Lavoie v. Canada: Reconciling Equality Rights and Citizenship-based Law

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This article examines the tension between citizenship-based law and equality rights in the Supreme Court of Canada decision in Lavoie v. Canada, [2002] 1 S.C.R. 769. *The author argues that the decision in* Lavoie *marks a retreat from the Court's recognition in* Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 *of the inherently discriminatory nature of citizenship preference provisions. By examining the historical context of the concept of citizenship, this article emphasizes the historical connection between discrimination and citizenship-based laws. The author argues that in overlooking the historical context of citizenship, the Court in* Lavoie *also overlooked the potential discriminatory impact of citizenship-based laws. If in future cases, the Court takes into account the potential discriminatory impact of citizenship preference provisions, the author concludes such provisions will not likely be upheld as a justifiable limit of rights under section 1 of the* Charter.

Cet article examine la tension entre les lois fondées sur la citoyenneté et les droits à l'égalité qui ressort de la décision rendue par la Cour suprême du Canada dans l'affaire Lavoie c. Canada, [2002] R.C.S. 769. *L'auteur argumente que la décision* Lavoie *constitue un pas en arrière par rapport à la reconnaissance par la Cour dans l'affaire* Andrews c. Law Society of British Columbia, [1989] 1 R.C.S. 143, *de la nature discriminatoire inhérente des dispositions favorisant la citoyenneté. Passant en revue le contexte historique du concept de la citoyenneté, l'article fait ressortir le lien historique entre la discrimination et les lois fondées sur la citoyenneté. L'auteur allègue qu'en omettant de considérer le contexte historique de la citoyenneté, la Cour dans l'affaire* Lavoie *a également omis de considérer l'effet discriminatoire possible des lois fondées sur la citoyenneté. Si dans les décisions à venir, la Cour prend en ligne de compte l'effet discriminatoire possible des dispositions favorisant la citoyenneté, l'auteur conclut qu'il est peu probable que ces dispositions soient reconnues comme étant une limite justifiable aux droits garantis par la Charte en vertu de l'article premier de la Charte.*

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I. Introduction

MORE THAN A DECADE after the Supreme Court of Canada's landmark decision on citizenship and equality rights in *Andrews v. Law Society (British Columbia)*,[1] the Court revisited the problem of balancing citizenship and equality rights in *Lavoie v. Canada*.[2] At issue in *Lavoie* was whether legislation giving Canadian citizens preferential treatment in federal Public Service employment violated equality rights under section 15(1) of the *Charter*[3] and, if so, whether the legislation could be saved as a justifiable limit of equality rights under section 1 of the *Charter*. The Supreme Court found that the citizenship preference provision violated section 15(1) but that the violation was justifiable as a reasonable limit under section 1 of the *Charter*. The Court thus upheld the citizenship preference provision as constitutional. In this essay, I examine the concept of citizenship as one that is inextricably linked with the concept of equality rights. Ultimately, I argue, legislation that discriminates on the basis of citizenship is incompatible with the underlying values of the *Charter*; in particular, the values of social justice and equality. The practical effect of the Court's most recent decision on citizenship preference provisions, I argue, may be not only the exclusion of non-citizens, but also the exclusion of racial and ethnic minorities from certain sectors of employment.

Lavoie marks a retreat from the Court's earlier decision in *Andrews*, a decision in which the Court emphasized the inherently discriminatory nature of citizenship-based laws and the potential danger such laws represent to a free and democratic society. At issue in *Andrews* was the constitutionality of a provision that made Canadian citizenship a requirement for

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1. [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews* cited to S.C.R.].
2. [2002] 1 S.C.R. 769, 210 D.L.R. (4th) 193, 2002 SCC 23 [*Lavoie SCC* cited to S.C.R.]. It should be noted that the Court also considered the relationship between *Charter* rights and citizenship in *Chiarelli v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289. The Court's inquiry, however, focused on the section 7 *Charter* right of fundamental justice rather than on section 15(1) equality rights. At issue in *Chiarelli* was the constitutionality of a deportation order against a permanent resident.
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11 [*Charter*].

admission to the profession of law. The claimant, a permanent resident in Canada, had met all the requirements for admission to the British Columbia bar except the citizenship requirement in the *Barristers and Solicitors Act*.[4] The Court held that the citizenship requirement violated section 15(1) of the *Charter* and could not be saved as a reasonable limit under section 1. In striking down the provision as unconstitutional, the Court stressed the importance of historical context to the recognition of the discriminatory potential of such laws. Wilson J. stated that the determination with respect to whether citizenship constitutes a ground of discrimination under section 15(1) is "a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society."[5] The *Lavoie* decision departs from the Court's approach in *Andrews* by eliding the historical context of citizenship-based laws that was emphasized by the Court in *Andrews*. In overlooking the historical context of the concept of citizenship, the Court also overlooked the potential discriminatory impact of citizenship-based laws in varying political and historical contexts.

Andrews is not only the first *Charter* challenge of a citizenship-based law, but also the Supreme Court of Canada's first consideration of equality rights under section 15(1) of the *Charter*. It is not surprising that a law based on the concept of citizenship should give rise to the Court's first decision on equality rights. The history of citizenship, after all, has been inseparable from the history of equality rights. In the United States, the 1866 *Civil Rights Act*[6] and the 1868 equal protection clause in the 14th Amendment of the Constitution[7] first emerged in response to the 1857 decision, *Scott v. Sandford*,[8] in which Chief Justice Taney relied on the concept of citizenship to justify slavery. In 1857, Dred Scott, a slave of John Sandford of Missouri, brought a suit claiming that his being held as a slave of John Sandford was illegal. Dred Scott's right to bring the suit depended upon his status as a citizen of Missouri. Sandford argued that Dred Scott was "a Negro of African descent" and therefore was not a citizen within jurisdiction to bring the lawsuit. Writing for the majority of the Supreme Court, Chief Justice Taney concluded that Dred Scott was not a citizen and gave the following reason for his decision:

> [W]hy are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not by the institutions and laws of the State numbered among its people. He forms no part of the sovereignty of the State, and is not, therefore, called on to uphold and defend it.[9]

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4. R.S.B.C. 1979, c.26, s.42.
5. *Andrews, supra* note 1 at 152.
6. *Civil Rights Act of 1866*, c. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)).
7. U.S. Const. amend. XIV, Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (New York: Oceana Publications, 1996).
8. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) [*Dred Scott*].
9. *Ibid.* at 415.

Chief Justice Taney went on to state that the inclusion of "the African race" in the status of citizenship would have the effect of "inevitably producing discontent and insubordination among them, and endangering the peace and safety of the state."[10]

Nine years after Chief Justice Taney's ruling, the U.S. Congress passed the 1866 *Civil Rights Act*, an act effectively overruling the *Dred Scott* decision with the statement that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[11]

Between the early and mid-twentieth century, laws reminiscent of the *Dred Scott* decision began to emerge in Canada. In 1941, when Canadian politicians were voicing suspicions about the loyalty of Japanese Canadians to the Canadian government, the Canadian government gradually began stripping away the citizenship rights of all persons of Japanese origin.[12] In the months leading up to Pearl Harbour, the government not only denied Japanese Canadians the right to vote but also the right to serve in the military. The Canadian government continued along the path of a progressive devaluation of the citizenship rights of Japanese Canadians, ordering Japanese Canadians to carry on their persons at all times evidence of their legal status as citizens or long-term residents.[13] By 1942, the discriminatory measures culminated in an order requiring Japanese Canadians to relinquish their citizenship and agree to deportation.[14]

When faced with the historical intersection between the concept of citizenship and discriminatory legislation, the Courts have tended to respond with two divergent formulations of citizenship. One formulation cursorily acknowledges the history of discriminatory legislation based on citizenship but then goes on to excise citizenship from that history of discrimination. Another formulation views citizenship in the historical and social context of discrimination and presents the concept of citizenship as inherently discriminatory. In equality rights cases where the impugned law is based on a distinction between citizens and non-citizens, the outcome of

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10. *Ibid.* at 417.
11. *Supra* note 6.
12. The history of discriminatory legislation against Japanese Canadians has been traced by Ken Adachi in *The Enemy That Never Was: A History of the Japanese Canadians* (Toronto: McClelland & Stewart, 1976). See also Ivan L. Head, "The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada" (1964) Can.Y.B. Int'l Law 107 at 128–29. Head documents the proliferation, during the early twentieth century, of Canadian legislation enacted to exclude Chinese Canadians from both private and public works employment.
13. As documented by Ken Adachi, the registration order required all persons of Japanese origin to be able to produce birth or naturalization certificates at all times and to carry a registration card, identifying the person's name, address, age, occupation and providing a photograph, thumb print, and serial number. The government issued white cards to Canadian-born, salmon-pink to naturalized citizens, and yellow cards to alien Japanese. Adachi, *ibid.* at 193.
14. Order in Council P.C. 1665, March 4, 1942.

the case frequently turns on whether or not the Court views the concept of citizenship as inherently discriminatory.

II. Section 15 Analysis

IN EQUALITY RIGHTS CASES, the Court applies the two-step framework of analysis established in *Andrews* and modified by *Law v. Canada (Minister of Employment and Immigration)*.[15] First the Court determines whether or not the impugned law violates equality rights. Second, if the Court finds a violation of equality rights under section 15(1) of the *Charter*, the Court then determines whether the impugned law can be saved as a justifiable limit of equality rights. Section 15(1) of the *Charter* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[16]

At this stage of analysis, the burden is on the claimant to prove, on a balance of probabilities, that the law violates his or her equality rights under section 15(1). If the Court finds that the law does violate section 15(1), the Court then goes on to determine whether or not the breach of section 15(1) equality rights can be justified under section 1 of the *Charter*. Section 1 states that the rights and freedoms guaranteed in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[17] Once the Court finds a violation under section 15(1), the burden then shifts to the government to prove, on a balance of probabilities, that the law infringing equality rights is a justifiable limit of rights under section 1.

In her survey of equality rights cases, Sheilah Martin notes that section 15(1), rather than section 1, has proven to be the most difficult hurdle for claimants.[18] Seventy percent of equality cases are dismissed because the claimant cannot satisfy the Court that the law in question constitutes a violation of section 15(1) equality rights. Once the Court finds a breach of section 15(1), however, the Court rarely goes on to find that the breach is a justifiable limit under section 1. Of the forty-four equality rights cases Martin surveys, she cites only three cases in which the Court found a section 15(1) violation that could be saved under section 1. The *Lavoie* decision is one of those rare instances in which the Supreme Court has found a violation of section 15(1) but has then determined the violation to be saved under section 1.

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15. [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law* cited to S.C.R.].
16. *Supra* note 3.
17. *Ibid.*
18. Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar. Rev. 299 [Martin].

In *Andrews*, the Court set out a three-part test in order to determine whether or not there had been a breach of equality rights under section 15(1). First, the Court considered whether or not there had been a denial of one of the four equality rights listed in section 15(1). Second, the Court determined whether or not the claimant had been denied equality rights through a distinction based on one of the grounds enumerated in section 15(1) or on grounds considered to be analogous to those listed in section 15(1). Finally, the Court determined whether or not the impugned distinction was discriminatory in its effect. The Court defined a law that is discriminatory in its effect as a law that imposes "burdens, obligations, or disadvantages on [an] individual or group not imposed upon others" or that withheld opportunities and advantages available to others.[19] In *Andrews*, the majority of the Court held that the provision excluding non-citizens from the practice of law violated section 15(1) and could not be saved under section 1. Two dissenting justices, McIntyre and Lamer JJ., agreed that the citizenship provision violated section 15(1) but went on to find that the provision could be saved under section 1.

Although McIntyre J. dissented, the majority of the Court agreed with McIntyre J.'s approach to section 15(1) analysis. In his discussion of section 15(1), McIntyre J. stressed that the enumerated grounds and other possible grounds of discrimination should be given a broad, liberal, purposive interpretation consistent with "the unremitting protection" of equality rights.[20] McIntyre J. found that citizenship was an analogous ground of discrimination under section 15(1) and further held that the provision excluding "an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status"[21] violated section 15(1) equality rights. In his decision, McIntyre J. cited, with approval, the U.S. Supreme Court's classification of non-citizens as a "discrete and insular minority" requiring equal rights protection.[22]

Writing in agreement with McIntyre J.'s analysis of section 15(1), Wilson J. also described non-citizens as a "discrete and insular minority", and found citizenship to be a ground analogous to the grounds of discrimination listed in section 15(1). Wilson J. cited J.H. Ely's observation that non-citizens are a group lacking political power and as such a group particularly vulnerable to having their rights overlooked.[23] In his concurring decision, La Forest J. similarly found that "non-citizens [...] are a group of persons who are relatively powerless politically, and whose interests are likely to be com-

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19. *Andrews*, *supra* note 1 at 174.
20. *Ibid.* at 175. McIntyre J. cited, with approval, the Court's comments on the protection of equality rights in *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641.
21. *Andrews*, *ibid.* at 183.
22. *Ibid.* McIntyre J. cited the remarks of the U.S. Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144 at 152–53 (1938) and *Graham v. Richardson*, 403 U.S. 365 at 372 (1971).
23. *Andrews*, *ibid.* at 152.

promised by legislative decisions."[24] As commentators have observed, the Court's conclusion in *Andrews* that citizenship is an analogous ground of discrimination under section 15(1) has surprising and far-reaching implications. Unlike the other grounds enumerated in section 15(1), citizenship is a product of legislation. If the very distinction between citizens and non-citizens creates a group vulnerable to discrimination, it has been argued, then the creation of that distinction must itself be discriminatory.[25] Where an impugned law is based on the citizenship distinction, then it is not only the provision itself that will be challenged, but also its legislative basis. For this reason, a provision based on the distinction between citizenship and non-citizenship would seem to be subject to a higher degree of scrutiny than are other provisions challenged under section 15(1).

The Supreme Court in *Lavoie* relied on the analysis of citizenship in *Andrews*, but applied the framework for section 15(1) analysis as developed in *Law*.

At issue in *Law* was the constitutionality of the survivor benefit provisions of the *Canada Pension Plan*.[26] In *Law*, a widow aged thirty of a *Canada Pension Plan* contributor was denied survivor benefits because she did not meet the conditions listed in the provision; conditions based on disability, dependent children, and age. She challenged the condition restricting benefits to survivors over 35 years of age.

In *Law*, the Supreme Court set out a three-step approach to the analysis of the equality rights guarantee in section 15 of the *Charter*. The Court stressed that this approach was not to be applied rigidly as a test, but rather as a more fluid guideline for a purposive and contextual analysis. At the first stage of analysis, the Court should consider whether or not the law draws a formal distinction on the basis of personal characteristics or fails to take into account a claimant's already disadvantaged position. The Court should then determine whether the impugned law subjects the claimant to differential treatment based on one or more of the enumerated or analogous grounds in section 15(1). Finally, the Court must ask whether the differential treatment discriminates by imposing a burden upon or withholding a benefit from the claimant in a manner that reflects the stereotypical application of characteristics, or which has the effect of perpetuating the view that the individual is less worthy of recognition or value.

Underlining the purposive and contextual nature of the analysis, the Court noted that the overarching purpose of section 15(1) is the promotion

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24. *Ibid.* at 146.
25. Donald Galloway, "The Dilemmas of Canadian Citizenship Law" [Galloway, "Dilemmas"] in T. Alexander Aleinikoff & Douglas Klusmeyer, eds., *From Migrants to Citizens: Membership in a Changing World* (Washington: Brookings Institution Press, 2000) at 108–109 [Aleinikoff & Klusmeyer, *From Migrants to Citizens*].
26. R.S.C. 1985, c.C-8, ss.44(1)(d), 58.

of human dignity. The Court then introduced several contextual factors to be used in determining whether the impugned legislation adversely affected human dignity and violated section 15(1). In establishing the contextual approach, Iacobucci J. listed four factors the Court should consider: i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; ii) the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; iii) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and iv) the nature and scope of the interest affected by the impugned law.[27]

Although the courts at both the trial and appeal levels of *Lavoie* applied the framework for a section 15 analysis set out in *Andrews* and modified in *Law*, the justices at all levels reached widely divergent conclusions as to whether or not the citizenship preference provision violated section 15(1). That divergence has prompted some commentators to wonder aloud whether the flexible and open-ended framework in *Law* leads to inconsistent decisions in equality rights cases.[28] The open-ended framework in *Law*, however, has found favour in some critical quarters. Denise Réaume, for one, argues that the flexible structure for equality rights analysis allows the legal system to adapt to the various new forms of discrimination and allows for the protection of groups from discrimination in various contexts.[29] As new forms of discrimination emerge, and as norms in discrimination law change, she points out, human rights legislation has had to respond by adding a new pigeonhole for each emergent ground of discrimination. The open-ended *Law* framework is particularly important for the analysis of citizenship-based legislation, because the concept of citizenship changes dramatically with changing social and historical contexts. As I will argue, the divergent decisions in *Lavoie* resulted, not from the open-ended nature of the *Law* framework, but rather from a failure to apply a contextual and purposive approach to section 15 analysis.

In *Lavoie*,[30] the Federal Court Trial Division held that the citizenship preference provision violated section 15(1), but was saved under section 1 of the *Charter*. On appeal, two of the three justices of the Federal Court of Appeal found a violation of section 15(1).[31] One justice found no violation of

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27. *Law*, *supra* note 15 at paras. 62–75.
28. See *e.g.* Sonia Lawrence, "Section 15(1) at The Supreme Court 2001–2002: Caution and Conflict in Defining 'The Most Difficult Right'" (2002) 16 Sup. Court. L. Rev. (2d) 103 at 110. Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299; Martin, *supra* note 18 at 329.
29. Denise Réaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40 Osgoode Hall L.J. 113.
30. *Lavoie v. Canada*, [1995] 2 F.C., 623, 125 D.L.R. (4th) 80, 95 F.T.R. 1 (T.D.) [*Lavoie TD* cited to T.D.].
31. *Lavoie v. Canada*, [2000] 1 F.C. 3, (1999) 174 D.L.R. (4th) 588 (C.A.) [*Lavoie CA* cited to C.A.].

section 15(1), while another found a violation of section 15(1) that could be saved under section 1. Linden, J.A., dissenting, found that the citizenship preference provision violated section 15(1) and could not be saved under section 1. When *Lavoie* was appealed to the Supreme Court of Canada, the Court split both on the issue of whether or not there was a section 15(1) violation and on the issue of whether or not the impugned provision could be saved under section 1. Seven of the nine justices found that the provision violated section 15(1). Four justices, Bastarache, Gonthier, Iacobucci, and Major JJ., found a violation of section 15(1) that was saved under section 1, while three justices, McLachlin C.J.C., L'Heureux-Dubé and Binnie JJ., found a violation of section 15(1) that could not be saved under section 1. Two of the justices, Arbour and LeBel JJ., found no violation of section 15(1). Given the 7–2 decision on the issue of section 15(1), it is probable that, in future cases, any citizenship preference provision will be found to violate section 15(1). The main issue in future cases, then, will likely be the outcome of the section 1 analysis. It is nonetheless important to examine the Court's analysis of section 15(1) in *Lavoie*, because the justices took widely divergent approaches to the section 15 analysis. Those divergent approaches to section 15(1) analysis ultimately led to inconsistent decisions on the issue of whether or not the law could be saved under section 1.

At the section 15(1) stage of analysis, in *Lavoie*, there was little disagreement among the Supreme Court justices with respect to the first two parts of the *Law* analysis. Noting that, of the three *Law* inquiries, the third is "the most challenging," Bastarache J. stated that the impugned provision clearly satisfied the first two *Law* criteria of constituting a distinction on the basis of personal characteristics and of constituting differential treatment on the basis of enumerated or analogous grounds.[32] Arbour J. agreed that the main issue under section 15(1) was the third part of the *Law* inquiry, whether or not the impugned provision discriminated in its effect, by imposing a burden or denying a benefit. In examining whether or not the provision had a discriminatory effect, the Court applied the four contextual factors set out in *Law* to the question at the heart of the discrimination inquiry, the question of whether or not the provision violates human dignity.

A. HUMAN DIGNITY

The "human dignity" inquiry is one aspect of the *Law* framework that has led commentators to voice concerns about the usefulness of the *Law* approach in equality rights cases. As Sheilah Martin points out, the concept of "human dignity" has proven to be very broad and malleable. It is easy, she notes, to be in favour of human dignity, but difficult to define human dignity precisely, and still more difficult to determine whether human dignity has been vio-

32. *Lavoie SCC, supra* note 2 at para. 38.

lated according to the subjective/objective test established in *Law*.[33] Like Denise Réaume, Martin suggests that the expansive concept of human dignity may be well suited to the ever emergent and protean forms of discrimination. As a solution to the problem of applying the human dignity concept, Martin proposes that the contextual approach—established in *Andrews* and restated in *Law*—be used to focus the inquiry as to whether or not there has been a violation of human dignity. The contextual analysis set out by the Court in *Andrews*, she argues, is particularly important because it requires a historical determination of the place of the group in Canadian society.[34] The extent to which the group has historically been excluded thus narrows the focus of the human dignity analysis.

In establishing the framework for the human dignity inquiry, the Court, in *Law*, articulated the subjective/objective test to be applied to the inquiry. The Court stated that the subjective component of the inquiry involves an examination of the "individual right, asserted by a specific claimant with particular traits and circumstances."[35] The objective component, on the other hand, is a much broader examination of the legislation in the context of the current and historical treatment of the individual or group. Describing the objective part of the inquiry, the Court stated:

> The focus of the discrimination inquiry is...objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed *only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances*. The objective component means that it is not sufficient, in order to ground a s.15(1) claim, for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law.[36]

Where the impugned law is based on citizenship preference, then, the human dignity inquiry must take account of the historical treatment of non-citizens.

B. CONTEXTUAL FACTORS

In applying the subjective/objective approach to the human dignity inquiry, the Supreme Court, in *Lavoie*, considered the four contextual factors set out in *Law*: pre-existing disadvantage, the relationship between the ground of the claim and the nature of the differential treatment, ameliorative purpose or effect, and the nature of the interest affected. At trial, Wetston J. did not apply the contextual factors set out in *Law* to his analysis of section 15(1). Finding that the issue of whether or not citizenship-based legislation infringed section 15(1) had been settled in *Andrews*, he did not engage in a

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33. Martin, *supra* note 18 at 329.
34. *Ibid.* at 330–331.
35. *Law*, *supra* note 15 at para. 59.
36. *Ibid.* at 532 [emphasis added].

detailed section 15(1) analysis. Wetston J. briefly stated that the citizenship preference provision violated section 15(1) and then devoted the rest of his decision to the question of whether or not the violation could be justified under section 1. At the Federal Court of Appeal, two of the three justices did not do any analysis of section 15(1). Marceau J.A. simply concluded that equality rights did not apply to citizenship, while Desjardins J.A. did not engage in a section 15(1) analysis and did not make any definitive decision with respect to section 15(1). Only the dissenting Justice, Linden J.A., engaged in a section 15(1) analysis and applied the contextual and purposive approach set out in *Law* to the human dignity inquiry. At the Supreme Court, a majority of the Court analyzed section 15(1) in depth and relied on the contextual factors established in *Law* to determine whether or not the impugned provision violated human dignity.

i) Pre-existing Disadvantage

In *Law*, Iacobucci J. stated that pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group is probably the most important factor in support of a determination that the legislation in question has a discriminatory effect. The factor of pre-existing disadvantage, he observed, is particularly important because a history of disadvantage, stereotyping, and prejudice suffered by the claimant and others like him suggests "further differential treatment will contribute to the perpetuation [...] of their unfair social characterization."[37]

At the Federal Court of Appeal, it was primarily on the basis of pre-existing disadvantage that Linden J.A., dissenting, found a violation of section 15(1). Citing Justice Tarnopolsky's study of discrimination, Linden J.A. observed that "Canada has historically discriminated against non-citizens... by denying them employment, particularly within the public service."[38]

At the Supreme Court, Bastarache J. applied the first *Law* factor to the facts in *Lavoie* and held that it is settled law that non-citizens suffer from pre-existing disadvantage, stereotyping, and prejudice. The issue of pre-existing disadvantage, he noted, had been settled in *Andrews*, when the Court held that non-citizens belong to a class "lacking in political power and as such vulnerable to having their interests overlooked."[39] Bastarache J. did not, therefore, go on to analyze in detail the historical disadvantage and stereotyping experienced by non-citizens.

In her analysis of the first *Law* factor, Arbour J. considered the pre-existing disadvantage suffered by the individual claimants. Two of the claimants, Janine Bailey and Elisabeth Lavoie, had been eligible to apply for

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37. *Law*, *supra* note 15 at para. 63.
38. *Lavoie CA*, *supra* note 31 at para. 162. Linden J.A. cites W.S. Tarnopolsky, "22" (1992), 41 U.N.B.L.J. 215 at 215–224.
39. *Lavoie SCC*, *supra* note 2 at para. 45. Iacabucci J. cites Wilson J. in *Andrews*, *supra* note 1 at 152.

Canadian citizenship but had declined. Janine Bailey, a Dutch citizen, chose not to apply for Canadian citizenship because she would have been forced to relinquish her Dutch citizenship. She had elderly family members in the Netherlands, and she testified that she felt compelled to keep her Dutch citizenship in case she had to return to take care of her family members. Elisabeth Lavoie, an Austrian citizen, also declined to apply for Canadian citizenship because she might lose her Austrian citizenship and would become "a foreigner in [her] own country."[40] On the basis of these facts, Arbour J. found that the claimants did not suffer from pre-existing advantage because they had chosen their status as non-citizens. In a sense, however, the claimants in *Lavoie* were forced by circumstances to remain non-citizens. They could choose to become Canadian citizens, but only at great costs. As LaForest J. observed in *Andrews*, citizenship, in general, is "typically not within the control of the individual [and is] at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs."[41]

Arbour J. briefly noted that the Court, in *Andrews*, had found that non-citizens in general suffer from prejudice, stereotyping, and pre-existing disadvantage. She went on to find, however, that the prejudice suffered by non-citizens in general did not apply to the individual claimants in *Lavoie*, and thus she dispensed with any further consideration of pre-existing disadvantage suffered by non-citizens as a group. The objective test, as stated in *Law*, requires a determination of "the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances."[42] Insofar as Arbour J. examined only the pre-existing disadvantage suffered by the individual claimants and not the pre-existing disadvantage suffered by non-citizens in general, she applied only the subjective test and not the objective test to the first *Law* factor.

In eliding the larger context of the legislation and its impact, not only on the individual claimants, but also on non-citizens as a group, Arbour J. overlooked the very purpose of the first *Law* factor. As Iacobucci J. stressed, in *Law*, the pre-existing disadvantage factor is particularly important because it takes into account the effect legislation might have in reflecting or reinforcing "inaccurate understandings of the merits, capabilities and worth of a particular person *or group*."[43] The purpose of the factor is to identify legislation that may reinforce stereotypes or disadvantage and thus further stigmatize not only the individual claimants but other members of the group to which the claimants belong.

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40. *Lavoie TD*, *supra* note 30 at para. 2.
41. *Andrews*, *supra* note 1 at p. 195.
42. *Law*, *supra* note 15 at para. 59.
43. *Ibid.* at para. 64 [emphasis added].

2) Relationship Between Grounds and the Differential Treatment

In *Law*, Iacobucci J. explained that, in some circumstances, the avoidance of discrimination requires differential treatment and distinctions based on personal characteristics. Iacobucci J. mentioned age and disability as grounds that may correspond with need, capacity or circumstances. In such cases, there may be a relationship between the ground of the section 15(1) claim and the nature of the differential treatment. The Court has recognized that, where there is a correspondence between grounds and differential treatment such that the "legislation [...] takes into account the needs, capacity, and circumstances of the claimant," the legislation will be less likely to violate human dignity.[44]

When the claimants in *Lavoie* appealed to the Federal Court of Appeal, Linden J.A., dissenting, found that the impugned provision did not take into account the needs, capacities or circumstances of non-citizens, but simply denied an opportunity to those already in a disadvantaged position. He thus concluded that there was no correspondence between the ground of the equality claim and the needs and capacities of the claimant.[45] On appeal to the Supreme Court, the respondents, in *Lavoie*, argued that the grounds of the claim corresponded to the differential treatment, because it is the essence of the concept of citizenship to distinguish between citizens and non-citizens. Arbour J. accepted the respondents' argument and further concluded that the differential treatment of non-citizens corresponds with the purposes of federal legislation on matters of citizenship, the purposes of recognizing the entitlements of citizenship and of encouraging naturalization.[46] As Bastarache J. pointed out, however, this approach misinterprets the second contextual factor in *Law*. The second factor, he noted, has traditionally functioned to uphold special accommodation for a disadvantaged class on the basis of the special needs or circumstances of that class. Unlike legislation that provides special accommodation for the disabled, the differential treatment of non-citizens simply functions to exacerbate the group's historical disadvantage.

3) Ameliorative Purpose or Effects

In *Law*, Iacobucci J. stated that the purpose of section 15(1) is not only to prevent discrimination but also to ameliorate the position of historically disadvantaged groups. Legislation that has such an ameliorative purpose or effect, he observed, will be less likely to violate human dignity.[47] In *Lavoie*, there was little disagreement about the third contextual factor. At both the

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44. *Ibid.* at para. 70.
45. *Lavoie CA*, *supra* note 31 at para. 166.
46. *Lavoie SCC*, *supra* note 2 at paras. 107–110.
47. *Law*, *supra* note 15 at para. 72.

Federal Court of Appeal and the Supreme Court, the Justices who engaged in an analysis of section 15(1) found that the citizenship preference provision had no ameliorative effect. Linden J.A., dissenting, rejected the argument of the respondents that the citizenship preference provision had the ameliorative purpose of encouraging non-citizens to naturalize. Bastarache J. similarly concluded that the impugned provision "does not aim to ameliorate the predicament of a group more disadvantaged than non-citizens; rather, the comparator class in this case...enjoys greater status on the whole than the claimant class."[48] Commenting that the ameliorative purpose factor had no application in *Lavoie*, Arbour J. dispensed with any analysis of the third contextual factor.

4) Nature of the Interest Affected

In articulating the fourth contextual factor, the Court, in *Law*, relied on L'Heureux-Dubé J.'s characterization in *Egan* of the nature of the interest affected. L'Heureux-Dubé J. emphasized that, in looking at the nature of the interest, the Court should examine not only the economic interest but also the constitutional and societal interest adversely affected by the legislation. "If all other things are equal," she stated, "the more severe and localized the economic consequences on the affected group, the more likely the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*."[49]

At the Federal Court of Appeal, Linden J.A., dissenting, observed that employment had long been recognized as central to an individual's identity and self-worth. Employment, he noted, contributes to an individual's status as a contributing, productive member of society and thus serves not only economic needs but also deep psychological needs.[50] Insofar as the impugned provision excluded the appellants from employment, he argued, the legislation had "severe and localized" effects on the appellants.[51] Writing for a majority of the Supreme Court, Bastarache J. similarly held that the nature of the interest was constitutionally protected, because work is a "fundamental aspect of a person's life, implicating his livelihood, self-worth and human dignity."[52] Arbour J. disagreed with Bastarache J. on the characterization of the nature of the interest affected. In *Lavoie*, she argued, the interest affected was not "employment" or "work" itself, because the citizenship preference provision was not an absolute bar to employment but rather a

48. *Lavoie SCC*, *supra* note 2 at para. 45.
49. *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 at para. 63.
50. *Lavoie CA*, *supra* note 31 at para.163. Linden J.A. cited David Beatty's characterization of employment in "Labour is not a Commodity," in Barry J. Reiter & John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 313 at 315.
51. *Lavoie CA*, *ibid.* at para. 164.
52. *Lavoie SCC*, *supra* note 2 at para. 45.

preference. Arbour J. thus concluded that the interest affected was closer to a "lost chance" than to employment in and of itself.[53]

In characterizing the interest as a "lost chance," Arbour J. focused more on the mechanics of the legislation than on the actual effects or consequences on the appellants. Whether the appellants are denied public service employment through an absolute bar or through a citizenship-based preference, the consequences are the same. In either case, the appellants are denied the opportunity of employment in the public service. Canadian courts have long recognized that it is not simply work itself but also the type of employment an individual is suited for that is central to an individual's identity. As Linden J.A. notes, "[p]eople define who they are in large part by what they do."[54]

Arbour J.'s characterization of the nature of the interest as a "lost chance" obscures another important aspect of the fourth contextual factor. In *Egan*, L'Heureux-Dubé J. was at pains to stress that the Court's examination of the nature of the interest affected should involve not simply an evaluation of individual interest and tangible economic consequences, but also an evaluation of the broader constitutional and societal significance of the interest affected. As Justice Tarnopolsky noted, Canada has historically discriminated against non-citizens by excluding them from employment, and particularly from public service employment.[55] Given that the exclusion of non-citizens from public service employment belongs to the long history of discrimination against non-citizens, the nature of the interest affected is much broader than a mere "lost chance." The interest affected belongs to what L'Heureux-Dubé J. described in *Egan* as "the more intangible and invidious harms flowing from discrimination, which the *Charter* seeks to root out."[56] In future cases involving citizenship preference provisions, a truly contextual and purposive approach to the human dignity inquiry will make it difficult for such provisions to withstand scrutiny under the section 15(1) analysis and will make apparent the need for a demonstrable justification of such legislation under section 1 of the *Charter*.

III. Section 1 Analysis

ONCE THE COURT DETERMINES that a law violates section 15(1) equality rights, the Court must then consider whether or not the law can be justified as a reasonable limit of those rights under section 1 of the *Charter*. Section 1 thus sets out the guarantee of rights along with the limits of those rights:

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53. *Ibid.* at paras. 119–121.
54. *Lavoie CA*, *supra* note 31 at 164.
55. Tarnopolsky's observation is cited by Linden J.A. in *Lavoie CA*, *ibid.* at para. 162. See also Tarnopolsky, *supra* note 38 at 218–222.
56. *Egan*, *supra* note 49 at para. 66.

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[57]

In determining whether or not a law can be justified as a reasonable limit under section 1, the Court applies the framework for section 1 analysis established in *R. v. Oakes*[58] and modified by *Dagenais v. Broadcasting Corp.*[59] At issue in *Oakes* was the constitutionality of a reverse onus provision for trafficking under the *Narcotics Control Act*.[60] Dickson C.J.C. (as he then was) formulated a three-part test for a determination under section 1: 1) the legislative objective behind the law must be pressing and substantial; 2) the violation of the *Charter* right must be rationally connected to the aim of the legislation; and 3) the law must impair the right in question as minimally as possible. The Court, in *Dagenais*, added a fourth requirement, that there be proportionality between the deleterious and salutary effects of the impugned law.

In formulating the structure of the section 1 analysis, Dickson C.J.C. emphasized the values that must guide the Court's analysis:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[61]

In equality rights cases, the Court has consistently followed Dickson C.J.C.'s guidelines for the section 1 analysis. Any objective that is inconsistent with *Charter* values and principles will thus likely fail the *Oakes* test.

The Court has stated that the section 15(1) analysis should be kept analytically distinct from the section 1 analysis. The two stages of analysis, however, may be closely linked and yet remain analytically distinct. As Sheilah Martin points out, the relationship between the section 15 and section 1 stages of analysis varies considerably, depending on the particular breach in question. While the two stages of analysis may overlap in some equality cases, the two stages may remain entirely separate in others. Although the justification of the impugned law should take place only at the section 1 stage of analysis, there are instances in which the impugned law is such that the analysis under section 15 significantly influences the analysis under section 1. The impugned law, Martin notes, may amount to a violation of section 15 that will be virtually impossible to justify under section 1.[62]

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57. *Charter*, *supra* note 3, s.1
58. [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [*Oakes* cited to S.C.R.].
59. [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 [*Dagenais* cited to S.C.R.].
60. R.S.C. 1970, c. N-1.
61. *Oakes*, *supra* note 58 at 136.
62. Martin, *supra* note 18 at 308.

Equality rights cases involving the distinction between citizens and non-citizens are precisely the type of cases in which there is considerable overlap between the section 15(1) and section 1 analysis. Where the impugned law is based on a citizenship preference, the characterization of that law under section 15 may well determine the outcome of the section 1 analysis.

A. PRESSING AND SUBSTANTIAL OBJECTIVE

1) Identification of the Objective

At trial in *Lavoie*, Wetston J. began his consideration of the legislative objective by observing that the identification of the objective "is critical because the manner in which the objective is formulated can directly affect the assessment of proportionality under the second branch of the section 1 analysis."[63] Legal commentators have also noted that the characterization of the objective is crucial to the success or failure of the government's justification of legislation under section 1 of the *Charter*. As Timothy Macklem and John Terry point out, courts can influence the outcome of the *Oakes* test through the classification of the objective. By characterizing the objective so that it closely matches the means chosen to achieve it, the court may ensure that the law passes the proportionality test.[64] Sheilah Martin similarly notes that the court's initial characterization of the objective has determined whether or not a law passes the *Oakes* test.[65] Where the legislative objective behind the impugned law is discriminatory or is inconsistent with the values of a democratic society, the courts will rarely proceed beyond the first stage of the *Oakes* test and will find that the law cannot be justified under section 1 of the *Charter*.

Although the United States Constitution contains no justifiable limit clause comparable to section 1 of the Canadian *Charter*, the examination of the legislative objective has been central to equality rights cases in the United States. Concern about improper legislative objectives has led United States courts to strike down citizenship preference legislation. In *Hampton v. Mow Sun Wong*,[66] for example, suspicion of a potentially discriminatory objective led the Supreme Court to strike down the federal Civil Service Commission's regulation excluding all non-citizens from employment in the federal civil service. It should be noted, however, that U.S. courts have subsequently construed *Hampton* narrowly and have upheld similar citizenship preference provisions.[67]

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63. *Lavoie TD*, *supra* note 30 at para. 54.
64. Timothy Macklem & John Terry, "Making the Justification Fit The Breach" (2000) 11 Sup. Ct. L. Rev. (2d) 573 at 581.
65. Martin, *supra* note 18 at 338.
66. 426 U.S. 88, 104 (1976), 48 L.Ed. 2d 495 [*Hampton*].
67. The retreat from *Hampton* is discussed in "Immigration Policy and The Rights of Aliens" (1983) 96 Harv. L. Rev. 1286 at 1424 [Immigration Policy]. See *e.g. Mow Sun Wong v. Campbell*, 626 F. 2d 739 (9th Cir. 1980), aff'g *Mow Sun Wong v. Hampton*, 435 F.Supp. 37 (N.D. Cal. 1977), *cert. denied*, 450 U.S. 959 (1981); *Vergara v. Hampton*, 581 F. 2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

At the trial level of *Lavoie*, the government argued that the objectives animating the legislation were twofold: first, to enhance the meaning, value and importance of citizenship and, second, to encourage permanent residents to naturalize. The plaintiffs, on the other hand, argued that the purpose of the legislation was to ensure the commitment and loyalty of Public Service employees. In *Andrews*, the Supreme Court found the objective of ensuring commitment and loyalty to be an improper motive shaped by stereotypes of non-citizens as untrustworthy and disloyal. The history of stereotypes about non-citizens has been thoroughly documented in legal commentary cited by the Court in *Andrews*. A characterization of the objective as ensuring commitment and loyalty of Public Service employees would, therefore, have made it very difficult for the citizenship preference provision to withstand judicial scrutiny under a section 1 analysis.

At the trial level of *Lavoie*, the government was at pains to stress that commitment and loyalty were not part of the legislative objective. The government's own expert witness, however, undermined the government's argument. Mr. Carson, who had been Chairman of the Public Service Commission when the *Public Service Employment Act* was enacted in 1967, testified that his reason for supporting the citizenship preference was to ensure commitment and loyalty to the federal government. Ultimately, Mr. Carson's testimony did not affect the outcome of the case, because Wetston J. dismissed Mr. Carson's testimony as "inconsistent with the documentary evidence" and as the expression of personal opinion rather than of government views.[68] Wetston J. accepted the government's argument that the objective of the legislation was twofold: first, to enhance the value of citizenship; and second, to encourage naturalization.

On appeal, the majority of the Federal Court of Appeal found that the citizenship preference did not violate section 15. The majority of the Court, therefore, did not go on to do a section 1 analysis and did not discuss the legislative objective. The dissenting Justice, Linden J.A., however, concluded that, at trial, Wetston J. had made a fundamental error in classifying the objective of the legislation:

> [T]he Trial Judge ignored evidence before him and therefore committed a palpable and overriding error in not finding that this legislation was also enacted to address concerns of commitment and loyalty which arise when non-citizens are hired to serve the Canadian public.[69]

In providing reasons for his conclusion, Linden J.A. noted that a 1908 House of Commons speech cited by Wetston J. contained a comment that clearly showed a concern about the commitment and loyalty of non-citizens. Furthermore, he noted, Wetston J. had quoted from the 1985 discussion

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68. *Lavoie TD*, *supra* note 30 at para. 69.
69. *Lavoie CA*, *supra* note 31 at para. 180.

paper circulated by the Minister of Justice, *Equality Issues in Federal Law*, a discussion paper that cited loyalty and commitment concerns as part of the rationale for the citizenship preference in the *Public Service Employment Act*.[70] Although he agreed with Wetston J.'s finding that two of the legislative objectives were to enhance citizenship and to encourage naturalization, Linden J.A. concluded that there was a third objective animating the citizenship preference, the objective of ensuring the commitment and loyalty of non-citizens.

On appeal to the Supreme Court the appellants argued that, in characterizing the objective, Wetston J. had erred by discounting the testimony of John Carson that concerns about commitment and loyalty influenced his support of the legislation. The Supreme Court rejected this argument and left undisturbed the conclusion of Wetston J. that there were only two objectives underlying the legislation, the objective of enhancing the value of citizenship and the objective of encouraging naturalization. Although the Supreme Court split on both the issue of a section 15 violation and the issue of justification under section 1, the Court was unanimous in accepting the trial judge's finding that there were only two legislative objectives: to enhance the value of citizenship and to encourage naturalization. While noting that the two parties had presented "radically different views of the objective behind the citizenship preference,"[71] the Court nonetheless accepted the government's characterization of the objective without any attention to the history of the enactment. Writing for the majority of the Court, Bastarache J. cursorily dismissed the plaintiff's argument with the statement that:

> [e]ven if concerns about commitment and loyalty informed the enactment of the amendments to the Civil Service Act in 1908, *on which I make no comment*, there is no denying that the citizenship preference is also intended to further Canada's citizenship policy.[72]

Bastarache J. thus suggested that concerns about the loyalty and commitment of non-citizens may possibly have animated the enactment but he nonetheless declined to comment on that objective. By way of explanation, Bastarache J. noted that the object of commitment and loyalty may be overlooked because there existed the other valid objective of furthering Canada's citizenship policy.

The Supreme Court's ready acceptance of the two-fold objective is surprising, in part, because the characterization of the objective in *Lavoie* was much more complicated than it usually is in equality rights cases. The Supreme Court has stated, in *R. v. Big M Drugmart*, that the legislative objective is determined by the intention of those who enacted the legislation *at the*

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70. *Ibid.* at para. 186.
71. *Lavoie SCC, supra* note 2 at para. 54.
72. *Ibid.* [emphasis added].

time of enactment, "not by any shifting variable."[73] In *Irwin Toy Ltd. v. Quebec*, the Supreme Court similarly established the objective as that which animated the legislation in the first place rather than any subsequent justification of the legislation.[74] The courts have traditionally followed the limited scope for classification of the objective by examining the purpose expressed in the preamble of the impugned legislation or by examining the legislative and parliamentary debates that took place at the time of enactment. In *Lavoie*, however, the task of determining the legislative purpose at the time of enactment was complicated by the fact that the impugned statute had been amended and debated at various different times over several decades. The citizenship requirement that first emerged in *The Civil Service Amendment Act, 1908*[75] was altered first by *The Civil Service Act, 1918*,[76] then by the 1932 amendment[77] to the statute, and once again by the 1961 *Civil Service Act*,[78] which was reintroduced and renamed in 1967 as the *Public Service Employment Act*.[79] Furthermore, the debates about the statute occurred not only during the transformation of the statute between 1908 and 1967, but also during the period in which reports on the citizenship preference were completed by parliamentary committees between 1979 and 1985.[80]

At trial, Wetston J. prefaced his discussion of the government's objective by citing, with approval, Dickson C.J.C.'s statement, in *Irwin Toy*, that the objective of the legislation must be determined, not by any shifting variable, but by the intention of those who enacted the legislation at the time of enactment.[81] What Wetston J. did not mention is the difficulty in determining the time at which the objective of the *Public Service Employment Act* was established. The impossibility of establishing one particular time at which the objective was established nonetheless became evident in Wetston J.'s tracing the citizenship preference, as it first emerged in the 1908 *Civil Service Amendment Act* and as it changed through various amendments to its current form in the 1985 *Public Service Employment Act*.[82] At the Federal Court of Appeal, Linden J.A., dissenting, noted the problem of determining the time at which the objective was established:

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73. [1985] 1 S.C.R. 295 at para. 91, 18 D.L.R. (4th) 321 at 353 (S.C.C.) [emphasis added].
74. [1989] 1 S.C.R. 927 at 984, 58 D.L.R. (4th) 577 at 618 [*Irwin Toy* cited to S.C.R].
75. S.C. 1908, c.15, s.14 [*Civil Service Amendment Act*].
76. S.C. 1918, c. 12, ss. 38, 41(1) [*Civil Service Act*].
77. *An Act to amend the Civil Service Act*, S.C. 1932 c. 40, s. 6.
78. S.C. 1960-61, c. 57, s. 40(1).
79. S.C. 1966-67, c. 71.
80. See *e.g.* Canada, *Report of the Special Committee on the Review of Personnel Management and the Merit Principle* (Ottawa: Supply and Services Canada, 1979)(Chair: Guy R. Davignon)[*Personnel Management*]; Canada, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Supply and Services Canada, 1985)(Chair: Patrick Boyer)[*Equality for All*].
81. *Lavoie TD*, *supra* note 30 at 657; *Irwin Toy*, *supra* note 74 at 984.
82. R.S.C. 1985, c. P-33.

> [I]n a case such as this it is hard to decide the time when the objective was established. As noted above, the modern citizenship preference appeared more or less in its current form in 1961, but was enacted seemingly without debate or fanfare. This makes it exceedingly difficult to consider what the legislative objective was at that time. As a result, both parties seemed to consider the entire legislative history of the provision—including debates which occurred years before and years after its adoption—in order to infer the legislative objective.[83]

Given the difficulty of fixing a determinate time of enactment for the impugned provision, it was logical for the parties in *Lavoie* to consider the legislative intention at various points of the provision's legislative history.

There is, however, another reason for considering the legislative objective in the context of the broad legislative history of the provision. The history of legislation on citizenship shows that much of that legislation was rooted in discriminatory objectives. As La Forest J. observed in *Andrews*:

> History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale of which was to limit the number of persons entering into certain employment. Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin[.][84]

If the courts are to be vigilant about the potential discriminatory objective behind nationality-based legislation, then they must be diligent in their examination of the history of such legislation.

The history of discriminatory objectives underlying nationality-based legislation has been documented by Ivan Head in an essay cited by La Forest J., in *Andrews*.[85] As Head points out, in Canada between 1878 and 1899, there were twenty-six statutes passed, all of which were animated by the intention to prevent Chinese aliens from working and to prevent competition with whites.[86] In the 1930s, British Columbia enacted various statutes that made inclusion on the voters list a requirement for admission to various professions, including law, pharmacy, and logging.[87] Such legislation effectively excluded Asian aliens from many professions, because aliens did not have the right to vote. The "B.C. Public Works Contract" prohibited Asians from working directly or indirectly for any contractor holding a Department of Public Works contract.[88] Ivan Head argues that the discrimination that had animated late 19th century statutes was further fuelled, during the early 20th century, by economic anxiety and widespread unemployment.[89]

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83. *Lavoie CA*, *supra* note 31 at para. 182.
84. *Supra* note 1 at 195.
85. Head, *supra* note 12 cited in *ibid.*
86. Head, *ibid.* at 127.
87. See *e.g. Pharmacy Act*, R.S.B.C. 1936, c. 215; *Forest Act*, R.S.B.C. 1936, c. 102.
88. B.C. Public Works Contract, clause 45 cited in Head, *supra* note 12 at 128.
89. Head, *ibid.* at 130.

At the trial level of *Lavoie*, Wetston J. did consider the comments that were made during the House of Commons debates on the 1908 *Civil Service Amendment Act* and the 1932 amendment to the *Civil Service Act*. Wetston J. quoted Mr. Boulanger's summary of the objectives behind the citizenship preference and the residence requirement in the 1932 amendment bill:

> I believe the spirit of the bill is in accordance with the Canada first policy of the present government, and I am sure the government will approve the bill and support it.... Not only are we for the Canada first policy but we are also for Canadians first and especially should that policy apply in the matter of the filling of civil service positions. Certainly that is one place where Canadians should be first.[90]

Wetston J. concluded, from this statement, that "Parliament connected the nationality and residency requirements to federal civil service positions and that this was related to the Canada first policy," and ultimately he concluded that the objective of the Canada first policy was to enhance the value and meaning of Canadian citizenship.[91]

Wetston J. did not, however, consider the historical context of the statement or the historical context of the Canada first policy. Just two weeks before Mr. Boulanger delivered his statement on the amendment, another member of Parliament, Mr. Barrette, had commented on immigration, the Canada first policy, and the policy of protection.[92] After noting that, during the last election, the Conservative party had promised "to work out a national and truly Canadian policy, that of 'Canada First,'" Mr. Barrette went on to describe the achievements of the current government in implementing the Canada first policy:

> Having assumed power on July 28, what did our government do? They first stopped the flow of immigration in order to protect the Canadian workers. They called an emergency session and appropriated $20,000,000 to help the unemployed.[93]

During the House of Commons debates on the residency requirement in the 1932 amendment, one member of Parliament, Mr. M.N. Campbell, had criticized the requirement on the basis that its purpose was to "discriminate between two classes of Canadian citizens, those who were born in Canada and those who were born in other lands."[94] In response to such concerns, Mr. Boulanger remarked:

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90. *Lavoie TD*, *supra* note 30 at 652; *House of Commons Debates*, 188 (1 May 1931) at 1198 (Mr. O.L. Boulanger).
91. *Lavoie TD*, *ibid.*
92. *House of Commons Debates*, 187 (14 April 1931) at 587 (Mr. Barrette).
93. *Ibid.*
94. *House of Commons Debates*, 188 (1 May 1931) at 1200 (Mr. M.N. Campbell).

> It seems to me that in times like this, when there are so many people out of work looking for jobs, to earn their daily bread for themselves and their families, we should at least restrict appointments in the civil service to persons living in Canada.[95]

Such comments indicate the connection between the fear of foreigners, economic anxiety, and the Canada First policy. As Ivan Head notes, in summing up his discussion of the discriminatory legislation of the 1930s, "[e]mpty stomachs prompt suspicious minds."[96]

The remarks made during the 1931 House of Commons Debates point to another improper objective behind the citizenship preference provision and the more general Canada First policy, namely, the protection of citizens from competition for employment. That same objective had animated early 20th century U.S. statutes providing for citizenship preference in employment, and the U.S. courts struck down such statutes on the basis of an invalid purpose.[97] In *Truax*, for example, the Supreme Court struck down an Arizona statute requiring employers of more than five workers to ensure at least eighty percent of their employees were citizens. The Court held that there was no public interest in the objective of protecting citizens from competition for employment.

An examination of the 1930s House of Commons debates shows that the Canada first policy was clearly articulated as a policy that would protect citizens from competition for employment. In light of the fact that the trial judge in *Lavoie* found the objective of the impugned provision to be the furtherance of the Canada first policy, it follows that one of the legislative objectives of the citizenship preference, at the time of enactment, was the protection of citizens from competition for employment. When the *Civil Service Act* was reviewed and amended again, during the 1970s and 1980s, ensuring the commitment and loyalty of employees was cited by at least one member of Parliament and by the Civil Service Chairman himself as an objective of the legislation.[98] Given the discriminatory history of the objectives, a history recognized by the Court, such objectives are inconsistent with the values of a free and democratic society and therefore could not be justified under section 1 of the *Charter*.

In overlooking the evidence pointing to improper and discriminatory objectives behind the impugned provision, the courts, at both the trial and appeal levels of *Lavoie*, made it much more likely that the citizenship provision would be saved under section 1 of the *Charter*. Given the history of discriminatory legislation against non-citizens in Canada, the Supreme Court should

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95. *House of Commons Debates*, 189 (23 June 1931) at 2945-46 (Mr. Boulanger).
96. *Supra* note 12 at 130.
97. See *e.g.* "Immigration Policy", *supra* note 57 at 1402 (history of such legislation); *Traux v. Raich*, 36 S. Ct. 7 (1915) [*Traux*].
98. *Public Service Employment Act*, R.S.C., 1985, c. P-33, ss.16 (4)(c), 17(4)(c) (The *Civil Service Act* was amended several times and was eventually renamed the *Public Service Employment Act*).

have been more vigilant in considering the possibility of an improper objective underlying the impugned provision. I would argue that, in determining the objectives of such legislation, the courts should apply a standard more akin to the "close scrutiny" standard suggested by Justice Blackmun in *Graham v. Richardson*.[99] In light of the fact that non-citizens have been found, by U.S. and Canadian courts alike, to be a "'discrete and insular' minority", Canadian courts should follow the suggestion of Justice Blackmun and treat such classifications as "inherently suspect" and "subject to close judicial scrutiny."[100]

2) Are the Objectives Pressing and Substantial?

In order for a law to qualify as pressing and substantial, the law must be consistent with the underlying values of the *Charter*. As Bastarache J. stated in *M. v. H.*, before the Court finds that a law satisfies the pressing and substantial test, the Court must first find the law to "be respectful of the equality of status and opportunity of all persons."[101] In *Andrews*, La Forest J. pointed out that "[d]iscrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race."[102] On the basis of that discriminatory history of citizenship-based distinctions, La Forest J. concluded that legislation based on citizenship-based distinctions "harbours the potential for undermining the essential or underlying values of a free and democratic society."[103] The plaintiffs, in *Lavoie*, cited La Forest's remarks in support of their submission that the objectives of the citizenship preference provision were not pressing and substantial.[104] Political theorist, Joseph Carens, testified that the differential treatment of non-citizens actually decreases the value of Canadian citizenship.[105] Insofar as it undermines the principle of equality and individual rights underlying the *Charter* and the Canadian legal system, Carens argued, the differential treatment of non-citizens devalues the concept of citizenship.[106] The government, on the other hand, relied on the opposing view of their expert witness, Peter Schuck, who testified that citizenship would be meaningless without significant differences between citizens and non-citizens, and, therefore, the differential treatment of non-citizens is essential to enhance the meaning and value of citizenship.[107]

Wetston J. accepted the argument put forth by Peter Schuck and concluded that the objectives underlying the citizenship preference provision

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99. 91 A S. Ct. 1848 (1971).
100. *Ibid.* at 1852.
101. [1999] 2 S.C.R. 3 at para. 354, 171 D.L.R. (4th) 577.
102. *Supra* note 1 at 195.
103. *Ibid.* at 197.
104. *Lavoie CA*, *supra* note 31 at para. 81.
105. *Lavoie TD*, *supra* note 30 at para. 77.
106. *Ibid.* at 660.
107. *Lavoie CA*, *supra* note 31 at para. 76.

were pressing and substantial. As further evidence in support of his conclusion, Wetston J. cited the fact that "virtually all liberal democratic societies impose citizenship-based restrictions in one form or another on access to employment in their national public services" for the very purpose of enhancing the meaning of citizenship.[108] The fact that virtually all liberal democratic nations have enacted a law for the purpose of enhancing the value of citizenship, however, does not guarantee that such a law is pressing and substantial. Virtually all liberal democratic societies have, at one time or another, imposed citizenship-based restrictions on access to employment for purposes of discrimination.[109] As Will Kymlicka notes, many citizenship-based restrictions in Europe and America have been the product of resurgent nationalist movements and fears about national stability and unity.[110] Such laws would not now qualify as pressing and substantial because they would be found to be inconsistent with *Charter* values. It is precisely the widespread use of the concept of citizenship as the basis for discrimination that has prompted Alexander Bickel to remark that "[c]itizenship is at best a simple idea for a simple government."[111] One of the most valuable features of the U.S. Constitution, Bickel argues, is that it "prescribes decencies and wise modalities of government quite without regard to the concept of citizenship."[112]

In determining whether or not a law is consistent with the underlying values of the *Charter*, the courts have been wary of relying on the practice of the majority, precisely because minorities belong to what J. H. Ely identifies as "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."[113] As Ely points out, discrimination that is codified in legislation is more difficult to recognize and more widely accepted, even by victims of discrimination, than are other forms of discrimination. In *Andrews*, the Court relied on J. H. Ely's observations in concluding that non-citizens, as a group, are particularly vulnerable to having their interests overlooked by elected officials.[114]

When the legislative objectives at issue in *Lavoie* were considered at the Federal Court of Appeal, Linden J.A. agreed with the trial judge that the objectives of enhancing Canadian citizenship and encouraging naturaliza-

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108. *Ibid.* at 661.

109. Alexander Aleinikoff and Douglas Klusmeyer observe that "[d]iscriminatory citizenship policies based on racial and ethnic categories are endemic in the histories of many Western democratic states[.]" in "Introduction" in Aleinikoff & Klusmeyer, *From Migrants to Citizens*, *supra* note 25 at 15. Citizenship policies in Australia, for example, developed in tandem with a "White Australia" policy discriminating against immigrants. See Gianni Zappalà & Stephen Castles, "Citizenship and Immigration in Australia" in Aleinikoff & Klusmeyer, *From Migrants to Citizens*, *supra* note 25 at 32.

110. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 175–78.

111. Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975) at 54.

112. *Ibid.*

113. John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) at 151.

114. *Andrews*, *supra* note 1 at 152.

tion were pressing and substantial objectives. On appeal to the Supreme Court of Canada, the majority in *Lavoie* similarly held that the two objectives were pressing and substantial. Citing Will Kymlicka's theory of multicultural citizenship, Bastarache J. held that "[the] objectives are non-controversial. In any liberal democracy, the concept of citizenship serves important political, emotional and motivational purposes...it fosters a sense of unity and shared civic purpose among a diverse population."[115]

Bastarache J.'s declaration of an uncontroversial acceptance of the objectives of citizenship is belied by continuing controversy about those objectives in the Court's previous decisions, in legal commentary, and in political theory. Indeed, the controversy is evident in the very work Bastarache J. cites in support of the non-controversial character of the objectives. After noting the strong criticism of differentiated citizenship, Will Kymlicka voices a concern about differentiated citizenship similar to that expressed by Joseph Carens.[116] To the extent that it excludes a group already vulnerable to prejudice and stereotype, differentiated citizenship, he suggests, threatens to undermine a sense of unity and shared civic purpose. Alan Cairns points out that it is precisely the practice of differential treatment and discrimination that has destabilized the meaning of Canadian citizenship. The Canadian state, he notes, is composed of communities whose memories of historical maltreatment, internment, and stigmatization result in group affirmation and differentiation.[117] In his discussion of citizenship and the nation-state, Marc Cousineau also throws into question the notion of citizenship as a non-controversial concept that serves the same purpose in any liberal democracy.[118] As Cousineau observes, the very legal foundation of citizenship, the nation-state, has been transformed by the countries of the European community to an extent that the nation-state is no longer the basic unit of international law and politics. Given that identification with the nation-state is the basis of citizenship, he concludes, the "legal sense of citizenship may thus be devoid of any substantive meaning."[119] Even those commentators who find some positive meaning in the concept of citizenship have observed that the concept of citizenship is coming under increasing pressure from the changing form of the nation-state. Vicki Jackson, for example, cautions that

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115. *Lavoie SCC, supra* note 2 at para. 57.
116. Kymlicka, *supra* note 110 at 178.
117. Alan C. Cairns, "The Fragmentation of Canadian Citizenship" in William Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 181 at 204.
118. Marc Cousineau, "Belonging: An Essential Element of Citizenship—A Franco-Ontarian Persepective" in William Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 137.
119. *Ibid.* at 138.

the concept of primary citizenship may be ill suited to the "fluid complexity of citizenship affiliations" in the 21st century.[120]

Far from accepting the value of citizenship as uncontroversial, the Court, in *Andrews*, emphasized the potential dangers inherent in the concept of citizenship. Wilson J. found that the very distinction between citizens and non-citizens was responsible for creating a vulnerable group lacking in political power. In a concurring opinion, La Forest J. noted the discriminatory potential of differentiated citizenship. Citing the remarks of McDonald J. in *Kask v. Shimizu*, La Forest J. stated that decisions unfairly based on citizenship would be likely to "inhibit the sense of those who are discriminated against that Canadian society is free or democratic as far as they are concerned."[121] As commentators have pointed out, the Court's decision in *Andrews* renders differentiated citizenship constitutionally suspect and thus throws into question the very hierarchical structure of citizenship.[122]

The Court's characterization, in *Lavoie*, of the two objectives as universal, uncontroversial objectives is further undermined by the historically variable nature of the concept of citizenship. The objectives of Canada's earliest definition of citizenship in *The Immigration Act*[123] of 1910 and *An Act to define Canadian Nationals and to provide for the Renunciation of Canadian Nationality*[124] of 1921 were to gain representation on the International Court of Justice and to facilitate Canada's independence.[125] Citizenship law in Canada has since changed over time in accordance with various competing objectives. At different historical moments, Canadian citizenship policy has been variously guided by the incommensurable goals of promoting social unity, protecting individual rights, and achieving demographic and economic growth. There continues to be considerable controversy surrounding the two main competing concepts of promoting national unity and protecting individual rights and human dignity.

Despite the scepticism voiced by some justices and commentators about the meaning and value of citizenship, Canadian courts have, in general, been amenable to the argument that enhancing the meaning of citizenship and encouraging naturalization are pressing and substantial objectives. It is probable that, in future challenges of citizenship preference provisions, the Court will find the objectives stated by the government to be pressing and substantial. Where the impugned law is based on a distinction between

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120. Vicki C. Jackson, "Citizenship and Federalism" in T. Alexander Aleinikoff & Douglas Klusmeyer, *Citizenship Today: Global Perspectives and Practices* (Washington: Brookings Institution Press, 2001) 127 at 129.
121. *Kask v. Shimizu* (1986), 69 A.R. 343 at para. 22, [1986] 4 W.W.R. 154 at 161(Q.B.); *Andrews*, *supra* note 1 at 197.
122. See Galloway "Dilemmas", *supra* note 25 at 108–09.
123. S.C. 1910, c. 27.
124. S.C. 1921, c. 4.
125. See Galloway "Dilemmas", *supra* note 25 at 94.

citizens and non-citizens, the outcome of the section 1 analysis is more likely to turn on the other two branches of the *Oakes* test, rational connection and minimal impairment.

B. RATIONAL CONNECTION

The outcome of the section 1 analysis in *Andrews* turned primarily on the rational connection stage of the *Oakes* test. In *Andrews*, the majority of the Court found that there was no logical connection between the statutory citizenship requirement and the objectives underlying the legislation (the objectives of ensuring familiarity with Canadian institutions, ensuring commitment to the Canadian government, and ensuring that lawyers are full members of Canadian society). In deciding that there was no rational connection between the objectives and the citizenship requirement, Wilson J. relied upon the argument of McLachlin J.A., as she then was:

> Citizenship does not ensure familiarity with Canadian institutions and customs. Only citizens who are not natural-born Canadians are required to have resided in Canada for a period of time. Natural-born Canadians may reside in whatever country they wish and still retain their citizenship.... While no doubt most citizens, natural-born or otherwise, are committed to Canadian society, citizenship does not ensure that that is the case. Conversely, non-citizens may be deeply commited (sic.) to our country.[126]

In his concurring opinion, La Forest J. relied on the same argument in reaching his conclusion that there was no rational connection between the provision and the government's objectives.[127]

Political theorists have suggested that the very policy of attaching rights and entitlements to citizenship is irrational. As Marc Cousineau points out, Canadian citizens do not earn their citizenship as they might earn an accolade or form of employment, and they will remain citizens, however the state may modify their rights and obligations. They are no less citizens because the state has denied them the right to vote or the right to employment. An individual can devote his life to dismantling the structures of the state, Cousineau argues, and yet still maintain citizenship and all the attendant rights of citizenship.[128] Joseph Carens also questions the logic of attaching a set of rights to the status of citizenship, noting that an individual may think of herself as the citizen of a state without feeling much patriotism or attachment to the state.[129]

In *Lavoie*, the courts subjected the concept of citizenship and the government's objectives to less scrutiny than did the Court in *Andrews*. The trial

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126. *Andrews v. Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600 at 612-13, 4 W.W.R. 242 at 255-56 (B.C.C.A.); *Andrews*, *supra* note 1 at 156.
127. *Andrews*, *ibid.* at 199.
128. *Supra* note 118 at 137.
129. Joseph H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (New York: Oxford University Press, 2000) at 168 [Carens, *Culture*].

judge cited, with approval, the Court's formulation of the rational connection test in *Irwin Toy* as a test that does not require a direct causal link between the means and the ends of the legislation in question.[130] At issue in *Irwin Toy* was the constitutionality of a government ban on advertising directed at children. The Court held that, in order to establish a rational connection between the means and ends of the legislation, the government was entitled to rely on inconclusive social science evidence. In order to satisfy the rational connection test in *Lavoie*, Wetston J. stated that the government need only show that Parliament had "a reasonable basis for believing that a causal link did or might exist."[131] Wetston J. found that, although there was no conclusive proof of a causal link between the citizenship preference and the legislative objectives, Parliament did have a reasonable basis to believe a causal link existed. Therefore, he concluded, there was a rational connection between the citizenship preference and the legislative objectives. At the Federal Court of Appeal, Linden J.A. did not engage in a detailed discussion of the rational connection test. After noting that the rational connection test was made, not on the basis of conclusive proof, but rather on the basis of reason, deduction or inference, he held that "it is logical to infer that giving citizens preferential treatment in public service employment will further the substantial objectives."[132]

Although the rational connection test may not require conclusive proof, it does, as both Wetston J. and Linden J.A. recognized, require a logical, reasonable basis for finding a causal connection. At the Supreme Court, Bastarache J. based his finding of a causal connection on the assumption that what happened following the implementation of a policy must have been caused by that policy. The fact that a high proportion of immigrants who meet the three-year residency requirement choose to naturalize, he reasoned, suggests that Canada's citizenship policy has had its desired effect. "[T]he government's efforts to enhance the value of citizenship," he concluded, "can reasonably be assumed to play a role" in the high rate of naturalization.[133] In a dissenting opinion, McLachlin C.J.C. and L'Heureux-Dubé J. were quick to point out the logical fallacy underlying such a conclusion:

> That the impugned provision was in effect at a time when the naturalization rate was high does not prove that the impugned provision *caused* the high naturalization rate. There is no evidence to suggest that high rates of naturalization were in any way attributable to the citizenship preference.[134]

The dissenters concluded that, far from being rationally connected to the objectives, the citizenship preference provision actually undermines

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130. *Lavoie TD*, *supra* note 30 at 664; *Irwin Toy*, *supra* note 74 at 990.
131. *Lavoie TD*, *ibid.*
132. *Lavoie CA*, *supra* note 30 at para. 198.
133. *Lavoie SCC*, *supra* note 2 at para. 60.
134. *Ibid.* at para. 16.

the objectives of enhancing the meaning of citizenship and encouraging naturalization.

In arguing that the citizenship preference provision in fact defeats the objectives of the legislation, McLachlin C.J.C. and L'Heureux-Dubé J. relied on the government's own definition of Canadian citizenship. Indeed, Canadian citizenship is defined by Citizenship and Immigration Canada as membership in a "free and democratic" country that "extends equal treatment to all its citizens."[135] Citizenship and Immigration Canada further defines the responsibilities of Canadian citizenship as including the responsibility "to discourage discrimination and injustice" and "to respect the rights of others."[136] If Canadian citizenship is defined as embodying the values of equality, tolerance, and justice, it is, as the dissenters argued, illogical to encourage naturalization and enhance the meaning of citizenship through a discriminatory policy. Given that the majority of the Supreme Court found the citizenship preference provision to be discriminatory under section 15, the majority should also have concluded that it was illogical to enact that provision for the objective of enhancing the meaning of citizenship and encouraging naturalization.

The arguments of McLachlin C.J.C. and L'Heureux-Dubé J., in *Lavoie*, find support in legal commentary and scholarship on citizenship. Joseph Carens, for one, points out that people who lack the legal status of citizenship may feel strong attachment to a political community, while those who have the legal status of citizenship may feel very little attachment to the political community that has given them citizenship. Carens cites public opinion surveys indicating that Francophones living in Quebec consider themselves citizens of Quebec first and citizens of Canada second.[137] Will Kymlicka similarly argues that the attachment of Canadian citizens to the political community of Canada may depend more on the country's commitment to equality and justice than on their citizenship status.[138] To allow long-term residents the right to remain in a country and yet deny those individuals full participation in society, Carens argues, actually "undermine[s] the basic principle of a democratic society, that legitimate political authority rests upon the consent of the governed."[139] In his theory of individual rights, Joseph Raz further suggests why a denial of individual and minority rights may actually undermine the objectives of national unity and shared civic purpose. Collective rights, Raz argues, can exist only if those rights serve the interests of individuals.[140]

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135. Citizenship and Immigration Canada, "Citizenship", online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/newcomer/fact_09e.html>.
136. *Ibid.*
137. Carens, *Culture*, *supra* note 129 at 169.
138. *Supra* note 94 at 179.
139. Joseph H. Carens, "Membership and Morality: Admission to Citizenship in Liberal Democratic States" in William Rogers Brubaker, ed., *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, MD: University Press of America, 1989) 31 at 37.
140. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 208.

Insofar as the denial of rights to long-term residents threatens to produce a disenfranchised class of vulnerable members, that denial of rights threatens to weaken any social cohesion and shared civic purpose.

Legal commentators have suggested yet another way in which the citizenship preference provisions actually defeat the purpose of enhancing the meaning of citizenship. Encouraging permanent residents to naturalize through the promise of preferential treatment in employment increases the chances that permanent residents will naturalize, not out of a sense of shared civic duty or attachment to the country, but rather for reasons of personal gain. Insofar as such incentives may encourage permanent residents to become citizens for personal gain, Aleinikoff observes, citizenship preference provisions are likely to have the effect of "cheapening" citizenship.[141]

In future challenges to citizenship-based provisions, the approach of the minority to the rational connection test is to be preferred to that taken by the majority of the Court in *Lavoie*. Even when the rational connection standard is articulated as a standard requiring only a reasonable basis, not conclusive proof, the means and ends of the citizenship preference provision do not meet the standard. It is not reasonable to enhance the meaning of citizenship, a concept defined by the values of equality, justice and tolerance, through legislation that the Court has found to violate section 15(1) equality rights.

C. MINIMAL IMPAIRMENT

The minimal impairment branch of the *Oakes* test has often been the focus of the section 1 analysis and has been termed the very "heart and soul of s.1 justification."[142] At this stage, the Court considers whether or not the impugned law has been tailored so that it impairs the freedom in question "as little as is reasonably possible."[143] In determining whether or not a law satisfies the minimal impairment test, the Court is reluctant to interfere with legislative determinations. Despite the judicial deference to legislative decisions at this stage, most of the *Charter* violations to date have failed the *Oakes* test at the minimal impairment stage.[144]

In *Lavoie*, the plaintiffs relied on the evidence of Joseph Carens that there were other means of encouraging naturalization without violating

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141. T. Alexander Aleinikoff, "Between Principles and Politics: U.S. Citizenship Policy" in Aleinikoff & Klusmeyer, *From Migrants*, *supra* note 25 at 133.

142. See Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, Ont.: Thomson Canada, 1997) vol. 2 at 35-33. See also Errol P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" in The Honourable Gérald A. Beaudoin & Errol Mendes, eds., *The Canadian Charter of Rights & Freedoms*, 3d ed. (Toronto: Carswell, 1996) 3-1 at 3-23.

143. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 772, 35 D.L.R. (4th) 1 at 44.

144. See Leon E. Trakman, William Cole-Hamilton & Sean Gatien, "*R. v. Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83 at 100 (Trackman et al. note that forty-three of the laws that have failed the *Oakes* test have failed at the minimal impairment branch of the test).

equality rights. Specifically, they cited Carens' argument that what most encourages individuals to naturalize is a sense of belonging to a community. The defendants in *Lavoie* argued that the citizenship preference provision was much less an impairment of rights than were the restrictions imposed by other free and democratic societies. In concluding that the citizenship preference provision passed the minimal impairment test, the trial judge stated that the legislation was reasonably tailored to balance the interests of individual permanent residents with the state's interest in citizenship.[145]

On appeal, Linden J.A. disagreed with the conclusion of the trial judge. The evidence, he noted, showed that the provision would have the potential effect of excluding 600,000 people from approximately 250,000 jobs.[146] Furthermore, he noted, the group disadvantaged by the legislation is a group that has historically suffered from discrimination. The government, he stated, had not shown any evidence that Canada was affected by undervalued citizenship or low naturalization rates such that the infringement of rights was justified. Nor was there any evidence, he concluded, that the government had considered other legislative objectives in order to avoid the infringement of rights.

At the Supreme Court, Bastarache J. acknowledged that the citizenship preference provision might be overbroad, especially when compared with the Australian model, which allows permanent residents to remain in the public service after they become eligible for citizenship. He also conceded that those awaiting final determination of their citizenship application or those with legitimate reasons to remain permanent residents might be denied the opportunity of public service employment. Nonetheless, he reasoned that, given the scarcity of public service openings, those individuals affected would be "exceptional cases."[147] The government's right "to define the rights and privileges of its citizens", he concluded, outweighed the "inconvenience" suffered by the claimants and satisfied the minimal impairment test.[148]

The possibility of less restrictive citizenship-based legislation has been considered by Alexander Aleinikoff in his three volume study of citizenship policies.[149] While recognizing that it may be reasonable to restrict positions implicating national security to citizens, Aleinikoff argues that legislation denying all public service employment to non-citizens is overbroad. In his policy recommendations, Aleinikoff notes that the restriction of public sector jobs to citizens also restricts the government's access to the most qualified

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145. *Lavoie TD*, *supra* note 30 at 671–72.
146. *Lavoie CA*, *supra* note 31 at para. 203.
147. *Lavoie SCC*, *supra* note 2 at para. 71.
148. *Ibid.*
149. T. Alexander Aleinikoff & Douglas Klusmeyer, *Citizenship Policies for an Age of Migration* (Washington: Brookings Institution Press, 2002).

candidates for employment. He suggests, therefore, that citizenship-based provisions should be used very rarely, only for those positions involving high-level policy decisions or national security.[150] Aleinikoff's observation about the effect of citizenship-based provisions restricting the government's access to qualified applicants is especially relevant to the *Public Service Employment Act*. The statute, after all, explicitly states, as one of its purposes, the recruitment of public service employees on the basis of merit.[151] In 1979, the D'Avignon Report, a report of the Special Committee on the Review of Personnel Management and the Merit Principle, stressed the need for more qualified public service employees and for hiring on the basis of merit.[152] The D'Avignon report recommended the elimination of the citizenship preference provision. After rejecting the recommendations of the D'Avignon report, the government did not propose any less restrictive provision. Instead, the government simply responded by asserting that preference for employment in the public service is one of the privileges of citizenship.[153]

If, as Linden J.A. found, the citizenship preference provision could potentially exclude 600,000 people from public service employment, then the Court may very well be faced with future challenges to the citizenship preference provision. In such future cases, the Court should consider the recommendations put forth by Aleinikoff, in particular, the suggestion that the government might still achieve its objectives without excluding so many individuals from as many as 250,000 jobs.

D. DELETERIOUS IMPACT

In *Dagenais*, the Court modified the *Oakes* test by adding a fourth stage of analysis. At this stage, the Court balances the objective of the impugned law and the deleterious effects of the law. In order for the impugned provision to pass the deleterious impact test, the Court must be satisfied that the deleterious effects are proportional to the salutary effects of the law. As Sheilah Martin observes, the Court rarely reaches this stage of analysis, and when the Court does proceed to the fourth branch of the test, there is often a repetition of the analysis that has taken place at the earlier stages of the *Oakes* test.[154]

Of all the Justices to consider *Lavoie*, only Linden J.A., at the Federal Court of Appeal, engaged in an analysis of the deleterious impact of the citizenship preference provision. Linden J.A. concluded that the deleterious impact of the legislation was significant because 600,000 individuals would potentially be excluded from the public service positions. The provision, he noted, would have the effect of excluding potential employees from a broad

150. *Ibid.* at 72.
151. *Supra* note 82, s. 10(1).
152. *Personnel Management*, *supra* note 80 at 5–7.
153. *Equality for All*, *supra* note 80 at 31.
154. *Supra* note 18 at 347.

range of positions, including positions as cooks, deckhands, curators, interpreters and secretaries. It is regrettable that the Supreme Court did not consider the citizenship preference provision in light of the deleterious impact test, for the provision lends itself particularly well to a balancing of deleterious and salutary effects. In particular, the Court might have considered the deleterious impact of the provision on the quality of public service work. As the D'Avignon Report made apparent, there has long been a concern about the availability of qualified personnel in public service employment. The potential deleterious effects of the provision thus include, not only a negative impact on the rights of individual applicants, but also a negative impact on the government's own goal of recruiting the most qualified applicants for public service employment.

IV. Conclusion

IN SEEKING A QUALIFIED EXPERT WITNESS to testify on the importance of citizenship, the government, in *Lavoie*, chose Peter Schuck, a professor of law and a United States citizen. The government's reliance on a citizen of the United States was an irony that went unmentioned at all levels of *Lavoie*. Schuck's testimony was ultimately crucial to the Court's decision to uphold the citizenship preference provision as constitutional. In effect, then, a citizen of the United States was instrumental in shaping Canadian citizenship law and policy at the highest level. In light of the government's choice of a United States citizen to help formulate Canadian citizenship law policy, it is perhaps time for the courts to reconsider the exclusion of non-citizens even from the highest levels of government policy decisions.

In future cases involving citizenship preference provisions, the most important consideration should be the impact such provisions have, not simply on the particular claimants challenging the provision, but also on traditionally disadvantaged minorities seeking public service employment. If the government excludes large numbers of non-citizens from public service employment, and, in the process, excludes racial and ethnic minorities, the effect will be to reduce cultural diversity in the public service. By excluding groups that have historically faced disadvantage and discrimination from public service employment, the government also undermines the values of equality and justice embodied in the definition of citizenship.