

# Section 15(1) at the Supreme Court 2001-2002: Caution and Conflict in Defining “The Most Difficult Right”

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## Citation Information

Lawrence, Sonia. "Section 15(1) at the Supreme Court 2001-2002: Caution and Conflict in Defining “The Most Difficult Right”." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 16. (2002).  
<http://digitalcommons.osgoode.yorku.ca/sclr/vol16/iss1/4>

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# SECTION 15(1) AT THE SUPREME COURT 2001-2002: CAUTION AND CONFLICT IN DEFINING “THE MOST DIFFICULT RIGHT”

Sonia Lawrence\*

Since early 2001, the Supreme Court of Canada has considered section 15(1) in three important rulings: *Dunmore v. Ontario (Attorney General)*, *Trinity Western University v. College of Teachers (British Columbia)* and *Lavoie v. Canada (Public Service Commission)*.<sup>1</sup> Both *Dunmore* and *Trinity Western* raise but do not satisfactorily address issues involving the interaction of equality and other rights or freedoms, and section 15 failed to figure prominently in either ruling. In *Lavoie*, on the other hand, the Court agreed that a section 15(1) analysis was required. However, its fractured approach revealed that the search for common ground on the understanding of equality rights remains elusive.

The cases do not display a unifying theme. The concurring reasons in *Dunmore* suggest that future claims of discrimination based on the characteristics of a group of workers may get at least a lukewarm reception at the Court.<sup>2</sup> The majority's decision to avoid section 15(1) in favour of section 2(d) leaves us without much guidance in that regard. The facts of *Trinity Western* bring to the fore the potential clash of religious freedom and equality rights, a clash that will continue to trouble *Char-*

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<sup>1</sup> *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193 [hereinafter *Dunmore*]; *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772 [hereinafter *TWU*]; *Lavoie v. Canada (Public Service Commission)*, 2002 SCC 23 [hereinafter *Lavoie*].

<sup>2</sup> As they have in the past: see *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 1 S.C.R. 922; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

ter<sup>3</sup> jurisprudence in the years ahead. With the exception of L'Heureux-Dubé J., the Court chose not to undertake a *Charter* analysis in *Trinity Western*. The majority resolved the case on administrative law grounds. Nevertheless, all of the reasons referred to section 15 values and their importance in determining the limit of section 2(a) rights.

*Lavoie v. Canada* is the only case that directly applied the section 15(1) analysis set out in *Law v. Canada (Minister of Employment and Immigration)* in the past year.<sup>4</sup> The Court split badly, with the plurality dismissing the appellant's claim that the Public Service Commission's hiring preference for citizens was unconstitutional. The majority found that the preference violated section 15(1), but could be saved at the section 1 stage of analysis. Justice Arbour and LeBel J., each writing their own reasons, found that section 15 was not violated, while the Chief Justice and L'Heureux-Dubé J. found that there was a violation that could not be saved under section 1. *Lavoie* cracks the veneer of unanimity which the Court projected in *Law*, and provides a perhaps unexpected and disturbing contrast to the Court's first section 15(1) decision, *Andrews v. Law Society of British Columbia*.<sup>5</sup> It reveals significant problems in the application of the *Law* test, and possibly a growing dispute about the proper application of section 1 in section 15 cases.

## I. INTRODUCTION

At the 2001 Constitutional Cases Conference, McLachlin C.J. described the *Charter* right to equality as "the most difficult right."<sup>6</sup> The evidence since that speech suggests that despite the impressive effort made in *Law v. Canada* to create a test that the whole court could agree with, the Court is far from unanimous on how the "human dignity" based test should be applied.<sup>7</sup> Similarly, the Court managed to skilfully but clearly duck the question of the conflict between

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<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11.

<sup>4</sup> [1999] 1 S.C.R. 497 [hereinafter *Law*].

<sup>5</sup> [1989] 1 S.C.R. 143.

<sup>6</sup> McLachlin, "Equality: The most difficult right" (2001) 14 S.C.L.R. (2d) 17.

<sup>7</sup> The *Lavoie* ruling supports the views of commentators who see the human dignity standard introduced in *Law* as vague and malleable, and for shifting to s. 15 a balancing of individual rights and legislative objectives that ought to take place at the s. 1 stage of analysis. See Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299, at 329-32; Hogg, *Constitutional Law of Canada* (2001, Student Edition), s. 52.7(b); Ross, "A Flawed Synthesis of the Law" (2000) 11 Constitutional Forum 74. Donna Greschner shares the view that the Court achieved consensus at a high level of abstraction in *Law*. Nevertheless, she defends the *Law* test as more likely to promote substantive equality than any of the alternatives. See Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299.

equality principles and other fundamental freedoms (namely freedom of religion). Thus 2001-02 has not involved grand announcements of new guiding principles in equality jurisprudence. Neither, for the most part, have the decisions over the past year managed to clarify past jurisprudence. We have come out of the latest term with an equality jurisprudence as muddy as it ever was, with grand principles intact, but practicalities unclear.<sup>8</sup>

## II. THE CASES

### 1. *Dunmore v. Ontario (Attorney General)*

*Dunmore* involved a challenge to the repeal of the *Agricultural Labour Relations Act, 1999*, in 1995.<sup>9</sup> Enacted only a few years earlier by the NDP government of Ontario, the Act extended collective bargaining rights to agricultural workers. The bases of the challenge were section 2(d) and section 15(1). In 1997, in a ruling later affirmed by the Ontario Court of Appeal, Sharpe J. considered and rejected the claim that the repeal was discriminatory, on the basis that “agricultural workers” did not constitute an analogous ground of discrimination under section 15(1).<sup>10</sup>

At the Supreme Court, only two judges, L’Heureux-Dubé (concurring in the result) and Major J.J. (dissenting) considered section 15(1). The majority decided the case on the basis of section 2(d) and deemed it unnecessary to continue through the section 15(1) analysis. However, the majority did see fit to make some comments about the proper application of section 15(1) in connection with section 2(d). In fact, given the cool reception the Court gave the section 15(1) claims in *Delisle*<sup>11</sup> and the *Workers’ Compensation Reference*,<sup>12</sup> perhaps we ought to be surprised that the majority refrained from making negative comments about the section 15 claim in *Dunmore*.

The dissenters offered opposing views on the section 15(1) claim. Madame Justice L’Heureux-Dubé concluded that agricultural workers are an analogous group, while Major J. adopted the conclusions of Sharpe J. in finding that no analogous grounds existed. In effect, we learn little from this case, although we could at least conclude that the alliance forged in *Law* is breaking down. The

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<sup>8</sup> Appendix A contains a partial list of Supreme Court s. 15 cases currently on reserve or granted leave to appeal. These cases might provide some further elucidation on s. 15(1) before the end of 2002.

<sup>9</sup> S.O. 1994, c. 6 [rep. by *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, s. 80(1), *Ontario Labour Relations Act, 1995*, S.O. 1995, c.1, Sched. A].

<sup>10</sup> (1997), 155 D.L.R. (4th) 193 (Ont. Gen. Div.); (1999), 182 D.L.R. (4th) 471 (Ont. C.A.).

<sup>11</sup> *Supra*, note 2, at paras. 42-46, *per* Bastarache J. for the majority.

<sup>12</sup> *Supra*, note 2, at 924.

two judges that did consider section 15(1) reached opposite conclusions. The choice to decide the case on section 2(d) grounds might have been based as much on pragmatism as on principle.

## 2. Trinity Western University v. College of Teachers (British Columbia)

Despite the fact that *TWU* is not really a section 15(1) case, but rather an administrative law case in which the University requested an order of mandamus, the clash between equality rights and religious freedom that produced the litigation is an increasingly important one in *Charter* jurisprudence. At issue was a decision of the British Columbia College of Teachers denying certification to Trinity Western University's teaching program. The only judge applying section 15(1) was L'Heureux-Dubé J., in dissent. The majority, while giving great play to the principles and values behind section 15(1), did not actually engage in a section 15(1) analysis. In fact, the majority decision skilfully ducks what promises to be a major area of contention in the future, the interplay or conflict of section 15(1) and section 2(a).

TWU, located in British Columbia, is an educational institution affiliated with the Evangelical Free Church of Canada. The University offers a teacher training program in which students spend four years at TWU, and a fifth year at Simon Fraser University. The British Columbia College of Teachers rejected TWU's application for permission to assume full responsibility for this program. TWU wanted to have full responsibility in order to have the program better reflect its Christian world view. The BCCT based its refusal on the conclusion that it was contrary to the public interest to have a teacher education program offered by a private institution which appears to follow discriminatory practices. The "discriminatory practices" in question were the TWU Community Standards, applicable to all students, faculty and staff. Specifically, TWU maintained a list of "PRACTICES THAT ARE BIBLICALLY CONDEMNED", which included "sexual sins including . . . homosexual behaviour." All members of the TWU community were asked to sign a document in which they agreed to refrain from such activities.

This case came to the courts for judicial review of the decision of the BCCT. The issue was whether the BCCT had jurisdiction to look at the discriminatory nature of a teaching program under the public interest component of the *Teaching Profession Act*,<sup>13</sup> and if so, whether the BCCT's decision was reasonable. Both lower courts found that there was no reasonable basis for the decision, although they differed on the question of jurisdiction.

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<sup>13</sup> R.S.B.C. 1996, c. 449.

Despite its administrative law focus, the case has some importance for those interested in *Charter* equality. The majority characterized this issue dramatically as “how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school system, concerns that may be shared with their parents and society generally.”<sup>14</sup> However, somewhat anticlimactically this clash of rights and values is interpreted away by the majority: “the scope of the freedom of religion and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled.”<sup>15</sup> The majority decision is based on administrative law principles. There was no evidence of discriminatory practices by TWU graduates, and this left the BCCT without a basis for their decision to deny accreditation. In other words, in the absence of any evidence to the contrary, the majority did not have to address the possibility of the practice of *Charter* protected religious beliefs which are antithetical to the *Charter* ideal of equality. The anticlimax is not so much in the legal ruling (which accords with the decisions in *Ross* and *Keegstra*<sup>16</sup> – the issue is what is being taught in the classroom), as in the very thin facts. There was no evidence suggesting that TWU graduates were creating situations akin to either *Ross* (racist beliefs publicly held can poison the learning environment even if they are not discussed in the classroom) or *Keegstra*. Within the next year, however, the Supreme Court will hear *Chamberlain v. Surrey School District No. 36*, which might force the Court to more directly address the relative constitutional priority of religious beliefs and equality values.<sup>17</sup>

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<sup>14</sup> *TWU*, *supra*, note 1, at para. 28.

<sup>15</sup> *Id.*, at para. 37. See also Buckingham, “Caesar and God: Limits to Religious Freedom in Canada and South Africa” (2001) 15 S.C.L.R. (2d) 461 at 477-95, for a more extensive discussion of resolving clashes between religious freedoms and other rights. Buckingham’s thorough consideration refers to the decision of the South African Constitutional Court in *Christian Education South Africa v. Minister of Education* (2000), 4 S.A. 757, 2000 (10) B.C.L.R. 1051 (C.C.).

<sup>16</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [hereinafter *Ross*]; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>17</sup> *Chamberlain v. School District No. 36 (Surrey)* (2000), 191 D.L.R. (4th) 128 (B.C. C.A.); leave to appeal to SCC granted on October 4, 2001, without reasons. In 1996, James Chamberlain, a teacher at an elementary school in Surrey, British Columbia, asked for the school board’s approval to use three books, all portraying families with same-sex parents, as educational resource materials in kindergarten and grade one classrooms. The school board passed a resolution prohibiting teachers in Surrey from using the books. Chamberlain and four others applied to B.C.’s Supreme Court for judicial review, claiming that the resolution banning the books violated the province’s *School Act* ([R.S.B.C. 1996, c. 412] specifically, section 76(1) which requires that schools be conducted on “strictly secular” principles) and was unconstitutional because it discriminated against gays and lesbians. For its part, the school board contended that its decision was made in the best interests of school children, in light of the strong religious and moral views in the community against homosexuality. The trial decision went against the school board, but the Court of Appeal

Madame Justice L'Heureux-Dubé however, never known to shy away from a fight, engaged the issue head on. In her view, the conflict between *Charter* values is properly dealt with at section 1, and she relies on the methodology the Court employed in mediating between section 15 values and section 2(b) rights in *Ross*.<sup>18</sup> In that case, the conflict was dealt with at section 1.

The decision in *TWU* allows three conclusions:

- Section 15 values, as opposed to formal claims that section 15 has been violated, are and will continue to be important, indeed deciding, factors in a variety of cases, whether strictly in the *Charter* context or in the administrative law context;
- We have no statement from the majority about whether the *Ross* approach would be followed in dealing with a genuine clash between section 2(a) and section 15 (although the facts in *TWU* provide ample material for imagining the form such a clash could take); and
- The court is not unanimous in its thinking on these questions.

Of course, a dissent from L'Heureux-Dubé J. is hardly significant in and of itself. In fact, agreement from L'Heureux-Dubé J. is more likely to raise eyebrows. However, the final case that will be considered here, *Lavoie*, certainly suggests that whatever unanimity the court may have had about section 15 has completely broken down.

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held that the *School Act* “cannot make religious unbelief a condition of participation in the setting of the moral agenda. [para. 31]” Accordingly, the trial judge’s ruling that the school board’s decision was *ultra vires* because it was influenced by religious beliefs could not be sustained. “No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues of education in public schools,” the Court declared. “In [our] respectful view ‘strictly secular’ so interpreted could not survive scrutiny in the light of the freedom of conscience and religion guaranteed by s. 2 of the *Charter* and the equality rights guaranteed by s. 15. [para. 34]” The issues on appeal to the Supreme Court of Canada include (1) whether the religious views of some trustees and parents regarding homosexuality were a legitimate basis for the school board’s decision, having regard to the requirements of B.C.’s *School Act*; (2) whether the board’s resolution infringes freedom of religion and expression and the guarantee of equality under the *Charter*; and (3) whether the Court of Appeal erred in failing to consider the *Charter* issues.

Case description is taken from the Supreme Court of Canada website, accessed 28-May-02, <[http://www.scc-csc.gc.ca/information/hearings/spring/spring\\_e.html#28654](http://www.scc-csc.gc.ca/information/hearings/spring/spring_e.html#28654)>.

<sup>18</sup> *Supra*, note 16.

### 3. Lavoie v. Canada (Public Service Commission)

Elizabeth Lavoie, Jeanne To-Thanh-Hien and Janine Bailey challenged section 16(4)(c) of the *Public Service Employment Act*.<sup>19</sup> The section gives preference to Canadian citizens in the appointment decisions of the Public Service Commission. Applications made by the three women were accepted, but were not referred to the requesting department, as the women were all foreign nationals without Canadian citizenship.

The Federal Court Trial Division found that section 15(1) had been violated, but that the provision was saved at section 1.<sup>20</sup> At the Federal Court of Appeal, one judge found no violation of section 15(1), two judges found section 15(1) violated, but where one found it saved at section 1, the other did not.<sup>21</sup> The Supreme Court also split badly in the decision, with Gonthier, Iacobucci, Bastarache, and Major JJ. finding a violation of section 15(1) saved at section 1, and the Chief Justice, L'Heureux-Dubé and Binnie JJ. finding a violation not saved by section 1. Justice Arbour, on her own, found no violation of section 15(1), and LeBel J. wrote reasons to the same effect.

*Lavoie* raises several interesting, if troubling, issues, at the section 15(1) and section 1 stages of analysis. All of the reasons purport to apply the *Law* test, which confirms the criticism that the test is too vague and open-ended and cannot be the basis for consistent decision-making under section 15(1).<sup>22</sup>

The majority of the Court does reject (again) the similarly situated test, this time as described in the dissenting judgment of Marceau, J.A. from the Federal Court of Appeal. Marceau J.A. had argued:

(1) that s. 15(1) permits of differential treatment to the extent individuals are “differently situated” ...; and (2) that section 15(1) permits distinctions that are “relevant” to the underlying legislative objective...

“In his [Marceau J.A.’s] view,” wrote Bastarache J.,

either of these principles could provide a basis for guaranteeing equal protection to non-citizens in the context of laws having nothing to do with citizenship *per se* (as in *Andrews*), but not in the context of laws whose very *raison d’être* is the definition of citizenship (as in this case). In the latter case, it may be argued, first, that citizens and non-citizens are so differently situated that they do not merit equal

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<sup>19</sup> R.S.C. 1985, c. P-33.

<sup>20</sup> [1995] 2 F.C. 623.

<sup>21</sup> [2000] 1 F.C. 3 (Marceau J.A. wrote the reasons, Desjardins J.A. concurring, Linden J.A. dissenting).

<sup>22</sup> See *supra*, note 4.

treatment and, second, that citizenship is a relevant (and indeed necessary) category on which unequal treatment is based.<sup>23</sup>

This reasoning is very similar to the “relevancy” approach taken by the majority in *Egan v. Canada*<sup>24</sup> and apparently discarded in *Law*, and Bastarache J. rightly rejects the respondents’ suggestion that this approach be taken:

The respondents imply that [“relationship between the ground upon which the claim is based and the nature of the differential treatment” (*Law*, at para. 69)] should also function to permit differential treatment on the basis of citizenship. In their words:

... it is the essence of the concept of citizenship that it confers certain rights and entitlements on citizens that are necessarily denied to non-citizens. .... What [Ms. Lavoie and Ms. Bailey] inveigh as simply another entitlement-denying law operating against non-citizens is, in reality, an original and fundamental citizenship-defining provision that establishes a basic and universal attribute of the status of citizen.<sup>25</sup>

The response of the majority perhaps reflects not the outright rejection of the similarly situated test, but rather the realization that the test itself leaves open the question of what is similar and what is not.<sup>26</sup> In this case, the Court decides that what is similar about citizens and non-citizens is more relevant than what is not similar:

“... to the extent non-citizens are “differently situated” than citizens, it is only because the legislature has accorded them a unique legal status. In all relevant respects — sociological, economic, moral, intellectual — non-citizens are equally vital members of Canadian society and deserve tantamount concern and respect. The only recognized exception to this rule is where the Constitution itself withholds a benefit from non-citizens, as was the case in *Chiarelli, supra*. . . . [T]he distinction in this case finds no authorization in the *Charter* and, more broadly, is not made on the basis of any “actual personal differences between individuals”; see *Law, supra*, at para. 71. If anything, the distinction places an additional burden on an already disadvantaged group. Such a distinction is impossible to square with this Court’s finding in *Andrews, supra*, at p.183, which held that “[a] rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would . . . infringe s. 15 equality rights”.<sup>27</sup>

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<sup>23</sup> *Lavoie, supra*, note 1, at para. 42, *per* Bastarache J.

<sup>24</sup> [1995] 2 S.C.R. 513.

<sup>25</sup> *Lavoie, supra*, note 1, at para. 42, *per* Bastarache J.

<sup>26</sup> For example, see Gibson, *The Law of the Charter: Equality Rights* (1990), at 72.

<sup>27</sup> *Id.*, at para. 44.

In addition, Bastarache J. attempted to strengthen the line between section 15(1) and section 1 considerations, stating that “[t]he concepts of dignity and freedom are not amorphous and, in my view, do not invite the kind of balancing of individual against state interest that is required under section 1 of the *Charter*.”<sup>28</sup> He then admonished:

... the suggestion that governments should be encouraged if not required to counter the claimant’s s. 15(1) argument with public policy arguments is highly misplaced. Section 15(1) requires us to define the scope of the individual right to equality, not to balance that right against societal values and interests or other *Charter* rights.<sup>29</sup>

In part, Bastarache J. argued that to decide these questions within section 15(1) would create a hierarchy of grounds of discrimination (perhaps similar to the U.S. “levels of scrutiny” approach, which requires that courts grant more or less deference to government imposed differential treatment based on the grounds of the differential treatment), an interpretation not warranted by the text, and which would greatly alter the course of section 15(1) jurisprudence.<sup>30</sup>

Madame Justice Arbour’s dissent centred on the third of the *Law* factors. She disapproved of Bastarache J.’s reliance on the subjective view of the claimant as to the discriminatory nature of the preference. In her view, *Law*’s requirement that the court take the point of view of a reasonable person would result in a finding that the equality right had not been violated — a direct contradiction of the majority conclusion.<sup>31</sup>

However, calling race “the exception that proves the rule”, Arbour J. did agree that:

[t]here are some distinctions made on certain enumerated or analogous grounds — I refer again to those made on the basis of race as an obvious example — which a reasonable person could not but view as presumptively, if not unavoidably, discriminatory. The discrimination inquiry may get short-circuited where these kinds of distinctions are at issue, not because it is unnecessary or unimportant but because its outcome will seem all too readily apparent.<sup>32</sup>

Justice LeBel’s short reasons focus on the fact that there is a generally accepted difference between citizenship and non-citizenship, and that the choice is with the individual, therefore harms to non-citizens flow from that choice and not from government action.<sup>33</sup>

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<sup>28</sup> *Id.*, at para. 47.

<sup>29</sup> *Id.*, at para. 48.

<sup>30</sup> *Id.*, at para. 51.

<sup>31</sup> *Id.*, at paras. 79-81, *per* Arbour J.

<sup>32</sup> *Id.*, at para. 83.

<sup>33</sup> *Id.*, at para. 125.

The Chief Justice, and L'Heureux-Dubé J. coauthored dissenting reasons. While they agree with the majority's decision on section 15(1), they would place the emphasis somewhat differently. In particular, they consider this case very similar to *Andrews*. Their concern with the majority judgment lies in the treatment of the violation at the section 1 stage of analysis. The dissent simply is not convinced that the citizenship preference is rationally connected to the achievement of either of the two stated objectives, namely enhancing citizenship and encouraging non-citizens to naturalize. In the view of the dissent:

Far from being rationally connected to the goal of enhancing citizenship, the impugned provision undermines this goal, by presenting Canadian citizenship as benefiting from, as nourished by, discrimination against non-citizens . . .<sup>34</sup>

The dissent also placed emphasis on the total lack of evidence presented by the government to show that exclusion of non-citizens “enhanced citizenship,” arguing that the majority was overly deferential in not requiring evidence at this stage. Likewise the Chief Justice and L'Heureux Dubé J. would not have accepted the second objective even if there had been evidence to support it, since they saw it as fundamentally at odds with the values of tolerance, equality and respect which supposedly ground Canadian citizenship.

In contrast, the majority's approach to section 1 was prefaced with the following:

In this case, we are presented with a law that attempts to promote the value of Canadian citizenship by detracting from the rights of non-citizens; as this inevitably requires Parliament to balance the interests of competing groups, some degree of deference is required in the application of *Oakes*. . . . That being said, the law does not promote the interests of a vulnerable group, is not premised on particularly complex social science evidence, and interferes with an activity (namely employment) whose social value is relatively high. . .<sup>35</sup>

Applying this deferential approach, Bastarache J. agreed that the objectives of the law were enhancing citizenship and facilitating naturalization,<sup>36</sup> and agreed that these objectives were pressing and substantial. In fact, throughout the majority's section 1 analysis, Parliament is repeatedly afforded deferential treatment:

While there is a point at which granting privileges to citizens may be unjustifiable under s. 1 — banning immigrants from social housing, perhaps — that point is not the same as the point at which this Court finds a s. 15(1) violation. Rather, as contemplated by s. 1 of the *Charter*, Parliament is entitled to some deference as to

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<sup>34</sup> *Id.*, at para. 10.

<sup>35</sup> *Id.*, at para. 53, *per* Bastarache J.

<sup>36</sup> *Id.*, at para. 57, *per* Bastarache J.

whether one privilege or another advances a compelling state interest. In this case, Parliament's view is supported by common sense and widespread international practice, both of which are relevant indicators of a rational connection.<sup>37</sup>

Since Wilson J.'s approach to section 1 in *Andrews* carried the majority, deference at section 1 has not been the pattern in section 15 cases.<sup>38</sup> The dissenting judges, the Chief Justice and L'Heureux-Dubé J. are clearly unhappy with the approach taken by the majority. Madame Justice Arbour (who did not find a violation of section 15(1); see II.3. above), stated her disapproval of the majority reasons for the record:

. . . I cannot accept that the violation of so sacrosanct a right as the guarantee of equality is justified where the government is pursuing an objective as abstract and general as the promotion of naturalization. [This would]... leave scarcely any legitimate state objective seriously constrained by the constitutional fetter of equality. .... We must be careful, in our understandable eagerness to extend equality rights as widely as possible, to avoid stripping those rights of any meaningful content. Lack of care can only result in the creation of an equality guarantee that is far-reaching but wafer-thin, an expansive but insubstantial shield with which to fend off state incursions on our dignity and freedom. ... The *Oakes* test was not designed to bear the considerable strain of salvaging under s. 1 a plethora of laws that would otherwise offend a s. 15(1) analysis essentially lacking consideration for the existence of objectively discernible discrimination. ... It would in my opinion be preferable, from the perspectives of analytical integrity, justificatory force and fidelity to this Court's prior equality jurisprudence, to avoid this paradox altogether.<sup>39</sup>

In other words, Arbour J.'s decision not to find a violation at section 15(1) ought to be considered in context of her assertion that once section 15(1) violations are found, they should be difficult to justify under section 1. She is not prepared to be deferential at section 1. Instead, she proposes a more restrictive (for the claimant) section 15(1) combined with a more restrictive (for the government) section 1.

The question of the proper interpretation of section 15(1) was first addressed by the Supreme Court in *Andrews*. Prior to the decision, some argued that section 15 was violated by any government differentiation on enumerated grounds. All other factors and arguments would be left for the section 1 analysis. The more robust interpretation of "discrimination" and "inequality" fa-

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<sup>37</sup> *Id.*, at para. 59, *per* Bastarache J.

<sup>38</sup> See Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 298 at 355 ("...deference is rarely relied upon in equality cases. Sometimes deference is not even discussed and when raised, it is not normally pivotal to the decision. In most equality cases the Court emphasizes its role as the protector of Charter rights." Citations omitted).

<sup>39</sup> *Id.*, at paras. 85-87.

voured by the Court has generally created uphill battles for *both* claimants at section 15, *and* governments at section 1. However, it has also led to the increasing use of arguments seemingly more appropriate at section 1 at the section 15 stage. This problem reached a head in the Equality Trilogy of 1995, when the Court split badly over the use of the so-called “relevancy” test, which considered the functional values underlying legislation crucial in the determination of whether or not a difference in treatment is discriminatory.<sup>40</sup>

In *Law*, the Court appeared to resolve the disagreements of the Equality Trilogy, but *Lavoie* has revealed that there are still deep divisions in the court. These divisions encompass both the proper application of the section 15 analysis as set out in *Law*, the correct approach to section 1, and the appropriate relationship between the two. Certainly *Lavoie* does strengthen the critique that the *Law* test (notably the third part and the four factors it urges for consideration) is too open textured to function as a test which will guide government behaviour and lower court decisions.<sup>41</sup>

The majority and dissenting reasons in *Lavoie* do not stake out different positions on the approach to section 15(1), which remains anchored in a substantive and purposive approach to *Charter* equality. We see no suggestion of a move to a formal equality test at section 15(1). This test, often unfavourably compared to the “substantive” notion of equality that Canadian jurisprudence has followed since *Andrews*, appeared to be the basis of Marceau J.A.’s dissent at the Federal Court of Appeal.<sup>42</sup> Justice Bastarache explicitly rejects this approach. Justice Arbour’s analysis does move further away from the approach Canadian courts have traditionally followed, but she argues that she chose her approach mindful of the interplay between section 15(1) and section 1. In addition, Justice Arbour’s dissent on the section 15(1) question seems to be based more on her reading of the facts and her view of the result of the “reasonable person” subjective-objective approach to the question of discrimination at the third stage of the *Law* test. Likewise LeBel J.’s approach at section 15(1) is premised on the temporary nature of non-citizenship.<sup>43</sup>

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<sup>40</sup> *Thibaudeau v. R.*, [1995] 2 S.C.R. 627; *Egan v. Canada*, *supra*, note 24; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

<sup>41</sup> See for instance, Ross, “A Flawed Synthesis of the Law” (2000) 11:3 Constitutional Forum 74; Bredt & Nishisato, “The Supreme Court’s new equality test: A critique” (2000) 8 CanadaWatch 17 (arguing that *Law* relies too heavily on context, and is overly complex, and also that the new test eviscerates s. 1 of the *Charter*).

<sup>42</sup> On the subject of substantive notions of equality, see for instance Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 Dal. L.J. 1.

<sup>43</sup> Although in *Andrews*, as McLachlin C.J.C. and L’Heureux-Dubé J. point out, the Court rejected an approach which would have essentially forced non-citizens to become citizens in order to gain “equality”. The forced choice itself is at the heart of the discrimination question.

The serious dispute, therefore, appears to be in relation to the proper content and application of the tests at section 15 and section 1. Ought the Court to blur the line between the two parts to render section 15(1) claims harder to make out, as Arbour J. argues, in order to prevent being forced into a weakened and overly deferential section 1 analysis?<sup>44</sup> Or is the answer that sought by the dissenting judges, who would have maintained strict standards at section 1, in keeping with past jurisprudence on section 15? The majority decision to find discrimination on the basis of citizenship and then find the discrimination justified under such a deferential application of the *Oakes* test does seem to bode ill for future equality claimants. All of this is a bit of a surprise, given that *Law* itself was criticized for blurring the line between section 15 and section 1, whereas in *Lavoie* we see seven members of the Court arguing that a strict division is necessary.<sup>45</sup> Yet with the Court so divided as it was in *Lavoie*, we will likely have to wait for the next case to confirm any of these thoughts, or build new theories about the nature and limits of equality rights under section 15(1).<sup>46</sup>

### III. CONCLUSION

The section 15(1) cases from late 2001 and early 2002 do not have a unifying theme. In truth, only one of the cases considered in this paper is truly a section 15(1) case. The only strong stand the court appears to have taken is found in the refusal or inability to clear up nagging questions about the proper relationship between various legal rules and issues — equality and other rights, section 15 and section 1, deference to elected officials and protection of minorities. Still, the decision in *TWU* does confirm the importance of equality as a *Charter* value even as it raises the spectre of serious and unavoidable clashes between religious freedoms and equality rights which current jurisprudence may be ill-equipped to deal with. The only true section 15(1) case, *Lavoie*, contains some surprises, especially considering the conclusions reached by last year's conference contributors.<sup>47</sup> Seemingly sensitized to the position of the

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<sup>44</sup> *Lavoie*, *supra*, note 1, at para. 86, *per* Arbour J.

<sup>45</sup> See Brecht & Nishisato, *supra*, note 41; see also Corbett *et al.*, *infra*, note 47.

<sup>46</sup> See Appendix A for a partial list of s. 15 cases remanded for judgment and granted leave to appeal to the Supreme Court.

<sup>47</sup> Corbett, Spector, & Strug, "Section 15 Jurisprudence in the Supreme Court of Canada in 2000" (2001) 14 S.C.L.R. (2d) 30 at 52 (based on *Granovsky v. Canada (Minister of Employment & Immigration)*, [2000] 1 S.C.R. 703, and *Lovelace v. Ontario (sub nom. Ardoch Algonquin First Nation & Allies v. Ontario)*, [2000] 1 S.C.R. 950, the authors were critical of the Court's seeming dismissal of the position of the rights claimant, and of the Court's willingness to accept arguments more properly treated under s. 1 inside the s. 15 analysis).

equality rights claimant, the majority approach in *Lavoie* is focused almost exclusively on the claimants' point of view in finding a violation of human dignity at section 15(1). Then, having drawn a bright line preventing the incursion of "policy" arguments during the section 15(1) stage, the majority goes on to apply an extremely deferential approach at section 1. Whether *Lavoie* is an aberration or the beginning of a trend towards increasing deference at section 1 in equality cases remains to be seen. Those interested will be watching for oral arguments and the release of decisions currently on reserve in order to gain some clear sense of what, exactly, our right to equality is guaranteeing us these days.

#### APPENDIX A: THE SCC & SECTION 15(1): HEARINGS AND JUDGMENTS EXPECTED IN 2002

##### **On reserve**

*Gosselin v. Quebec (Attorney General)*, [1999] J.Q. No. 1365, [1999] R.J.Q. 1033. Heard October 29, 2001.

*Sauve v. Canada (Chief Electoral Officer)* [1999] F.C.J. No. 1577, [2000] 2 F.C. 117. Heard December 10, 2001.

##### **Inscribed for hearing**

*Chamberlain v. School District No. 36 (Surrey)* (2000), 191 D.L.R. (4th) 128 (B.C. C.A.), [2000] B.C.J. No. 1875; leave to appeal granted October 4, 2001 SCC Bulletin 2001 1772, [2001] S.C.C.A. No. 324 QL. Inscribed for hearing, June 12, 2002.

##### **Leave granted**

*Martin v. Nova Scotia (Workers' Compensation Board)* (2000), 192 D.L.R. (4th) 611, [2000] N.S.J. No 353 (N.S. C.A.); leave to appeal granted June 14, 2001 without reasons SCC Bulletin 2001 p. 1097. Appeal not yet inscribed for hearing [2001] SCCA No. 23.

*Trociuk v. British Columbia (Attorney General)* (2001), 200 D.L.R. (4th) 685 (B.C. C.A.), [2001] B.C.J. No. 1052; leave to appeal granted November 8, 2001 without reasons SCC Bulletin 2001 1994.

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