁹ formulation created difficulties at the lower level in *B.C. Health Services*.⁶⁰ Justice Garson struggled to locate a single, appropriate comparator and in the end, despite expressing discomfort with the claimants’ choice, never decided on what the appropriate comparator should be. She concluded:

⁵⁵ *B.C. Health Services*, Trial Decision, *supra*, note 30, at para. 189.

⁵⁶ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2004] B.C.J. No. 1354, 2004 BCCA 377, at para. 137 (B.C.C.A.).

⁵⁷ For an elaboration of a critique of *Hodge* see: Daphne Gilbert & Diana Majury, “Critical Comparisons: The SCC Dooms Section 15” (2006) 24 Windsor Y.B. Access Just. 111; Sophia R. Moreau, “Equality Rights and the Relevance of Comparator Groups” (2006) 5 J.L. & Equality 81; Dianne Pothier, “Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What’s the Fairest of Them All”, in *Diminishing Returns*, *supra*, note 47, at 135.

⁵⁸ *Supra*, note 53.

⁵⁹ [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357 (S.C.C.).

⁶⁰ *Supra*, note 54.

The plaintiffs define their comparator group for the purposes of the first branch of the Law test as those public sector workers who do not work in the most female dominated sectors. I find it difficult to apply a comparator group that has the basis of the s. 15 claim infused into its description. However, accepting for the purposes of this analysis that this is an appropriate comparator group, I do not see how Bill 29 draws a distinction between the plaintiffs and this comparator group on the basis of personal characteristics.⁶¹

This conclusion both confirms the circular logic of the comparator group model, and shows how difficult an exercise it is to choose a single comparator group. The claimants in *B.C. Health Services* defined themselves as women in stereotypically gendered women's occupations. This was the basis of their claim of discrimination. If comparison is necessary to ground a section 15 claim, how else could the essence of their claim be uncovered if not by comparison to those workers in non-gendered occupations? It is that comparison that most revealingly shows the consequences of the impugned legislation. Justice Garson's concern that her comparator group not be "infused" with the ground of the section 15 claim not only makes the analysis completely abstract and artificial, it also belies the model of analysis used in *Hodge* and *Auton*, two recent (and controversial) Supreme Court comparator group decisions. In *Hodge*, the claimant was defined as a former common law spouse and compared to former married (*i.e.*, divorced) spouses. The comparison between common law and marriage relationships was the basis of the section 15 issue for both the claimant and the government. Similarly, in *Auton* the claimants, autistic children wanting funding for a specific kind of behavioural therapy, were compared to "non-disabled [people] or [people] suffering a disability other than a mental disability ... seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required".⁶² The Supreme Court's chosen comparator group is based entirely on the essence of the section 15 claim, focusing as it does on the nature of the treatment and whether others receive funding. Surely if comparison is required, and is in fact, central to the whole section 15 analysis, we cannot limit it to comparisons that make no reference to the basis of the alleged discrimination. Justice Garson's reasoning at the trial level shows how difficult the comparator group step is in the section 15 process. She feels

⁶¹ *B.C. Health Services*, Trial Decision, *supra*, note 30, at para. 164.

⁶² *Auton*, *supra*, note 43, at para. 55.

obligated to point out a need to disconnect the claimants from their claim, in order to bring some integrity to the search for a single “correct” comparator. Yet, she decides not to elaborate the comparator analysis. This step has proven to be unworkable and unprincipled at the Supreme Court and the confusion trickles down.

3. Section 15 and Section 1

A third issue of concern is the relationship between section 15 and section 1. There are three ways the interaction between these two sections manifests in problematic ways in equality analysis. First is the kind of situation we saw in the *N.A.P.E.* case where the government of Newfoundland was allowed to justify breaching a pay equity agreement (in violation of section 15) by arguing extreme financial circumstances.⁶³ Allowing governments to use a fiscal crisis to justify discriminatory treatment creates a certain intractable tension in the relationship between Equality Rights and section 1.

A second problem stems from the nature of the *Law* test and its focus on human dignity. Discrimination premised on a finding that differential treatment promotes a view that the claimant is less capable or less worthy of recognition as a human being (the words used in *Law* to describe what is short-formed as the “human dignity” step),⁶⁴ and justifying such a result in a section 1 argument is an unsavoury (perhaps even untenable) position for governments to be in. In *Lavoie v. Canada*, McLachlin and L’Heureux-Dubé JJ. (writing in dissent) emphasized that the burden of justifying a finding of discrimination should be “onerous” and emphasized that it will be a “rare case” where it will be considered reasonable to discriminate.⁶⁵ In *Lavoie*, a discriminatory hiring practice was justified at the section 1 stage, but since then the Court has preferred to narrow its approach to section 15, making it ever harder for claimants to prove a claim of discrimination. The Court clearly struggles with how to rationalize a dignity infringement. This narrowing was evident in 2007 in *B.C. Health Services*,⁶⁶ *Baier*⁶⁷ and *Charkaoui*,⁶⁸ none of which made it to a substantive section 15 analysis.

⁶³ *N.A.P.E.*, *supra*, note 44.

⁶⁴ *Law*, *supra*, note 48, at para. 88.

⁶⁵ *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769, at para. 6 (S.C.C.).

⁶⁶ *Supra*, note 54.

⁶⁷ *Supra*, note 39.

⁶⁸ *Supra*, note 51.

A third concern about the relationship between section 15 and section 1 is the import of rationalization or justification into the section 15 analysis. In an article on the problematic consequences of an overly deferential approach to government policies at the section 15 stage, Sheila McIntyre concluded that the Supreme Court was shifting from an adverse effects model of discrimination to a focus on “reasonable governmental intentions and rational statutory designs”.⁶⁹ In her view, this undermines equality claims in three ways, each of which is a pertinent criticism of the decision in *B.C. Health Services*.

First, a move away from considering claims of adverse effect discrimination allows systemic inequalities, and especially inequalities based on intersecting vulnerabilities, to be unexamined in the Court’s analysis. In *B.C. Health Services*, the Court’s simultaneous recognition of the gendered employment context and its decision that occupational status here was not a “personal characteristic” left the systemic inequality of stereotyped “women’s work” unanalyzed.

Second, once the Court’s focus is located on the reasonableness of government decision-making, rather than on the disadvantage occasioned by the decisions, “... the legitimacy of judicial second-guessing of legislative line-drawing becomes a live issue”.⁷⁰ In *B.C. Health Services*, the Court did not consider whether the occupational status at issue could be described as an analogous ground under section 15. It instead adopted the reasoning of the trial judge, who concluded:

The government has made a policy decision with respect to the health care system that has adversely affected the employment interests of a group whose composition is linked to s. 15 characteristics. However, the fact that this group is predominantly female does not constitutionally shield it from governmental action that may adversely affect them without evidence that it is being subject to differential treatment on the basis of s. 15 characteristics.⁷¹

This is surprisingly circular reasoning. The claimants argued discrimination on the basis of the intersecting grounds of sex, occupational status and status as non-clinical workers. Their unions were specifically targeted by the impugned legislation, and their unions are predominantly composed

⁶⁹ Sheila McIntyre, “Deference and Dominance: Equality Without Substance” in *Diminishing Returns*, *supra*, note 47, at 102 [hereinafter “McIntyre”].

⁷⁰ *Id.*, at 103.

⁷¹ *B.C. Health Services*, Trial Decision, [2003] B.C.J. No. 2107, 2003 BCSC 1379, at para. 174 (B.C.S.C.).

of women performing stereotypically gendered work like nursing and hospital/community support. The government was shielded by the court's inability or refusal to analyze the systemic inequality of labour practices. The trial judge's statement precisely describes what an adverse effects model of discrimination analysis is meant to uncover, but she does not engage in the analysis and the Supreme Court simply accepts this reasoning.

The third way that judicial deference to government policy undermines equality is, as McIntyre argues, that the equation of reasonable legislative choices with non-discrimination has incorporated intention into the section 15 analysis. She concludes, "[u]nless the court finds that the government purpose itself is discriminatory or that its ground-based distinctions are based on stereotypes that the Court recognizes as such, it will tend to find no discrimination."⁷² In *B.C. Health Services*, the Court held: "the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force."⁷³ There was no consideration given to whether it is a "long-standing practice" to discriminate against women workers or for governments to be more dismissive when the work at issue is "women's work". The Court treated the government's decision as "neutral" and in accordance with ordinary labour practices, without unpacking whether those practices are systematically discriminatory.

IV. CONCLUSION

The 2007 decisions on section 15 can perhaps best be described as unsettling. There were no dramatic pronouncements, no shifts in substance, no new "tests" or formalities. The relative brevity is still a cause for concern. The Court missed opportunities to address the increasingly vocal criticism of its equality jurisprudence. The 2007 cases might have offered a chance to acknowledge unfortunate developments and to offer some guidance in restoring a vision of section 15 that focuses on substantive equality.

Equality-seekers should also be concerned in particular with the decision in *B.C. Health Services*. The Court's failure to analyze the

⁷² McIntyre, *supra*, note 69, at 104.

⁷³ *B.C. Health Services*, *supra*, note 54, at para. 165.

section 15 claim as either one of intersecting gender/occupational status discrimination or adverse effects discrimination may have serious repercussions in efforts to promote gender equality through the Charter.

The emphasis in *Hodge*⁷⁴ and *Auton*⁷⁵ on comparator groups, and the interrelationship of section 15 and section 1 in *N.A.P.E.*⁷⁶ combined to drastically curtail the potential for progressive substantive equality analysis in their aftermath. Since then, the Court has rested on its section 15 laurels and other issues and Charter rights have risen to the fore — section 7 and section 2 in particular. The language of equality — the rhetoric with which section 15 arguments are created and upon which they are based — is impoverished, leaving claimants with, at best, a limited (and increasingly dated) toolbox of equality precedents with which to build their arguments. The Supreme Court no longer seems willing to critically engage with what it has called the most conceptually difficult Charter right.

⁷⁴ *Supra*, note 42.

⁷⁵ *Supra*, note 43.

⁷⁶ *Supra*, note 44.