A-317-95 (T-2479-90)

Janine Bailey (*Appellant*) (*Plaintiff*)

v.

Her Majesty the Queen in Right of Canada and **the Public Service Commission** (*Respondents*) (*Defendants*)

A-318-95 (T-1686-90)

Elisabeth Lavoie, Jeanne To Thanh Hien (*Appellants*) (*Plaintiffs*)

v.

Her Majesty the Queen in Right of Canada and **the Public Service Commission** (*Respondents*) (*Defendants*)

Indexed as: Lavoiev. Canada (C.A.)

Court of Appeal, Marceau, Desjardins and Linden JJ.A."Ottawa, January 13, 14 and May 19, 1999.

Public Service — Selection process — Competitions — Appellants permanent residents — Denied referral to open competition for positions in public service under PSEA, s. 16(4)(c) — Qualified non-Canadian candidates subject to citizenship preference when applying for positions to be filled by open competition — Citizen-based distinction drawn by Act, s. 16(4)(c) not discrimination within meaning of Charter, s. 15(1) — Canadian citizens, permanent residents not —similarly situated— — Preference for Canadian citizens in open competitions not violating merit principle.

Constitutional law — Charter of Rights — Equality rights — Appellants contending citizenship preference for employment in public service contrary to equality principle in Charter, s. 15, not saved by s. 1 — Non-citizens not referred as candidates in open competitions until inventory of qualified Canadian candidates exhausted — Appellants' basic rights under Charter, s. 15 not breached by PSEA, s. 16(4)(c) — Equality principle not applicable — Citizenship preference not giving rise to discrimination under Charter, s. 15 — Oakes test applied — Impugned legislation not disguise, abuse of powers — Importance of legislative objectives outweighing disadvantage created by impugned statutory provision.

Citoyenneté et Immigration — Statut au Canada — Citoyens — La préférence que l'art. 16(4)c) de la LEFP accorde aux citoyens canadiens en matière d'emploi est-elle contraire à l'art. 15(1) de la Charte? — Selon l'art. 16(4)c), l'application de la préférence est discrétionnaire à l'étape de la présentation des canditats — La préférence n'empêche pas les non-Canadiens de participer aux concours publics mais les citoyens qualifiés ont priorité — La citoyenneté exige un attachement aux lois et aux institutions canadiennes, ainsi que l'engagement de s'acquitter des obligations incombant aux citoyens — La disposition législative contestée est le fruit d'un exercice raisonnable, par le législateur, des compétences qu'il a en matière de citoyenneté — Le désavantage qu'entraîne la disposition en cause n'a pas de rapport avec la dignité

humaine des résidents permanents — Les citoyens canadiens et les résidents permanents ne sont pas dans une —situation analogue—.

These were appeals from a Trial Division decision dismissing the appellants' actions for declaratory relief and damages, on constitutional grounds, in respect of the application of paragraph 16(4)(*c*) of the *Public Service Employment Act*. All three appellants were, at the relevant times, permanent residents of Canada but not citizens. They are well educated women who had all obtained employment with the federal public service, but were denied "referral to open competition" for certain positions for which they had applied on the grounds of said provision. Two of them, who are citizens of Austria and the Netherlands, refused to obtain Canadian citizenship because they would automatically have lost their original citizenships, thereby limiting their opportunities for future employment in the public service of their native countries. It was submitted that the preferential treatment reserved for Canadian citizens offended the equality principle embodied in section 15 of the Charter and that the impugned provision could not be saved by section 1. The citizenship preference can apply at two stages of a competition for a position in the public service: the candidate referral stage (paragraph 16(4)(*c*)) and the eligibility stage (paragraph 17(4)(*c*)). At the referral stage, the application of the preference is discretionary; at the eligibility stage, it is mandatory. The respondents exercised their discretion under paragraph 16(4)(*c*). Although the citizenship preference does not exclude non-Canadians from competing in open competitions, non-citizens will not be referred as candidates until the inventory of qualified Canadian candidates has been exhausted. The Trial Judge found that the purpose and objective of the citizenship preference was twofold: (a) to enhance the meaning, value and importance of citizenship, and (b) to provide an incentive for permanent residents to become citizens. Proceeding to an analysis under section 1 of the Charter, His Lordship ruled that the twofold objective of the impugned legislation constituted a sufficiently pressing and substantial concern to warrant a restriction on the appellants' equality rights under section 15 of the Charter. He concluded that, while paragraph 16(4)(*c*) of the Act infringes section 15 of the Charter, it constitutes a reasonable limit and is saved by section 1. The issue was whether the employment preference in favour of Canadian citizens created by paragraph 16(4)(*c*) of the Act violates subsection 15(1) of the Charter because the preference is not enjoyed by permanent residents.

Held (Linden J.A. dissenting), the appeals should be dismissed.

Per Marceau J.A.: The Trial Judge erred in finding that the appellants' basic rights under section 15 of the Charter were breached by the impugned provision. An immigrant, on setting foot on Canadian soil, cannot pretend to have an inherent right to participate in all Canadian legislative attributes and benefits on the same level as Canadian citizens. To try to apply equality rights between citizens and non-citizens with respect not to their common condition as human beings but to their relative status on Canadian soil would negate the concept of citizenship. The determination of an alien's status in Canada is a purely political prerogative and thus an objectionable law is to be attacked within the political rather than the judicial arena. The equality principle can have no application here. The citizen-based distinction drawn by paragraph 16(4)(*c*) of the PSEA did not constitute discrimination within the meaning of the Charter provision. Exclusive or preferential access to Public Service employment is and has long been one of the privileges of citizenship not only domestically but almost universally. The intent to enhance the value of citizenship does not denigrate the landed immigrant in a manner based upon a personal characteristic. The citizenship preference cannot be seen objectively as demeaning the human dignity of the appellants or non-citizens generally.

Per Desjardins J.A. (*concurring in the result*): A permanent resident means a person who has been granted landing whereas a Canadian citizen means a person who is a citizen within the meaning of the *Citizenship Act*. A permanent resident who chooses not to become a Canadian citizen swears no allegiance and assumes

none of the duties of a Canadian citizen. The Charter embodies a number of important constitutional rights which only citizens are entitled to. Law enforcement legislation also establishes preferences. Not only are citizens accorded special privileges, they are also provided greater protection than permanent residents specifically on account of their closer ties with the state. Citizenship requires attachment to Canadian laws and institutions and a commitment to the duties that ensue as a Canadian citizen. There was ample evidence on which the Trial Judge could base his conclusion that Parliament's intent, in adopting paragraph 16(4)(*c*) of the Act, was to value Canadian citizenship and to encourage those who are not Canadian citizens to naturalize. However, the impugned legislation puts in a serious disadvantageous position members of a discrete and insular minority and affects them in their search for employment. If it is discriminatory, an analysis under section 1 of the Charter is mandatory. If the impugned legislation is related to citizenship, an analysis under section 1 of the Charter is also required.

In recent cases, the Supreme Court of Canada has repeated that the analytical framework outlined in *The Queen v. Oakes* is the proper approach for determining whether a statutory provision constitutes a reasonable limit on a Charter right under section 1. Such analysis is heavily dependant on the facts of each case. The burden of proving that a legislative enactment is "demonstrably justified in a free and democratic society" lies upon the party seeking to uphold the legislation. The first step of the section 1 analysis is to determine whether the objective of the impugned legislation is pressing and substantial. Since citizenship is a status shared by both new immigrants and long-time residents and, as such, represents a logical common symbol, it is normal that Parliament would seek to enhance the value and importance of citizenship in Canadian society as a way of bringing Canadians together. The preference in favour of citizens in public service hiring may be perceived as a means of accomplishing this goal. The reasonableness of the objective pursued by the impugned provision in terms of the balance of probabilities suffices to meet the first criterion. The objective pursued by the impugned legislation makes sense considering the history of Canada, a country which has grown both socially and economically by accepting immigrants from other lands and other cultures. The second step of the *Oakes* test is whether the means chosen are reasonable and demonstrably justified in a free and democratic society. Given their distinct histories, all free and democratic societies, which have preferences, have adopted them for various and complex reasons which are directly dependent upon their own internal traditions. It is hardly possible to draw a firm inference from this comparison except to say that special bonds between citizens and state have a long and enduring history. As to the proportionality test, the key question was whether the impugned provision was carefully designed so as to impair the chances of employment of permanent residents as little as possible. The impugned legislation expresses a government policy of enhancement and incentive in a status where rights and duties are correlated. To declare paragraph 16(4)(*c*) of the Act as being of no force or effect would allow the Court to enter a field where rights and duties are to be balanced. Parliament, in such an area, should be left with a "margin of appreciation". A Court can intervene in the face of a violation of Charter rights. But preference in employment, as opposed to exclusion from the Public Service, is not one of them. This is so especially, given the acceptance of dual citizenship by Canada which minimizes the hardships of the preference for permanent residents. The importance of the legislative objectives outweighs the disadvantage which is created. The impugned legislation amounts to a reasonable exercise by Parliament of its power with respect to citizenship. It does not constitute a disguise or an abuse of powers. The disadvantage created by the impugned statute does not pertain to the human dignity of permanent residents. Citizenship and permanent residence, by essence, connote different characteristics. The citizen assumes duties, the permanent resident does not. As a result, Canadian citizens and permanent residents are not "similarly situated". Preference in favour of Canadian citizens in open competitions for positions in the Public Service is not in violation of the merit principle embodied in section 10 of the Act.

Per Linden J.A. (*dissenting*): Citizenship is meant to be an accessible goal for all new Canadians. It is a tool of equality, not exclusion. Non-citizens enjoy almost all the rights held by citizens. Under the Charter, most rights are accorded to all those who are subject to Canadian law. Only certain specific rights, like democratic rights, certain mobility rights and minority language rights, are reserved to citizens. The Canadian approach to equality has always given a large and liberal interpretation to anti-discrimination legislation.

The different views taken by the Supreme Court of Canada regarding the proper approach to subsection 15(1) of the Charter have been laid to rest in the recent decision of *Law v. Canada (Minister of Employment and Immigration)*, a turning point in equality jurisprudence in Canada. This case is now the starting point for any analysis of discrimination under the Charter. There are three questions to be answered by a party seeking to prove a violation of subsection 15(1) of the Charter. First, the claimant must show that the impugned legislation or state action draws a distinction between him and others. Second, he must show that the distinction has been drawn on an enumerated or analogous ground. Third, he must show that such a distinction is discriminatory in its nature. Paragraph 16(4)(*c*) of the PSEA does not grant equal benefits to all individuals as it denies non-citizens equal benefit of the law *vis à vis* citizens. Moreover, it is now settled that the distinction is made on the analogous ground of non-citizenship. The third question, whether such a distinction constitutes discrimination under subsection 15(1) of the Charter, is more complex. Where a distinction is drawn exclusively on the basis of an enumerated or analogous ground, that will generally suffice to establish discrimination. Human dignity is now at the centre of the analysis under subsection 15(1) of the Charter. Any Court which deals with it must carefully consider the relationship between the impugned law or state action and the human dignity of the claimant. A determination that a law or state action has adverse effects on the dignity of the claimant must be made from the appropriate context. In *Law*, the Supreme Court has outlined important contextual factors which may help to evaluate whether, from the perspective of the reasonable person in the shoes of the claimant, the legislative imposition of differential treatment has the effect of demeaning his human dignity. The Trial Judge was correct in holding that the citizenship preference violates subsection 15(1) of the Charter. This legislative distinction denies non-citizens employment on the basis of non-citizenship alone. There are four reasons why this legislation demeans the human dignity of non-citizens such as the claimants. First, one of the principal ways in which Canada has historically discriminated against non-citizens and immigrants is by denying them employment, particularly within the public service. In enacting paragraph 16(4)(*c*) of the PSEA, Parliament has exacerbated the historic, present and pre-existing disadvantages borne by non-citizens in our society. Second, denying people the chance to work is far more serious than refusing them some monetary benefit or procedural right. When the government acts to deny employment to an enumerated or analogous group, the human dignity and self-worth of the group are always impugned. In the context of this case, the impact of the impugned legislation on the appellants was severe and localized. Third, it is questionable to what extent the government may "enhance" citizenship by derogating from the rights of non-citizens. The concept of citizenship cannot be enhanced when it is identified by stripping away the rights of non-citizens. To use citizenship as a tool for exclusion denies the dignity of those who are excluded and rebukes that which is uniquely Canadian. Fourth, the impugned provision is a blanket provision which makes no reference to the needs and capacities of the targeted group (non-citizens). It denies the opportunity to compete for employment to those who are already in a disadvantaged position when seeking employment. Further, the legislation does not take into account the needs or circumstances of non-citizens. Allowing people to stay permanently in our country while excluding them from jobs which they are qualified to perform on the basis of citizenship alone is a discriminatory practice. This legislation violates the human dignity of non-citizens by denying them the opportunity to compete in a free and fair labour market.

To determine that paragraph 16(4)(*c*) of the Act is saved by section 1 of the Charter, it must be established that the objective which the limitation is designed to promote is "of sufficient importance to warrant overriding a constitutionally protected right or freedom". At a minimum, an objective must be "pressing and substantial in a free and democratic society" to qualify as sufficiently important. Only those infringements which are reasonable and demonstrably justified will be permitted. The Trial Judge ignored evidence before him and therefore committed a palpable and overriding error in not finding that the impugned legislation was enacted to address concerns of commitment and loyalty which arise when non-citizens are hired to serve the Canadian public as well as to enhance citizenship and encourage naturalization. There was ample evidence of an additional purpose underlying the citizenship preference, that is concerns of loyalty and commitment. The objectives of enhancing Canadian citizenship and encouraging naturalization are sufficiently important to warrant the compromise of equality between citizens and non-citizens. Legislation will be rationally connected to its intended objective if it is designed to meet its objective, is not arbitrary and is based on assumptions which, logically applied, further the objective. In this case, it was logical to infer that giving citizens preferential treatment in public service employment will further the substantial objectives of enhancing citizenship and encouraging people to naturalize and that the objectives of the impugned legislation are rationally connected to Parliament's goals. On the other hand, the Crown has not shown evidence that Parliament, in response to a problem or in furtherance of a pressing and substantial objective, has passed legislation which is carefully tailored to minimize impairment of a Charter right, or has turned its mind to alternatives other than the complete repeal of the citizenship preference. The Trial Judge was wrong in holding that the infringement of the equality guarantee was not serious. The effects of the provision are disproportionate to its objectives because one of these effects is to undermine the merit principle underlying the statute as a whole. If Parliament wishes to encourage non-discriminatory, merit-based hiring, it seems disproportionate to bar non-citizens, who may be the most meritorious candidates, from competing in virtually all open competitions. The citizenship preference violates subsection 15(1) of the Charter and cannot be saved by section 1.

statutes and regulations judicially considered

Act of Settlement (The), 1700 (U.K.), 12 & 13 Will. III, c. 2, s. 3.

An Act to amend the Naturalization Act, S.C. 1931, c. 39, s. 4.

Aliens' Employment Act, 1955 (U.K.), 4 Eliz. 2, c. 18, s. 1.

Aliens Restriction (Amendment) Act, 1919 (U.K.), 9 & 10 Geo. 5, c. 92, s. 6.

Bank of Canada Act, R.S.C., 1985, c. B-2, s. 10(4).

Bill C-63, *An Act respecting Canadian Citizenship*, 1st Sess., 36th Parl., 1998 (First reading December 7, 1998).

British Nationality Act 1981 (U.K.), 1981, c. 61.

Broadcasting Act, S.C. 1991, c. 11, ss. 36, 38.

Canada Deposit Insurance Corporation Act, R.S.C., 1985, c. C-3, s. 6.

Canada Elections Act, R.S.C., 1985, c. E-2, s. 50.

Canada Labour Code, R.S.C., 1985, c. L-2, s. 9.

Canada Mortgage and Housing Corporation Act, R.S.C., 1985, c. C-7, s. 8.

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

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B,

Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 3, 6(1), 15, 23, 24.

Canadian Citizenship Act (The), S.C. 1946, c. 15.

Canadian Payments Association Act, R.S.C., 1985, c. C-21, s. 14.

Canadian Radio-television and Telecommunications Commission Act, R.S.C., 1985, c. C-22, s. 5(1).

Citizenship Act, R.S.C., 1985, c. C-29, ss. 6, 24, Sch.

Civil Service Act, R.S.C. 1927, c. 22, s. 33(1) (as am. by S.C. 1932, c. 40, s. 6).

Civil Service Act, S.C. 1960-61, c. 57, ss. 38(3), 40(1).

Civil Service Act, 1918 (The), S.C. 1918, c. 12, ss. 38, 41(1).

Civil Service Amendment Act, 1908 (The), S.C. 1908, c. 15, s. 14.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 23(2), 31(2), 91(25).

Criminal Code, R.S.C., 1985, c. C-46, ss. 7(3.1) (as enacted by R.S.C., 1985 (1st Supp.), c. 27, s. 4), 46, 279.1 (as enacted *idem*, s. 40; S.C. 1995, c. 39, s. 148), 290(1)(*b*).

Immigration Act, R.S.C., 1985, c. I-2, s. 2.

International Centre for Human Rights and Democratic Development Act, R.S.C., 1985 (4th Supp.), c. 54, s.13(1).

International Development Research Centre Act, R.S.C., 1985, c. I-19, ss. 3, 10, 11.

International Covenant on Civil and Political Rights, December 19, 1966, [1976] Can. T.S. No. 47, Art. 25.

Juries Act, R.S.N.S. 1989, c. 242, s. 4(a).

Juries Act, R.S.O. 1990, c. J.3, s. 2(b).

Jurors Act, R.S.Q., c. J-2, s. 3(a).

Jury Act, R.S.B.C. 1996, c. 242, s. 3(1)(a).

Jury Act, R.S.M. 1987, c. J30, s. 3.

Jury Act, R.S.N.B. 1973, c. J-3.1, s. 2.

Jury Act, R.S.N.W.T. 1988, c. J-2, s. 4(b).

Jury Act, R.S.P.E.I. 1988, c. J-5, s. 4.

Jury Act, R.S.Y. 1986, c. 97, s. 4(b).

Jury Act, S.A. 1982, c. J-2.1, s. 3(b).

Jury Act, S.S. 1980-81, c. J-4.1, s. 3.

Jury Act, 1991, S.N. 1991, c. 16, s. 4.

Museums Act, S.C. 1990, c. 3, s. 18.

National War Services Regulations, 1940 (Recruits), s. 4 (1)(*i*).

Naturalization Act, Canada, 1881 (The), S.C. 1881, c. 13, s. 10.

Official Secrets Act, R.S.C., 1985, c. O-5, s. 13.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

Public Service Act, S.B.C. 1985, c. 15, s. 12.

Public Service Act 1922-1973 (Aust.), ss. 34, 82(1A).

Public Service Employment Act, S.C. 1966-67, c. 71.

Public Service Employment Act, R.S.C., 1985, c. P-33, ss. 10 (as am. by S.C. 1992, c. 54, s. 10), 12(1) (as am. *idem*, s. 11), (3) (as am. *idem*), (4) (as am. *idem*), 16(1),(4)(*a*),(*b*) (as am. *idem*, s. 13), (*c*), 17(4)(*c*).

Public Service Legislation (Streamlining) Act 1986, No. 153, 1986 (Aust.), s. 25.

Public Service Reform Act 1984, No. 63, 1984 (Aust.), s. 26.

Public Service Staff Relations Act, R.S.C., 1985, c. P-35, ss. 2 "Public Service", 13(1), Sch. I.

Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, s. 9.1(2) (as enacted by R.S.C., 1985 (2nd Supp.), c. 8, s. 4).

Transfer of Offenders Act, R.S.C., 1985, c. T-15, s. 3.

Treaty establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11, Art. 48.

Universal Declaration of Human Rights, GA Res. 217 A (III), UN GAOR, December 10, 1948, Art. 21.

Young Offenders Act, R.S.C., 1985, c. Y-1.

cases judicially considered

applied:

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497; (1999), 170 D.L.R. (4th) 1; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; (1989), 56 D.L.R. (4th) 1; [1989] 2 W.W.R. 289; 34 B.C.L.R. (2d) 273; 25 C.C.E.L. 255; 10 C.H.R.R. D/5719; 36 C.R.R. 193; 91 N.R. 255; *The Queen v. Oakes*, [1986] 1 S.C.R. 103; (1986), 26 D.L.R. (4th) 200; 24 C.C.C. (3d) 321; 50 C.R. (3d) 1; 19 C.R.R. 308; 65 N.R. 87; 14 O.A.C. 335; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; (1995), 127 D.L.R. (4th) 1; 100 C.C.C. (3d) 449; 62 C.P.R. (3d) 417; 31 C.R.R. (2d) 189; 187 N.R. 1; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; (1998), 212 A.R. 237; 156 D.L.R. (4th) 385; 224 N.R. 1; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; (1997), 151 D.L.R. (4th) 385; 218 N.R. 241.

considered:

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; (1992), 90 D.L.R. (4th) 289; 2 Admin. L.R. (2d) 125; 72 C.C.C. (3d) 214; 8 C.R.R. (2d) 234; 16 Imm. L.R. (2d) 1; 135 N.R. 161; *Miron v. Trudel*, [1995] 2 S.C.R. 418; (1995), 124 D.L.R. (4th) 693; 29 C.R.R. (2d) 189; [1995] I.L.R. 1-3185; 10 M.V.R. (3d) 151; 181 N.R. 253; 81 O.A.C. 253; 13 R.F.L. (4th) 1; *Egan v. Canada*, [1995] 2 S.C.R. 513; (1995), 124 D.L.R. (4th) 609; 95 CLLC 210-025; 29 C.R.R. (2d) 79; 182 N.R. 161; 12 R.F.L. (4th) 201; *Winner v. S.M.T.*, [1951] S.C.R. 887; [1951] 4 D.L.R. 529; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 299; (1990), 67 D.L.R. (4th) 697; 42 Admin. L.R. 189; 10 Imm. L.R. (2d) 137; 107 N.R. 107 (C.A.); *Pearkes v. Canada* (1993), 72 F.T.R. 90 (F.C.T.D.); *Austin v. British Columbia (Ministry of Municipal Affairs, Recreation & Culture)* (1996), 66 D.L.R. (4th) 33, 42 B.C.L.R. (2d) 288; 47 C.R.R. 264 (S.C.); *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145; (1984), 55 A.R. 291; 11 D.L.R. (4th) 641; [1984] 6 W.W.R. 577; 33 Alta. L.R. (2d) 193; 27 B.L.R. 297; 14 C.C.C. (3d) 97; 2 C.P.R. (3d) 1; 41 C.R. (3d) 97; 9 C.R.R. 355; 84 DTC 6467; 55 N.R. 241; *R. v. Big M Drug Mart Ltd. et al.*, [1985] 1 S.C.R. 295; (1985), 60 A.R. 161; 18 D.L.R. (4th) 321; [1985] 3 W.W.R. 481; 37 Alta. L.R. (2d) 97; 18 C.C.C. (3d) 385; 85 CLLC

14,023; 13 C.R.R. 64; 58 N.R. 81; *Larbi-Odam and Others v. Member of the Executive Council for Education*, CCT 2-97 (South Africa Const'l Court); *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; (1998), 38 O.R. (3d) 735; 159 D.L.R. (4th) 385; 226 N.R. 1; 109 O.A.C. 201; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; (1991), 3 O.R. (3d) 511; 81 D.L.R. (4th) 545; 91 CLLC 14,029; 4 C.R.R. (2d) 193; 126 N.R. 161; 48 O.A.C. 241.

referred to:

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APPEALS from a Trial Division decision ([1995] 2 F.C. 623; (1995), 125 D.L.R. (4th) 80; 95 F.T.R. 1) dismissing actions for declaratory relief and damages on the ground that, while paragraph 16(4)(*c*) of the *Public Service Employment Act* infringes section 15 of the Charter, it constitutes a reasonable limit and is saved by section 1 of the Charter. Appeals dismissed.

appearances:

Andrew J. Raven and *David Yazbeck* for appellants.

Edward Sojonky, Q.C., and *Yvonne Milosevic* for respondents.

solicitors of record:

Raven, Allen, Cameron & Ballantyne, Ottawa, for appellants.

Deputy Attorney General of Canada for respondents.

The following are the reasons for judgment rendered in English by

[1]Marceau J.A.: No provision of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] has given rise to more detailed analyses and thoughtful commentaries in the case law and the legal literature than section 15. And yet the basic meaning, purpose and scope of the equality principle embodied in that section has remained a constant subject of controversy. While this decision was under reserve, the Supreme Court, on March 25th, released its decision in the case of *Law v. Canada (Minister of Employment and Immigration)*.[1] The parties were accordingly given an opportunity to file written representations with respect to the relevance of that judgment to the matter at issue here. Such occurrence explains the long delay between the hearing of this case and the date of judgment.

[2]The matter arises from similar complaints of three plaintiffs in two different actions. All three plaintiffs were, at relevant times, residents of Canada, having been admitted a few years earlier as landed immigrants, but they were not citizens of Canada. Well educated women, they had all obtained employment with the federal public service but they presented evidence that they had been denied "referral to open competition" for certain positions for which they had applied on the grounds of paragraph 16(4)(*c*) of the *Public Service Employment Act* [R.S.C., 1985, c. P-33] (PSEA) which, in its pertinent parts, reads:

16. . . .

(4) Where, in the case of an open competition, the Commission is of the opinion that there are sufficient

qualified applicants who are

. . .

(*c*) persons who are Canadian citizens who do not come within paragraph (*a*) or (*b*),

to enable the Commission to establish an eligibility list in accordance with this Act, the Commission may confine its selection of qualified candidates under subsection (1) to the applicants who come within paragraph (*a*), paragraphs (*a*) and (*b*) or paragraphs (*a*), (*b*) and (*c*).

[3]All three plaintiffs are citizens of European countries and, at least two of them, who are citizens of Austria and the Netherlands"countries which do not permit the holding of dual citizenship"in their testimony conceded that they refused to naturalize to Canada in part because of the benefits concomitant with their original citizenships, one of which was preferential employment within the European Union countries, and within the public service of their native countries. Their contention, nevertheless, was that the Canadian preferential treatment reserved for citizens offended the equality principle embodied in section 15 of the Charter and that the legislative provision could not be validated under section 1. They sought a declaration to that effect and a consequential remedy in damages pursuant to section 24 of the Charter.

[4]It took several days of trial: first, to establish the facts of the case, especially the circumstances of the individual complaints as well as the history and operation of the citizenship preference in Canadian federal legislation; and then to hear the opinions of two expert witnesses on the concept of citizenship and the role it has in the world today. The learned Trial Judge, in lengthy but clear reasons [[1995] 2. F.C. 623 (T.D.)], after reviewing all of that evidence along with the comments of the Supreme Court in *Andrews v. Law Society of British Columbia*,[2] apparently had no difficulty in finding that the citizenship preference created by subsection 16(4) of the PSEA violated subsection 15(1) of the Charter. He held, at pages 647-648 of his reasons:

In *Andrews*, *supra*, at page 183, McIntyre J. stated in very clear terms that non-citizens, lawfully permanent residents of Canada, are a good example of "discrete and insular minority" who come within the protection of subsection 15(1). There is also little doubt that on the facts of this case all three plaintiffs were in one way or another disadvantaged or burdened by the citizenship preference. Paragraph (16)(4)(*c*) does not have to be an absolute bar to disadvantage or burden permanent residents. It nevertheless operates as a disadvantage for a minimum of about four years (3 years waiting period plus a 1 year administrative delay) before citizenship is obtained. The application of paragraph 16(4)(*c*) virtually precludes referral to open competitions whether the permanent resident is in or outside the public service. Clearly, the difference in treatment is closely related to the personal characteristic of the person or group of persons, i.e. citizenship. It is only on account of the plaintiffs lack of citizenship that the disadvantages or burdens have been imposed. The distinction, therefore, in the Court's view, is unquestionably based on this personal characteristic and is a characteristic covered by subsection 15(1) of the Charter. Accordingly, it is the Court's view that paragraph 16(4)(*c*) of the PSEA infringes the right to equality guaranteed in subsection 15(1) of the Charter.

[5]The real difficulty for the learned Trial Judge was to decide whether the infringement could be excused under section 1 within the confines established by the *Oakes* test.[3] Recognizing that the determination of the objective of the legislation was crucial to properly apply the test, he reasoned that the legislative objective behind the citizenship preference was twofold: (a) to enhance the value of citizenship and (b) to encourage naturalization. His reasoning to that effect was based principally on the history of the provision which,

although formally enacted relatively recently,[4] was in fact a mere continuation of long-standing residency requirements that have been in effect since 1908,[5] and also on speeches made in the House of Commons by members of the Government at various occasions. After having determined legislative intent, the Trial Judge found that the restrictive provision was meant to realize a pressing and substantial goal; that it could reasonably help achieve that goal; and that it imposed in the circumstance an impairment so minimal that an acceptable proportionality between the deleterious and salutary effects of the measure, was maintained. The requirements of the *Oakes* test being therefore met, the plaintiffs could not maintain that their constitutional rights had been violated, and thus their action could not succeed.

[6]Before this Court, the appellants first dispute the conclusion of the Trial Judge as to legislative intent. They argue that the true objective of the legislation was to assuage security and loyalty concerns which attend the employment of non-citizens in the national civil service. They continue, however, by alleging that even if the objective was correctly determined by the Trial Judge, it was not one that was pressing and substantial, that there was no evidence that such an objective could be achieved by the citizenship preference and finally that, in any event, the important impairment caused to the people subject to it was much greater than the benefit that could flow from it.

[7]The respondents defend vigorously the conclusion of the Trial Judge as to the objective of the legislation and they obviously support his reasoning as to the application of the *Oakes* test. Their main argument, however, is that section 15 was not breached if the teachings of the Supreme Court in the decisions following *Andrews* are respected.

[8]I have always felt an intellectual malaise when confronted with a case involving section 15 of the Charter and admit to having always had difficulty mastering the teachings of the Supreme Court. The decision in *Law* is, no doubt, bound to open a new chapter in the evolving area of equality law, but its real import, at this time, is not clear in my mind and my confusion has not been assuaged. As such, the views I arrived at finally in considering the present appeal remain somewhat untested, but I obviously have no choice other than to decide in accordance with them.

[9]Like the respondents, I too think with respect that the learned Judge erred in finding that the appellants' basic rights under section 15 of the Charter were breached by the impugned provision. My criticism, however, is even more basic. Not only do I think, as the respondents do, that the distinction made by the legislation does not give rise to the type of discrimination prohibited by section 15, it is my view that one cannot even speak of the possibility of a breach of the equality principle when comparing the privileges of citizenship to those accorded to immigrants. So I will first deal with the latter proposition before explaining as an alternative conclusion my adherence to the position of the respondents.

1. I do not see how the equality principle can be breached by the citizenship preference

[10]The rejection of the similarly situated concept by Mr. Justice McIntyre in *Andrews* to verify the existence of inequality between individuals or groups is understandable if the words used in the formulation of the test are taken in their plenary meaning. Indeed, at the limit, taking "similar" as "identical," the very basis on which the impugned distinction is established may be analysed as showing dissimilarity between the groups and therefore, from the outset, depriving the test of any meaning. It seems to me, however, that such rejection cannot be interpreted as denying that the two groups being compared on both sides of the equation must necessarily be seen at the outset as forming one large entity by virtue of the existence of a sufficiently significant common denominator. To verify the existence of discriminatory unequal treatment

between individuals or groups, the starting proposition must be one that attests undisputable sufficient similarity of relevant characteristics and situation between the individuals or the members of the two groups. Otherwise, the comparison would be flawed from the start and the demonstration could not even take off. The claimant must be able to say that the members of his or her group and the members of the group favourably treated were all equally deserving of the same treatment because they were all in the same situation with respect to the existence and exercise of the right involved or the entitlement to the benefit created, a situation which will then lead to the conclusion that the alleged basis for the introduction of the particular unequal treatment is, on first analysis at least, purely artificial. A sort of "common mantle," so to speak, must fit the two groups before allowing a conclusion that an inequality of treatment introduced afterwards is discrimination.[6]

[11]When considering the terms and conditions upon which immigrants are admitted to and allowed to stay in this country, the "common mantle" fitting them and the citizens, required to base a reasoning founded on the equality principle and leading to discrimination, cannot to my mind be identified. The status of immigrants is determined by Parliament under subsection 91(25) of the *British North America Act, 1867* [now *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]] and is a political prerogative derived from the sovereignty of the nation. An immigrant, on setting foot on Canadian soil, cannot pretend that he or she, on the basis of what or who he or she is, has an inherent right to participate in all Canadian legislative attributes and benefits on the same level as Canadian citizens. When one compares the immigrant and the citizen, the equality principle, beyond what pertains directly to their common condition as human beings, is not rational. It should be recalled that we are dealing with the Canadian (not the world) Charter within the Canadian Constitution which recognizes the concept of citizenship as lying at the very foundation of the national political community.[7] To try to apply equality rights between citizens and non-citizens with respect, I repeat, not to their common condition as human beings but to their relative status on Canadian soil appears to me to negate or abolish the concept of citizenship altogether.

[12]In reaching such a conclusion, am I not going here against the decision in *Andrews*? I don't think so. The terms and conditions upon which immigrants are admitted and allowed to live in Canada as determined by the competent authority, namely Parliament, was not involved in *Andrews*. In question there was a piece of provincial legislation. Provincial laws govern all the residents living within the boundaries of provincial jurisdictions and the people subject to provincial legislation are composed of citizens as well as landed immigrants. There is no limit attached to the status of being a landed immigrant, as determined by Parliament, that would affect the right to earn a living and practice a profession in any jurisdiction. When a provincial legislature bans landed immigrants from the practice of their profession, it imposes on a particular group within its community a restriction that would not normally exist and it prevents its members from exercising a right they could otherwise exercise. Section 15 is directly involved. The comments of the judges in *Andrews* that landed immigrants form a "discrete and insular minority," "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated," are quite appropriate. The equality principle between the various groups of residents of a province before the laws of that province that govern their activity must be given full impact. But again, what was in question there was not legislation which affected the status of all immigrants living on Canadian soil.

[13]I note the result was achieved in the United States where state laws affecting aliens are subject to judicial scrutiny under the equal protection clauses of the American Constitution, but a corresponding judicial scrutiny does not apply to Congressional laws. Mr. Justice Rehnquist (as he then was), in the

Hampton v. Mow Sun Wong decision,[8] is adamant in that respect, opening his reasons as follows:

At the outset it is important to recognize that the power of the federal courts is severely limited in the areas of immigration and regulation of aliens. As we reiterated recently in *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972):

> `"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.'" Quoting from *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547 (1895).

It is also clear that the exclusive power of Congress to prescribe the terms and conditions of entry includes the power to regulate aliens in various ways once they are here. *E.g.*, *Hines* v. *Davidowitz*. 312 U. S. 52, 69-70 (1941). Indeed the court, by holding that the regulations in question would presumptively have been valid if "expressly mandated by the Congress," *ante* , at 103, concedes the congressional power to exclude aliens from employment in the civil service altogether if it so desires or to limit their participation.[9]

[14]It seems to me somewhat artificial to reject any useful reference to the American jurisprudence by saying, as the learned Trial Judge says:[10]

It is clear that the application of U.S. constitutional equality law is problematic in the Canadian context. Federalism has a different impact on the enforcement of Charter rights in Canada than in the United States. In Canada, similar standards of constitutional doctrine apply to both federal and provincial legislation under the *Canadian Charter of Rights and Freedoms*, whereas in the U.S. with respect to alienage, the Supreme Court has applied different standards of review to federal and state legislation.

I suppose I can say, with respect, that the learned Trial Judge's explanation is hardly convincing.[11]

[15]Would my analysis mean that any qualification imposed by Parliament with respect to the status of the landed immigrant could not be criticised under section 15? It is my understanding that such qualification may offend fundamental rights and be attacked under other provisions of the Charter, but not on the sole basis of inequality with citizens. The determination of an alien's status in Canada is a purely political prerogative and thus an objectionable law is to be attacked within the political rather than the judicial arena. Again, I am talking about the status of landed immigrants generally, that is to say the basic qualifications imposed on all immigrants without differentiation. A law that in its purpose or in its effect would differentiate between immigrants would undoubtedly fall under section 15, but not a generally applicable one.

[16]In *Chiarelli v. Canada (Minister of Employment and Immigration)*,[12] Mr. Justice Sopinka quickly rejected any possible argument under section 15 against the provision that provides for deportation in addition to the regular penalty for a non-citizen found guilty of an indictable offence punishable by a minimum of five years of imprisonment. Referring to the provisions of the Constitution, he simply ended the discussion by stating adamantly [at page 736]: "There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens."

[17]What I think, therefore, basically is that the equality principle can have no application here and one cannot speak of discrimination as a result of the application of the citizenship preference.

2. If I am wrong and the equality principle applies, then I say that the citizenship preference does not give rise to the discrimination contemplated in section 15 of the Charter.

[18]There is no other way to verify such an assertion than to apply, as the respondents suggest, the teachings of the Supreme Court begun with *Andrews*[13] and further developed in many other much commented cases, such as *Miron*,[14] *Egan*,[15] *Eaton*,[16] *Benner*,[17] *Eldridge*,[18] and finally *Law*[19] which is presented as a synthesis of the applicable principles agreed upon by all the members of the Court. But before addressing those teachings, it is necessary to be better informed as to the real effects of the legislation and, more particularly, as to its objectives.

[19]Subsection 16(4) of the PSEA establishes a scheme of preferences applicable when positions are staffed by open competition. Preference is given first to war service pensioners (disabled veterans), then to able-bodied veterans and widows, and, thirdly, to Canadian citizens. The citizenship preference, like the veterans' preference, applies at two stages of an open competition: the candidate referral stage (paragraph 16(4)(*c*)) and the eligibility list stage (paragraph 17(4)(*c*)). At the referral stage, the application of the preference is discretionary; at the eligibility list stage, it is mandatory. In the case of the appellants, the respondent Public Service Commission (PSC) exercised its discretion under paragraph 16(4)(*c*) of the PSEA in accordance with policy guidelines in effect during the relevant period (1988-1990). The guidelines state that the citizenship preference does not exclude non-Canadians from competing in open competitions or from being accepted into candidate inventories. However, non-citizens will not be referred as candidates until the inventory of qualified Canadian candidates has been exhausted. As for the objectives of the legislation, in spite of the arguments of the appellants, I have no hesitation in accepting the findings of the learned Trial Judge to which I referred to above. It might be that the classification of objectives is a type of "legislative fact," and as suggested by La Forest J. in *RJR-MacDonald Inc. v. Canada (Attorney General)* ,[20] that with respect to a finding concerning a so-called "legislative fact," the deference due to a trial judge can be less stringent. But here, as I said, the finding is based on a detailed analysis of the evidence and I believe that the conclusion this analysis pointed to was properly identified by the Trial Judge. It is to be agreed upon, therefore, that the objectives of the citizen preference in the PSEA are twofold: (a) principally to enhance the meaning, value and importance of Canadian citizenship by according citizens preferential access to federal public service employment, and, as a result, (b) to provide an incentive to permanent residents to naturalize.

[20]These preliminary points regarding the objectives and effects of the legislation being, for me, settled, I should read again subsection 15(1) of the Charter:

15. (1) 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.

[21]It is clear from a mere reading of the provision that a claimant under subsection 15(1) of the Charter must establish: not only that, because of a distinction drawn by law between he or she and others, he or she has been denied "equal protection" or "equal benefit" of the law, but also that the denial constitutes discrimination on one of the grounds enumerated therein or an analogous ground in view of the use in the text of the phrase "in particular." There lies the real difficulty: how is this crucial question of when a legislatively drawn distinction will constitute the discrimination contemplated by the provision to be approached?

[22]Until *Law*, the members of the Supreme Court did not appear to be unanimous as to the proper way to tackle this difficulty. Some members were of the view that the focus should be put on relevance, noting that, to constitute a breach of subsection 15(1), it was not enough that a distinction be based on an enumerated or analogous ground since the same ground could be discriminatory in some cases but not in others depending on the context. A violation of subsection 15(1) would exist only if the distinguishing personal characteristic was not relevant to the legislative goal or functional values underlying the impugned law, provided obviously that the goal or values of that law were not themselves discriminatory. Other members preferred to leave the question of relevance and context to the exculpatory provision of section 1. They suggested that the verification of the discriminatory nature of a prejudicial distinction had to be done principally by the assertion that it was based on a stereotypical application of presumed group or personal characteristics.

[23]*Law*, as I understand it, did not dispute the validity of these two lines of reasoning. It accepted both, but reduced their role and significance, so to speak. They should not be taken as strict and rigid tests to be followed in conducting the equality analysis but as guidelines which will help in verifying whether the purpose of subsection 15(1), the safeguard of human dignity, has been infringed.

[24]I was in complete agreement with the respondents' position that, on either of the two approaches that were suggested by the Supreme Court's jurisprudence prior to *Law*, in view of the objectives of the legislation and its limited scope, the citizen-based distinction drawn by paragraph 16(4)(*c*) of the PSEA did not constitute discrimination within the meaning of the Charter provision.

[25]On the one hand, focussing on the relevance of the preference, one has to admit that the concept of citizenship which is put in effect is a concept imbedded in our Constitution, universally held within a democratic context to be of value to both the citizen and the state, and inherently distinctive based as it is on the idea that certain rights, privileges and obligations will be ascribed exclusively to citizens as attributes of their status. Exclusive or preferential access to Public Service employment is and has long been one of the privileges of citizenship not only domestically but almost universally. On the other hand, again keeping in mind the objective of the preference as defined by the Trial Judge, it makes no sense to speak of a "stereotypical application of presumed group or personal characteristics." The intent to enhance the value of citizenship does not denigrate the landed immigrant in a manner based upon a personal characteristic.

[26]Was the decision in *Law* susceptible of weakening my adherence to the view that the citizenship preference cannot be seen as discriminatory? On the contrary, it has confirmed me in my conviction. I was not sure that the directives of the Supreme Court were well understood and followed when the two so-called approaches were presented and applied as complete and exclusive to one another. It seemed to me that the first approach, on focussing essentially on relevancy, constituted a partial return on the similarly situated concept but applied in reverse starting with an analysis of the ground of distinction viewed in itself and then only looking at it in context. And the danger could be the one suggested by Mr. Justice McIntyre that the relevancy issue be subject only to a superficial view. As to the other approach, the appeal "to a stereotypical application of presumed personal characteristics" had the effect, in my view, of restricting unduly the scope of the guarantee. Why should we have a group; why should the group be insular and discrete and why should the group lack sufficient influence to ward off disadvantage? But the synthesis of *Law* where the previous approaches are seen as just that, approaches to analysis, in order to answer the essential question involved, namely whether the human dignity of the individual or group prejudicially treated is affected, eliminates completely my uneasiness. With the greatest respect for the contrary opinion, considering the extent of the citizenship preference and the full context of the claim, I simply cannot accept that it can be seen objectively as demeaning in any way the human dignity of the appellants or non-citizens generally.

[27]Whether or not I rely on my contention that the equality principle can have no application here, which indeed is my main reason, or that, if one may speak of its application, the distinction made is not discriminatory as human dignity is not affected, a subsidiary reason, I conclude that the learned Trial Judge was right, finally, in denying merit to the actions.

[28]I would therefore suggest that the appeals be dismissed. With respect to costs, this being an appeal, I see no reason to depart from the normal rule, but only one set of costs should be awarded.

The following are the reasons for judgment rendered in English by

Desjardins J.A.

I"Introduction

[29]Does the employment preference in favour of Canadian citizens created by paragraph 16(4)(*c*) of the *Public Service Employment Act*[21] (the Act) violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter) because the preference is not enjoyed by permanent residents?

[30]The three appellants, Janine Bailey, Elisabeth Lavoie and Jeanne To Thahn Hien, contend there is such a violation.

[31]Janine Bailey is a Dutch citizen who became a permanent resident of Canada in November 1986. She was eligible to become a Canadian citizen in November 1989. She decided not to become a citizen because she would have to relinquish her Dutch citizenship. She was unwilling to do so because she has emotional ties with the Netherlands and was concerned she might need to return there to care for her aging parents. Elisabeth Lavoie is an Austrian citizen who became a permanent resident in June of 1988. She became eligible to obtain Canadian citizenship in June of 1991 but did not do so because she would automatically have lost her Austrian citizenship, thereby limiting her opportunities for future employment in the public service of Austria. Jeanne To Thanh Hien is a citizen of France. She became a permanent resident of Canada in 1987. She encountered difficulties in obtaining employment in the Public Service, because of her status as a permanent resident until she acquired Canadian citizenship in 1991. Since neither French nor Canadian law prohibit dual citizenship, she was able to retain her French citizenship. All three appellants are citizens of the European Union. As such, they enjoy the privileges and benefits that flow from their national and European citizenship status, including the right to work in any member state of the European Union.

[32]Bailey has a Dutch law degree. Lavoie is an executive secretary and office administrator. To Thanh Hien is a French language editor. Bailey commenced her employment in the public service with the Canada Employment and Immigration Commission in June of 1987 when she was selected for a short-term appointment. Between then and 1992, she applied for a number of positions as an immigration counsellor, but she experienced difficulty obtaining these positions because she was virtually unable to compete in open competitions due to her citizenship. Similarly, after working for the Department of Supply and Services for twenty-two weeks under a series of short-term contracts, Lavoie applied for a permanent position in that department. Her application was refused by the Public Service Commission because a qualified Canadian citizen was available. The appellant To Thanh Hien had similar experiences. She commenced her employment when she secured a part-time position as a French language editor for the House of Commons. Later, she moved through a series of short-term appointments, but was unable to secure positions to suit her qualifications because, at the time, she was not a Canadian citizen. All three sought declaratory relief and damages on constitutional grounds as a result of the application of paragraph 16(4)(*c*) of the Act.

[33]The citizenship preference, like the veterans' preference, can apply at two stages of a competition for a position in the public service: the candidate referral stage (paragraph 16(4)(*c*)) and the eligibility stage (paragraph 17(4)(*c*)). At the referral stage, the application of the preference is discretionary; at the eligibility stage, it is mandatory. Since the appellants were affected only at the referral stage, the constitutionality of paragraph 17(4)(*c*) is not at issue. Subsection 16(1) and paragraph 16(4)(*c*) read thus [paragraph 16(4)(*b*) (as am. by S.C. 1992, c. 54, s. 13)]:

16. (1) The Commission shall examine and consider all applications received within the time prescribed by it for the receipt of applications and, after considering such further material and conducting such examinations, tests, interviews and investigations as it considers necessary or desirable, shall select the candidates who are qualified for the position or positions in relation to which the competition is conducted.

. . .

(4) Where, in the case of an open competition, the Commission is of the opinion that there are sufficient qualified applicants who are

(*a*) persons in receipt of a pension by reason of war service as defined in Schedule II,

(*b*) persons who do not come within paragraph (*a*) and who are veterans as defined in Schedule II or widows or widowers of veterans as defined in Schedule II, or

(*c*) persons who are Canadian citizens who do not come within paragraph (*a*) or (*b*),

to enable the Commission to establish an eligibility list in accordance with this Act, the Commission may confine its selection of qualified candidates under subsection (1) to the applicants who come within paragraph (*a*), paragraphs (*a)* and (*b*) or paragraphs (*a*), (*b*) and (*c*). [Emphasis added.]

[34]The respondent exercised its discretion under paragraph 16(4)(*c*) of the Act in accordance with policy guidelines in effect during the relevant period (1988-1990). The guidelines state that the citizenship preference does not exclude non-Canadians from competing in open competitions or from being accepted into candidate inventories. Open competitions are those in which both persons in and outside the public service are eligible to compete. However, non-citizens will not be referred as candidates until the inventory of qualified Canadian candidates has been exhausted. In accordance with this policy, the usual practice of the Public Service is to exclude non-citizens from referral to open competitions where it is of the opinion that there are sufficient qualified Canadian candidates for referral. Where there are insufficient qualified candidates for referral, or where there are no qualified citizens, the Public Service will refer qualified non-Canadian candidates either alone or together with Canadian candidates as it did in the case of Bailey and To Thanh Hien. Successful non-Canadian candidates who are appointed to the Public Service are immediately eligible for appointment to other positions through closed competition or without competition without regard to their citizenship status. However, they remain subject to the citizenship preference when applying for positions which are to be filled by way of open competition. While no statistics are kept, it is clear that the number of non-Canadians referred to open competition is small.[22]

II"The judgment under appeal[23]

[35]The Trial Judge held that paragraph 16(4)(*c*) of the Act did not need to be an absolute bar to employment in order to disadvantage or burden permanent residents. It operated as a disadvantage for a

minimum of about four years because there is a three-year waiting period plus a one-year administrative delay before citizenship can be obtained. The appellants, as a result, had been discriminated on the basis of a personal characteristic, namely citizenship. He then proceeded to determine, under section 1 of the Charter, whether paragraph 16(4)(*c*) of the Act was justified as a reasonable limit to the guaranty of equality. He found that the purpose and objective of the citizenship preference in the Act was twofold: (a) to enhance the meaning, value and importance of citizenship, and (b) to provide an incentive for permanent residents to become citizens. He said:[24]

What is clear from my review of the evidence, particularly in the comparative context with European nations including Germany, France, and the United Kingdom, is that in an immigration country like Canada citizenship has always been relatively easy to obtain. The evidence of Professors Schuck and Carens amply demonstrates that citizenship is an inherently political and social status which clearly is matter of important public policy. It is also a matter of growing debate, particularly in a global economy. It is more than simply a question of the right to vote or the right to carry a Canadian passport, or to be appointed or elected to certain positions. It is more a question of defining who we are both individually and as a nation. A free and democratic society like Canada is invariably uncomfortable with highlighting differences among its people. However, no citizenship law is capable of escaping the drawing of some distinctions between people within a nation-state, and while it will never resolve the fundamental social or political problems within a country, its necessity is unquestioned. [Emphasis added.]

[36]Pursuing his analysis under section 1 of the Charter, he found that the twofold objective of the impugned legislation constituted a sufficiently pressing and substantial concern to warrant a restriction on the equality rights of the appellants under section 15 of the Charter. He noted that with the exception of Sweden and New Zealand, virtually all liberal democratic societies imposed citizenship based restrictions in one form or another on access to employment in their national public services.[25] He concluded that the means chosen to achieve that objective satisfied the *Oakes* test.[26] The validity of the legislation was thereby upheld.

III"Analysis

A"Permanent residence and citizenship

[37]Under the *Immigration Act*,[27] a permanent resident means a person who has been granted landing. A Canadian citizen on the other hand means a person who is a citizen within the meaning of the *Citizenship Act*.[28] The status of "Canadian citizen" was created by *The Canadian Citizenship Act* in 1947 [S.C. 1946, c. 15]. Prior to 1947, Canadian nationals were merely British subjects resident in Canada. In *Winner v. S.M.T.*,[29] Rand J. referred to both subsection 91(25) of the *Constitution Act*, *1867*, and the residual powers as the foundation for Parliament's constitutional powers with regard to citizenship. He said:[30]

The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status. [Emphasis added.]

[38]The *Citizenship Act* does not identify these rights and duties, the correlatives of allegiance and

protection, which are inherent to the status of citizenship. It recognizes, however, their existence both in section 6 and in the Schedule to section 24 of the Act. What the Schedule to section 24 makes clear is that a permanent resident who choses not to become a Canadian citizen swears no allegiance and assumes none of the duties of a Canadian citizen.

[39]By contrast, a person who wishes to become a Canadian citizen must take the oath or affirmation of citizenship which is the following:[31]

I swear (*or* affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen. [Underlining added.]

[40]The rights and duties of the Canadian citizen, the correlatives of allegiance and protection, are not to be found in any comprehensive legislation. One must look to a number of pieces of legislation to identify them. The following is a sampling of the rights and duties created by federal statutes.

1. The rights

[41]The Charter itself embodies a number of important constitutional rights which only citizens are entitled to. Section 3 specifies that only citizens have the right to "vote in an election of members of the House of Commons or a legislative assembly and to be qualified for membership therein". This fundamental distinction is reflected in section 50 of the *Canada Elections Act* ,[32] which specifies that one must be a Canadian citizen in order to qualify as an elector. Section 6 of the Charter grants to Canadian citizens, only, the right to enter, remain in, and leave Canada. However, the same section gives to both citizens and permanent residents the right to move between provinces and to gain a livelihood in any province. Only citizens have the right to minority language education for their children under section 23 of the Charter. Only those who are "Subjects of the Queen" qualify for the office of senator under sections 23 and 31 of the *Constitution Act, 1867.*

[42]Many of the pieces of legislation which create federal public bodies require that the directors and principal officers of those organizations be Canadian citizens.[33] Similar restrictions apply to numerous senior positions in some federal organizations.[34] Further, in order to qualify for many of these positions the law requires a citizen to be "ordinarily resident in Canada".[35]

[43]This preference for citizens is not universal. Some federal organizations can be headed by permanent residents. The International Centre for Human Rights and Democratic Development is only one example. Its chairman, vice-chairman, president and directors can all be permanent residents.[36]

[44]Other federal organizations employ a hybrid strategy which allows some senior officers to be non-citizens. For example, the International Development Research Centre is headed by a chairman, a president and up to 19 governors. Of these, only the chairman, the president and nine governors must be Canadian citizens.[37] Further, the voting rules of the organization stipulate that a quorum can only be achieved when the majority of governors present are citizens.[38] The *Young Offenders Act*[39] permits the attorneys general of the provinces to establish "youth justice committees" to assist in the implementation of programs for young offenders. Positions on these committees are open to citizens only.

[45]Law enforcement legislation also establishes preferences. Subsection 9.1(2) of the *Royal Canadian Mounted Police Act*[40] specifies that persons who are not citizens can be appointed as members of the police force (which includes police officers) where there are no Canadian citizens who meet the requirements for the position in question.

2. The protections

[46]Not only are citizens accorded special privileges, they are also provided greater protection than permanent residents specifically on account of their closer ties with the state. The *Transfer of Offenders Act*[41] provides that Canadian citizens who are convicted of offences in foreign countries and are confined in those countries may request that they be transferred to serve the remainder of their sentences in Canada.[42] There is no similar privilege for permanent residents in the same situation. Also, it is an offence under Canadian law for a person to take a Canadian citizen hostage even though the hostage taking occurs abroad.[43] This is not true if the person taken hostage is a permanent resident.

3. The duties

[47]The criminal law applies equally to citizens and permanent residents inside Canada. However, when these two groups are outside of Canada they become subject to different obligations and the *Criminal Code*[44] provides for a number of offences that can be committed abroad only by Canadian citizens. Section 46 specifies that only citizens (and not permanent residents) will commit treason if they perform certain treasonous acts while outside of Canada. Similarly, only a Canadian citizen commits an offence if he or she enters into a bigamous marriage outside the country.[45] The *Official Secrets Act*[46] makes it an offence under Canadian law for a citizen, or a person owing allegiance to the Crown, to disclose secret information while outside the country.[47] The same measure does not apply to permanent residents.

[48]Allegiance, historically, has been linked with the duty to bear arms. It is interesting in this regard to note that under the *National War Services Regulations, 1940 (Recruits)*[48] those who were called out for military training were "every male British Subject who [was] or [had] been at any time subsequent to the first day of September, 1939, ordinarily resident of Canada."

[49]Although I have not canvassed other provincial legislation creating duties for citizens, it is known that only citizens are called upon to serve as jurors in the provinces.[49] In the North West Territories, both citizens and permanent residents must sit on juries.[50] In the Yukon, this duty is required of both citizens and British subjects.[51]

4. Conclusion

[50]From this, I conclude that citizenship, as demonstrated by the oath or affirmation, requires attachment to Canadian laws and institutions and a commitment to the duties that ensue as a Canadian citizen. A number of statutes, designed to foster specific links between the state and its nationals, illustrate the rights, privileges and duties of Canadian citizens.

B"The citizenship preference in the *Public Service Employment Act*

[51]The impugned legislation must first be characterized.

[52]In his analysis of the objectives of paragraph 16(4)(*c*) of the Act and his quest to determine whether that measure relates to a concern sufficiently pressing and substantial in a free and democratic society to override a protected right, the Trial Judge concluded that Parliament's intent, in adopting this legislation, was to value Canadian citizenship and to encourage those who are not Canadian citizens to naturalize. There was ample evidence on which he could base his conclusion.

[53]In 1985, for instance, the year section 15 of the Charter came into force, the Minister of Justice issued a paper on *Equality Issues in Federal Law: A Discussion Paper*[52]. The Minister noted that few would question the need to create distinctions between citizens, permanent residents and aliens. The Minister noted a range of federal and provincial statutes which use citizenship as a condition of eligibility for some status or benefit. He stated generally:[53]

The right to vote and to hold public office are reasonable concomitants of citizenship. It may also be reasonable to require the allegiance witnessed by citizenship in certain sensitive positions in law enforcement or in the Public Service. A degree of latitude may also be appropriate in requiring citizenship simply to encourage residents of Canada to acquire citizenship and participate more fully in our political process.

[54]There was then a discussion on public service employment. He said:[54]

The rationale [for the citizenship preference] is threefold. First, is the argument that one of the benefits of Canadian citizenship is the right to seek and receive employment in the federal Public Service. While this preference is subject to certain obligations, it remains one of the advantages of Canadian citizenship.

Secondly, employees must recognize the authority of and faithfully serve the employer. In the Public Service, the Crown is the employer. Citizenship implies loyalty to the Crown, but non-Canadians, even if permanently resident in this country, owe loyalty to another state.

This rationale, however, raises questions because non-citizens can be granted Public Service positions. This preference for citizens does not, therefore, imply a want of recognition of service, loyalty or reliability on the part of the non-citizen. The citizenship requirement is merely a preference, although its effect is that very few positions in the federal Public Service are held by non-citizens. The same question applies to the third rationale which is a concern for national security of non-Canadians are employed.

The fundamental issue here is whether offering citizens a preference for positions in the federal Public Service should be considered an acceptable privilege that goes along with the acquisition of citizenship. Since citizenship must have some privileges, the concern is to delineate what privileges are justified.

[55]The sub-committee on Equality Rights in turn expressed concern about what it felt was a form of discrimination with regard to paragraph 16(4)(*c*) of the Act. It recommended that the provision be eliminated.[55]

[56]The Response of the Minister of Justice was the following:[56]

The Government does not agree with this recommendation. It takes the view that the current preference granted to citizens is a reasonable and justified limitation, permitted by the *Charter* and the *International Covenant on Civil and Political Rights*.

This view is based on considerations of the nature of citizenship and its relation to the role of the Public Service. In their work, public servants serve and represent the Canadian community by guaranteeing its security, ensuring its safety, advancing its physical and economic welfare and representing its interests, in Canada and abroad.

Citizenship carries with it both privileges and responsibilities. The privileges include the right to vote; one responsibility is to promote the security and welfare of the country and protect the country's way of life. The Government is of the opinion that one of the legitimate benefits of Canadian citizenship should be the right to seek and receive employment in the federal public service on a preferential basis. This right is subject to certain obligations, such as the limitations on political activity, but it remains one of the advantages of citizenship and a recognition of the value placed on citizenship by Canadian society.

It is to be noted that this view seems to prevail in other Western democracies, some of which (e.g., United States, France, Great Britain, Australia) go farther than Canada in making citizenship a requirement for entry to the civil service, rather than a preference.

Under the current system, non-Canadians can be employed in public service jobs for which no qualified Canadian citizens are found.

[57]The Report of the Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs was debated in the House of Commons in March 1986. A motion that the Report be concurred with by the House failed to win the necessary support. On the issue of the citizenship preference, the Honourable Pierre H. Cadieux (Minister of Labour) stated:[57]

The Government has clearly indicated that it felt that the preference now granted to Canadian citizens is a reasonable and justified restriction under the Charter and the International Agreement on Civil and Political Rights.

The main purpose of this step is to recognize that all of us, you and I and every other Canadian, cherish and appreciate our citizenship which involves some duties such as the promotion of welfare within the community. It also includes a number of rights, including the right to vote, Mr. Speaker. And one of the legitimate benefits of Canadian citizenship must be the right of priority access to jobs within the federal Civil Service. It is only reasonable that we should thus recognize the value and particular importance of Canadian citizenship.

If permanent residents wish to acquire the same rights and duties, they have the possibility to do so by applying for Canadian citizenship. After all, we only ask them to wait three years before they can say they are Canadians and proud of it. Any Canadian citizen has the right to claim certain benefits resulting from Canadian citizenship due to the status which Canadian citizenship confers to citizens. Moreover, Canada is not the only country which feels that its Civil Service should be made up entirely of its own citizens. As a matter of fact, countries such as the United States, France, Great Britain and Australia go even further than Canada, making citizenship a *sine qua non* condition for joining their Civil Services and not merely a criteria for preference as in this country. I should emphasize that, through an international agreement, whoever serves in the foreign service or diplomatic corps of a country must be a citizen of that country.

[58]*Prima facie*, considering the findings of the Trial Judge, the preference of employment in the Public Service appears to be just another feature of the rights and privileges of Canadian citizens meant to

reinforce the links between citizens and state.

[59]The appellants submit, however, that the case of *Andrews*, reaffirmed recently by a unanimous judgment of the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*,[58] supports the findings of the Trial Judge that the appellants were subject to discrimination contrary to section 15 of the Charter.

[60]*Andrews* involved the constitutional validity of a provincial legislation while, in the case at bar, the impugned legislation is federal. It opens the possibility that the federal legislation may not discriminate but constitutes a valid distinction in relation to citizenship.

[61]*Law*, on the other hand, deals with the denial of survivor's benefits under the *Canada Pension Plan* [R.S.C., 1985, c. C-8] for those, such as Nancy Law, who are without dependent children or disability and are under the age of thirty-five. The case is a brilliant synthesis of guidelines meant to assist courts of law in identifying the relevant contextual factors in a particular discrimination claim. Iacobucci J., for the Court, states at paragraph 51 [page 529] that the key purpose of subsection 15(1) of the Charter:

. . . is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. [Emphasis added.]

[62]"Human dignity" was thus defined in paragraph 53 [page 530] of his reasons for judgment:

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[63]In the final analysis, the provision of the *Canada Pension Plan* was held non discriminatory. It simply reflected the fact that younger people, such as Nancy Law, were more able to overcome long-term need than others covered by the legislation. The challenged provision did not demean, neither in purpose nor effect, the dignity of those it excluded.[59]

[64]In the case at bar, the impugned legislation puts, in a serious disadvantageous position, members of a discrete and insular minority and affects them in their search for employment. If it is discriminatory, an analysis under section 1 of the Charter is mandatory.

[65]If the impugned legislation is related to citizenship, an analysis under section 1 of the Charter is also required. Let me explain this latter proposition.

[66]The legal status of aliens including permanent residents has been, historically, the subject of much abuse.[60] Great care must, therefore, be taken before the validity of such a provision is pronounced. One is reminded of La Forest J.'s statement in *Andrews* where a British Columbia statute, which required citizenship as a condition for admission to the Bar, was found to be discriminatory. La Forest J. laid down the following principles of analysis:[61]

There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives. I am sensitive to the fact that citizenship is a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity. Nonetheless, it is, in general, irrelevant to the legitimate work of government in all but a limited number of areas. By and large, the use in legislation of citizenship as a basis for distinguishing between persons, here for the purpose of conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society that are embodied in s. 15. Our nation has throughout its history drawn strength from the flow of people to our shores. Decisions unfairly premised on citizenship would be likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned and. . . such persons are likely not to have faith in social and political institutions which enhance the participation of individuals and groups in society, or to have confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of vocational and personal development".

[67]Later, he said:[62]

That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification. [Emphasis added.]

[68]In the same vein, McLachlin J. in *Miron v. Trudel*[63] stated:

Marriage and citizenship may be used as the basis to exclude people from protections and benefits conferred by law, provided the state can demonstrate under s. 1 that they are truly relevant to the goal and values underlying the legislative provision in question. [Emphasis added.]

She further said:[64]

If the proponent of the law can demonstrate that the ground of denial of a protection or benefit is relevant to the goal of the legislation, the discrimination loses its sting. "[I]f the . . . differences amongst different people are relevant to the goal in question, then this will be a permissible distinction . . .": *Boronovsky v. Chief Rabbis of Israel* , [P.D. CH [25] (1), 7]. [Emphasis added.]

[69]I will, at this stage, make no firm finding as to whether this law deals with a legitimate goal, namely, citizenship, or whether it imposes an invalid distinction which amounts to discrimination. In both cases, scrutiny of the impugned legislation is mandatory. I shall, therefore, proceed with such an analysis.

C"Section 1 of the Charter

[70]Section 1 of the Charter reads:

1. 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. [Emphasis added.]

1. The analytical framework under section 1

[71]On several recent occasions, the Supreme Court of Canada has repeated that the analytical framework outlined in *The Queen v. Oakes*[65] is the proper approach for determining when a statutory provision constitutes a reasonable limit on a Charter right under section 1. In *Vriend v. Alberta*,[66] seven members of the Court approved the following summary formulated by Iacobucci J. with regard to the steps to be performed according to the *Oakes* standard:[67]

A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable. [Emphasis added.]

[72]In the earlier case of *RJR-MacDonald Inc. v. Canada (Attorney General)*,[68] a majority of the Court also agreed that this analysis is meant to be context sensitive and must, therefore, be applied in a flexible manner taking into account the particular rights asserted and the sphere of activity in which they are asserted. Thus, it is not a formalistic test which is to be applied in the abstract to each fact situation. As La Forest J., for the dissenting judges, explained:[69]

The appropriate "test" to be applied in a s. 1 analysis is that found in s. 1 itself, which makes it clear that the court's role in applying that provision is to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society". In *Oakes* , this Court established a set of principles, or guidelines, intended to serve as a framework for making this determination. However, these guidelines should not be interpreted as a substitute for s. 1 itself. It is implicit in the wording of s. 1 that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. Such a balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The s. 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement.

[73]Later in the same case, McLachlin J., writing for herself and two others, supported much the same position, though she preferred to focus on the specific questions a court must answer to ensure that its analysis is sensitive to the context:[70]

That the s. 1 analysis takes into account the context in which the particular law is situate should hardly

surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.

[74]As La Forest and McLachlin JJ. suggest, this analysis is heavily dependant on the facts of each case. The divisions between the members of the Supreme Court in *RJR-MacDonald Inc.* is a good example of this. In that case, La Forest J. and three of his colleagues found that the context of the case, which involved legislation enacted to prevent Canadians from being influenced by advertising to use tobacco products, justified the application of a less demanding and more deferential standard of justification. La Forest J. was particularly influenced by the difficulties of proving the sociological theories behind major social policy legislation. This position was substantially rejected by McLachlin J., writing for herself and two others, who explained that words "demonstrably justified" in section 1 required that courts ensure that, before the state overrides constitutional rights, it must provide a reasoned demonstration of the benefits the legislation may achieve relative to rights it would infringe.

[75]It is agreed that the burden of proving that a legislative enactment is "demonstrably justified in a free and democratic society" lies upon the party seeking to uphold the legislation. The standard of proof is the ordinary civil standard of proof, the balance of probabilities.[71] In *RJR-MacDonald*, the various judges of the Supreme Court explained that appellate courts owe less deference to some of the findings of fact of a trial judge in the context of a section 1 analysis. The usual level of deference applies to purely factual findings. A much lowered degree of deference applies to a trial judge's findings concerning the interpretation of social science and other policy evidence. This is because a trial judge is not in a privileged position to appreciate and weigh "social" or "legislative" facts relative to appellate courts.[72]

[76]I must now examine each of the steps of the section 1 analysis individually.

(a) The objective of the impugned legislation must be pressing and substantial

[77]Since its inception, Canada has always been a country which has grown both socially and economically by accepting immigrants from other lands and other cultures. This has meant that one of Canada's greatest challenges has been to create common bonds to join together its diverse peoples. One of the primary means of accomplishing this has been the creation of symbols to which Canadians of all backgrounds were capable of relating. Citizenship, a status shared by both new immigrants and long-time residents, is a logical common symbol. It is, therefore, understandable that Parliament would seek to enhance the value and importance of citizenship in Canadian society as a way of bringing Canadians together. The preference in favour of citizens in public service hiring may be perceived as a means of accomplishing this goal.

[78]The appellants submit that to demonstrate a pressing and substantial concern, one would have expected that the respondents would have tendered evidence that the number of permanent residents in Canada was increasing, that permanent residents were not naturalizing at a fast rate, that there was some animosity or other frictions developing between permanent residents and citizens as a result of the presence of permanent residents in Canada, and that this animosity or friction was causing concrete problems in Canadian society at large.[73]

[79]I do not think so.

[80]We need not, in my view, assess this criterion by reference to a crisis or in terms of success in numbers, but in terms of an appreciation of the reality behind this legislation. Canada has an interest in encouraging residents to become citizens and has envisaged an incentive for permanent residents to encourage them to become full-fledged members of the Canadian society. Canada facilitates this adhesion by recognizing dual citizenship, thereby allowing permanent residents to maintain their connections with their countries of origin. In the case at bar, the countries of origin of Ms. Bailey (the Netherlands) and Ms. Lavoie (Austria) do not recognize dual citizenship. This appears to have been the key reason for their refusal to apply for Canadian citizenship. Dual citizenship was not a barrier for Ms. To Thanh Hien. When she discovered this, she applied and obtained Canadian citizenship.

[81]What suffices, in my view, to meet the first criterion is the reasonableness of the objective pursued by the impugned provision in terms of the balance of probabilities. I conclude that the objective pursued by the impugned legislation makes sense considering Canada's history which La Forest J. summed up in *Andrews v. Law Society of British Columbia*[74] in the following way:

Our nation has throughout its history drawn strength from the flow of people to our shores.

(b) The means chosen-are they reasonable and demonstrably justified in a free and democratic society?

[82]It is worth examining first the state of the law in other democratic countries and under international law. I do not find this analysis to be determinative, but simply illustrative of the trends shown in other free and democratic countries.

[83]I start with the international instruments. The *Universal Declaration of Human Rights*[75] recognizes equality for citizens in public service employment of their respective countries. Article 21 provides that:

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country. [Emphasis added.]

[84]The *International Covenant on Civil and Political Rights*[76] also recognizes the rights of citizens to equal access to employment in the public services of their respective countries. According to Article 25(c):

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restriction:

. . .

(c) To have access, on general terms of equality, to public service in his country. [Emphasis added.]

[85]These instruments, because they are the result of a consensus between many very differently situated

nations, may, to a certain extent, reflect only a common denominator. They recognize. They do not condemn.

[86]The Trial Judge found that with the exception of Sweden and New Zealand, virtually all liberal democratic societies impose citizenship-bases restrictions in one form or another on access to employment in their national public services. This is so in Switzerland where only Swiss citizens may be appointed as public servants except in exceptional cases where the Federal Council authorizes the employment of a non-citizen.[77]

[87]For many years, the United States has restricted the employment of non-citizens in the federal public service. These restrictions have survived challenges under the equality provisions of the United States Constitution. Yet, similar restrictions by state governments have almost always been struck down by the United States Supreme Court as violations of equality rights. The distinction appears to lie in the division of legislative powers between state and federal governments. Since aliens and citizenship is an area of federal legislative competence, federal legislation which creates restrictions based on citizenship is subjected to a much less rigorous standard of review than is equivalent state legislation.[78] State legislation is inherently suspect.[79] The courts are deferential to federal distinctions based on citizenship because of their belief that aliens and citizenship is an area of authority that has been committed to the political branches of government. Because of the separation of powers doctrine, the courts are not to interfere with the activities confined to the political branch and thus the courts exercise only the most limited powers of review in this area.[80] The only state legislated restriction to survive scrutiny under the constitutional guarantee of equality was a restriction which prevented non-citizens from exercising "political functions" in a state's public service. This is a narrow exception which only prohibits non-citizens from holding positions in which a state could "require citizenship as a qualification for office".[81] It requires a consideration of each function sought to be reserved for citizens to determine whether citizenship is truly a prerequisite for performing that role.

[88]Australia has taken a path different from that of other nations. Until 1984 only British subjects could obtain permanent employment in the public service of Australia unless a special exception was obtained.[82] A Royal Commission recommended the abolition of the nationality requirement,[83] but the Government rejected this option. Instead, it legislated that Australian citizenship would be a requirement for public service employment, but with an important limitation.[84] Permanent residents can be appointed to public service positions on a probationary basis for up to two years. Probationary positions only become permanent if permanent residents obtain citizenship within the two-year period. Failure to obtain citizenship results in the termination of the appointment.

[89]In my view, the Australian system is more drastic than the Canadian preference system since, after the end of the probationary period, a total exclusion is pronounced.

[90]The situation is more complex for European countries which are members of the European Union. Most of these countries have constitutions or statutes which reserve for their citizens employment opportunities in their public services. For example, the German Constitution provides that only Germans shall be employed in its public service except where there is an urgent need to hire a non-citizen.[85] Statutes create the same system in the United Kingdom and provide that aliens may be hired for limited periods only where there are insufficient British subjects available and special authorisation is received.[86] However, such restrictions have been limited to positions in the "public administration" of each country by Article 48 of the Treaty of

Rome[87] which generally requires that workers within the European Union be free to work in any country without discrimination based on nationality. In *Re Public Employees: E.C. Commission v. Belgium*[88] the European Court determined the scope of "public administration" and found that member countries could only institute citizenship restrictions for those positions which "involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State".[89] The Court explained that the rational for employing such a closely tailored functional definition was that:[90]

Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.

[91]While this decision encourages the free movement of workers within the European Union, it does not benefit citizens of countries outside that trade block. For them the previous absolute restrictions enshrined in the national law of each member country continue to apply.

[92]I agree with the appellants that, given their distinct histories, all free and democratic societies, which have preferences, have adopted them for various and complex reasons which are directly dependent upon their own internal traditions.[91] I find that it is hardly possible to draw a firm inference from this comparison, except to say that special bonds between citizens and state have a long and enduring history.

(c) The proportionality test

[93]At this stage, under the *Oakes* test, I must determine whether the means chosen to implement the objective are proportionate to it. The analysis is threefold: (a) I must ask whether the means chosen are rationally connected to the objective, (b) if so, whether the means impair the right in question as little as possible and (c) whether there is a proper balance between the effect of the limitation and the legislative objective.

[94]My concern lies with this threefold test of proportionality. Not so much with regard to the rational connection. It makes sense for Parliament, on a balance of probabilities, to encourage permanent residents to become citizens and to participate more fully in the affairs of the state by giving them the added incentive of increased employment opportunities in the Public Service.

[95]The key question is whether the impugned provision was carefully designed so as to impair the chances of employment of permanent residents as little as reasonably possible. Could Parliament have accomplished its goal with a less restrictive preference? By limiting, for instance, the preference to the most sensitive positions where citizenship might be deemed to be essential for reasons of security? Or where allegiance is deemed essential? Should the appellants have brought to our attention less intrusive measures? Should the Australian model of a total exclusion after a probationary period of two years be preferred?

[96]The application of the minimal impairment test is not an easy one. In *Libman v. Quebec (Attorney General)*,[92] a freedom of expression case, the Supreme Court of Canada reiterated some of the key principles applicable. The Court reminded us of the following:

In *RJR-MacDonald*, *supra*, McLachlin J. explained the application of the minimal impairment test as follows, at p. 342:

> [T]he government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . .

This Court has already pointed out on a number of occasions that in the social, economic and political spheres, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice. On the other hand, the courts will judge the legislature's choices more harshly in areas where the government plays the role of the "singular antagonist of the individual""primarily in criminal matters"owing to their expertise in these areas *(Irwin Toy* , *supra*, at pp. 993-94; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 304-5; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at p. 521; *RJR-MacDonald*, *supra*, at pp. 279 and 331-32). La Forest J.'s comment on the subject in *RJR-MacDonald*, *supra*, at p. 277, is perfectly apposite:

> Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.

[97]These comments are fundamental to the case at bar.

[98]My view, in the final analysis, is the following. The impugned legislation expresses a government policy of enhancement and incentive in a status where rights and duties are correlated. To declare paragraph 16(4)(*c*) of the Act as being of no force or effect would allow this Court to enter a field where rights and duties are to be balanced. Parliament, in such an area, should be left with a "margin of appreciation".[93]

[99]Concepts such as national allegiance and citizenship might be seen as archaic in today's global village. One could wish that, one day, we might all be citizens of the world. At present, such concepts, including the rights and duties attached, are in the political field. They are not defined by courts of law. As a result, the drawing of the line with regard to employment restriction in the Public Service cannot be entirely devoid of political considerations. A court can intervene in the face of a violation of Charter rights. But preference in employment, as opposed to exclusion from the Public Service, is not one of them. This is so especially, given the acceptance of dual citizenship by Canada which minimizes the hardships of the preference for permanent residents.[94]

[100]The last element to be considered under the *Oakes* test is the balancing between the limitations on a fundamental right and the objective which the state uses to justify these limitations. It is a weighing exercise as between the significance of the infringement and the importance of the countervailing objectives. Having found in favour of the legislation on both counts, I can only conclude that the importance of the legislative objectives outweighs the disadvantage which is created.[95]

IV"Conclusion

[101]I am satisfied that this impugned legislation amounts to a reasonable exercise by Parliament of its power with respect to citizenship. It does not constitute a disguise or an abuse of powers.

[102]The disadvantage created by the impugned statute does not pertain to the human dignity of permanent residents. They are not deprived of work, nor are they prevented from practising their profession in other sectors of the public service (by opposition to the Public Service). They are deprived of a preferential treatment in one sector of the Canadian economy where citizenship, as a status, is valued. Citizenship remains, however, wide open to them. The policy behind paragraph 16(4)(*c*) of the Act may serve an integrative and equalizing function rather than an exclusionary one.

[103]Citizenship and permanent residence, by essence, connote different characteristics. They cannot be compared. The citizen assumes duties. The permanent resident does not. As a result, Canadian citizens and permanent residents are not "similarly situated".[96] No real comparison under subsection 15(1) of the Charter is possible. The contextual framework is such that citizenship cannot be the proper comparator in the case at bar.[97]

[104]In such a context, preference in favour of Canadian citizens in open competitions for positions in the Public Service is not in violation of the merit principle embodied in section 10 [as am. by S.C. 1992, c. 54, s. 10] of the *Public Service Employment Act*. The merit principle applies to those who qualify under the Act.

[105]I would dismiss these appeals with one set of costs.

The following are the reasons for judgment rendered in English by

[106]Linden J.A. (*dissenting*): I respectfully disagree with both of my colleagues.

I. Introduction

[107]The issue in this case is whether the "Canadians First" policy enshrined in the *Public Service Employment Act*[98] violates the equality provision of the *Canadian Charter of Rights and Freedoms*, which reads:

15. (1) 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.

II. Facts

[108]This matter arises from the complaint of three plaintiffs: Janine Bailey, Elisabeth Lavoie, and Jeanne To Thanh Hien. All three plaintiffs were, at relevant times, permanent residents"but not citizens"of Canada. All three plaintiffs applied for employment with the public service, and all three presented evidence[99] that they were denied referral to open competition for public service positions on the grounds of paragraph 16(4)(*c*) of the *Public Service Employment Act*, which reads:

16. . . .

(4) Where, in the case of an open competition, the Commission is of the opinion that there are sufficient applicants who are

(*a*) [veterans],

(*b*) [veterans' widows], or

(*c*) persons who are Canadian citizens who do not come within paragraph (*a*) or (*b*),

to enable the Commission to establish an eligible list in accordance with this Act, the Commission may confine its selection of qualified candidates under subsection (1) to applicants who come within paragraphs (*a*), (*b*), and (*c*).

[109]All three appellants are citizens of European countries: Bailey is Dutch, Lavoie is Austrian, and Hien is French. All three are educated, professional women: Bailey holds a Dutch law degree, Lavoie is an office administrator, and Hien is a French language editor with a Master's degree in Applied Foreign Languages from l'Université Paris X. All three women applied for positions within their respective fields of interest.

[110]In their testimony, both Bailey and Lavoie, who would automatically lose their original citizenship upon obtaining Canadian citizenship, testified about personal reasons for refusing to apply for Canadian citizenship. Janine Bailey, for example, testified that she needed the unfettered right to enter and remain in Holland in order to visit and care for her aging parents. Hien acquired Canadian citizenship in 1991 and now holds dual citizenship.

[111]All three plaintiffs have had temporary or contract positions with the federal public service. Bailey was hired to a term position as a receptionist (at the CR-03 level), and received a term position as an Immigration Counsellor (at the PM-02 level) through a closed competition. Since March 31, 1992 she has been acting as an Immigration Case Presenting Officer at the PM-03 level. Elizabeth Lavoie worked with the Department of Supply and Services through a series of short-term contracts, and as a secretary through a temporary agency. On November 25, 1988, the contract between the temporary agency and the Department of Supply and Services regarding Lavoie's services was not renewed. Subsequently, Lavoie sought employment outside the federal public service. Jeanne To Thanh Hien was also hired to provide secretarial services to various government agencies through a temporary employment agency. In March, 1989, she was appointed to a term position as a secretary with the Department of Secretary of State. During that time the Department redeployed her to the Translation Secretariat in order to better use her skills. However, in May, 1989, she was appointed to a secretarial position. She left the federal public service in September 1989 and has worked on a contract basis as a translator with the House of Commons since that time.

[112]The appellants want only to be allowed to compete for positions on the basis of merit; they are not seeking any special treatment. The Government, for its part, has conceded that the number of non-citizens referred to open competitions for public service employment is very small. In their testimony, all three plaintiffs conceded that one benefit of retaining their original citizenship was preferential employment within the European Union countries, and within the public service of their native countries.

III. The PSEA

[113]It was pointed out by counsel for the appellants that the purpose of the PSEA generally is to ensure that the Canadian public service hires the best possible people in the fairest possible manner,[100] without discrimination. Section 10 of the Act requires that appointments are to be based on merit:

10. (1)

[114]Subsection 12(1) [as am. by S.C. 1992, c. 54, s. 11] of the Act explains what Parliament meant when it established that appointments are to be based on merit:

12. (1) For the purpose of establishing the basis for selection according to merit under section 10, the Commission may prescribe standards for selection and assessment as to education, knowledge, experience, language, residence or any other matters that, in the opinion of the Commission, are necessary or desirable having regard to the nature of the duties to be performed and the present and future needs of the Public Service.

[115]Subsections 12(3) [as am. *idem*] and 12(4) [as am. *idem*] of the Act instruct that the Commission shall not discriminate on the basis of irrelevant personal characteristics"including national origin" unless the characteristic represents a *bona fide* occupational requirement.

12. . . .

(3) The Commission, in prescribing or applying standards under subsection (1), shall not discriminate against any person by reason of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

(4) Subsection (3) does not apply in respect of the prescription or application of standards that constitute bona fide occupational requirements having regard to the nature of the duties of any position.

[116]It should be noted that the PSEA applies only to that portion of the federal public service that is legislatively defined [in section 2] as the "Public Service." That definition includes the departments listed in Part I of Schedule I of the *Public Service Staff Relations Act* , and some of the employers listed in Part II of that Schedule, including some 90 departments and agencies, for example the positions staffed by the Public Service Commission, civilians within the RCMP, the Canada Labour Relations Board, the Canadian Human Rights Commission, and the Federal Court. Employers not covered by the PSEA include military personnel, RCMP uniformed personnel, and employees of Crown corporations.

[117]The PSEA operates to staff about half of the public service, broadly defined, comprising approximately 250,000 jobs. Only competitions staffed pursuant to the PSEA engage the citizenship preference found in paragraph 16(4)(*c*). Further, only open competitions are subject to the operation of paragraph 16(4)(*c*) of the PSEA. Open competitions are those in which persons both within and outside the Public Service may compete. Closed competitions are those in which only persons already employed in the Public Service may compete. The majority of skilled positions are staffed through closed, rather than open, competitions.

IV. An evolutionary view of Canadian Citizenship

[118]Like Canada itself, conceptions of Canadian citizenship evolved gradually out of the idea of being British, and not without considerable debate. Canadian scholars, unlike their U.S. counterparts, see citizenship as a fluctuating concept in part because they have no common reference point"from bitter debates over conscription to debates over the composition of Canadian society, citizenship has never during our history had a single, purposive meaning.[101] While scholars in the United States debate the modern meaning of citizenship in that country,[102] the notion of American citizenship is clearly based on the United

States Constitution and the views of its framers.

[119]In Canada there is a plurality of views about the elusive concept called citizenship. For example, Cairns speaks of a "three-nations" view of Canada, by which Quebec, Aboriginal Canadians, and the "rest of Canada" give separate and distinct perspectives on citizenship and community which shape our nation-building exercise.[103] Sigurdson compares a liberal individualist notion of citizenship with a universalist, plural understanding of citizenship and finds that each, individually, lacks the components which would yield a satisfactory model of Canadian citizenship[104]. He believes that Canadian citizenship is polarized around ideas of individualism, whereby citizens are able to choose their own identity and are given equal opportunity to achieve self-expression, and pluralism, whereby citizens receive differential group treatment to ensure true equality. Sigurdson concludes that neither of these abstract ideals is sufficient to ground a satisfactory concept of Canadian citizenship. Colom-González identifies four "patterns" of citizenship"republican, liberal, ethnocultural, and multicultural"from which Canadians, through delicate balance, have fashioned a national identity. Colom-González argues that each of the patterns of citizenship is compatible with the democratic ideal and that each reflects a different historical experience. In his view, Canada has created a distinctive concept of citizenship by delicately balancing these ideals.[105]

[120]Like any distinctive category, citizenship has often been used to exclude. Nationalist views of citizenship, based on *jus sanguinis*, have been instituted by countries which intend to protect a "pure" or racially-based polity from the intrusion of immigrants. Among these attempts, the German vision of the Reich stands out as a widely known example. Other countries have developed widely different concepts of citizenship. In the United Kingdom, for example, concepts of citizenship are related to the concept of the British Commonwealth. While Commonwealth citizens and British citizens are distinct categories, any Commonwealth citizen, as defined by the *British Nationality Act 1981* [(U.K.), 1981, c. 61], may vote in England.[106] The European Union stands as an example of a supranational polity which broadly grants reciprocal political and legal rights to its citizens without attempting to create interpersonal bonds between its citizens.[107] Unlike the European trend toward inclusiveness, the United States has recently enacted legislation that broadens the gap between citizens and permanent residents. The *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* [Pub. L. No. 104-193, 110 Stat. 2105 (1996)] excludes aliens, including permanent residents, from "any grant, contract, loan, professional licence, or commercial licence provided by an agency of the United States" and "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit."[108]

[121]While Canada, in the past, has not always treated immigrants and new Canadians with respect and dignity,[109] Canada's modern position as a multicultural society has redefined, and in some ways curtailed, more traditional, exclusionary views of citizenship.[110] The broader, inclusive, Canadian view of citizenship which has emerged brings with it important legal ramifications. Citizenship is meant to be an accessible goal for all new Canadians. It is a tool of equality, not exclusion.

[122]To this end, we have by our highest law prescribed limits within which the government is constrained from drawing distinctions between citizens and non-citizens. More precisely, we have limited the kinds of rights which accompany citizenship. Indeed non-citizens enjoy almost all the rights held by citizens. Dean Robert Sharpe (as he then was) wrote that one of Canada's fundamental values, by operation of the Charter, forbids us from preferring our fellow citizens to the detriment of strangers:

As a result of the guarantee of equality in section 15 and the decision of the Supreme Court in *Andrews v. Law Society of British Columbia*, the Charter significantly constrains governments' capacity to confer benefits or impose restrictions on the basis of citizenship. In other words, not only is citizenship eliminated as a prerequisite for asserting a claim to most Charter rights: citizenship itself is rendered a highly suspect legislative classification.[111]

V. Citizenship and the *Canadian Charter of Rights and Freedoms*

[123]Under our Charter, most rights are accorded to all those who are subject to Canadian law. Only certain specific rights"democratic rights, certain mobility rights, and minority language rights"are reserved to citizens by the Charter. Specifically, those rights are enumerated in section 3, subsection 6(1), and section 23 of the Charter, which read as follows:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

. . .

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

. . .

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[124]As well, membership in the Senate is constitutionally reserved [in the *Constitution Act, 1867*]:

23. The Qualifications of a Senator shall be as follows:

. . .

(2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union

[125]My colleague Décary J.A. wrote in another context that "[t]o be a Canadian citizen by birth is a most cherished privilege."[112] I believe he would agree that this sentiment extends to Canadian citizenship however it is acquired. Canadian citizenship is a cherished privilege, not for the pecuniary benefits which accrue to its holders, but for the bonds that it creates. Those bonds are not built on exclusion.

[126]The Charter and its jurisprudence allow some other distinctions to be made between citizens and non-citizens. In *Chiarelli v. Canada (Minister of Employment and Immigration)*, Sopinka J. wrote for the Court that:

I agree, for the reasons given by Pratte J.A. in the Federal Court of Appeal, that there is no violation of s. 15. As I have already observed, s. 6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in, and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.[113]

[127]The *Chiarelli* case questioned the constitutionality of the expulsion provisions relating to non-citizens in the *Immigration Act* and found those provisions to be constitutionally valid. That the right to enter into and remain in Canada can be found in the Charter itself was, in effect, dispositive of the appeal. Undoubtedly there are certain citizen's rights which are protected by the Charter. Those rights, however, are also limited by the Charter. When *Chiarelli* was adjudicated in this Court, Pratte J.A. wrote that:

The appellant . . . argued that subsection 32(2) violates the right to equality guaranteed by section 15 of the Charter. He made two submissions on the point. His first submission was that subsection 32(2) infringes section 15 because it discriminates against permanent residents by requiring that they be deported while, in similar circumstances, Canadian citizens may remain in the country. That submission has no merit. It would, if accepted, lead to the conclusion that the Charter guarantees to permanent residents a right to remain in Canada equal to that enjoyed by Canadian citizens. That is not so. The Charter, itself, in subsections 6(1) and (2), distinguishes between the rights enjoyed by Canadian citizens and permanent residents in this respect. It is clear that, subject to section 1, the Charter guarantees the right of Canadian citizens to remain in the country; it is equally clear that the Charter does not guarantee that same right to permanent residents. Thus, the Charter impliedly recognizes the power of Parliament to differentiate between Canadian citizens and permanent residents by imposing limits on the right of the permanent residents to remain in Canada. In exercising that power, Parliament is not guilty of discrimination prohibited by section 15. The situation would be different if Parliament or a Legislature were to differentiate between permanent residents and citizens otherwise than by determining the limits of the residents' right to remain in the country. Such was the case in *Andrews v. Law Society of British Columbia* where the Supreme Court of Canada held that a law denying to permanent residents the right to practice law was discriminatory and against section 15 of the

Charter.[114] [Emphasis added; footnotes omitted.]

[128]Where the citizenship-based distinctions do not flow from the rights granted in the Charter itself, the Supreme Court has decided that these distinctions may constitute discrimination. In *Andrews v. Law Society of British Columbia*, La Forest J. specifically noted that citizenship, as a permissible distinction, was limited in its scope:

There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives. I am sensitive to the fact that citizenship is a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity. Nonetheless, it is, in general, irrelevant to the legitimate work of government in all but a limited number of areas. By and large, the use in legislation of citizenship as a basis for distinguishing between persons, here for the purpose of conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society that are embodied in s. 15. [Emphasis added.][115]

[129]Wilson J. explained, in her concurring reasons, why this was so:

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending". . . Non-citizens, to take only the most obvious example, do not have the right to vote.[116]

[130]Since *Andrews*, commentators[117] have expressly noted that citizenship is a constitutionally suspect ground on which to distinguish between people. Courts have recognized this. In *Pearkes v. Canada*, the Federal Court (Trial Division) held that certain Social Sciences and Humanities Research Council grants which could not be held abroad by permanent residents violated section 15 of the Charter and could not be saved by section 1. In that case, Pinard J. wrote that:

. . . the application by SSHRC of the impugned regulation can only discriminate against nonfaculty member permanent residents of Canada who wish to apply to hold a SSHRC grant abroad. Such permanent residents of Canada are entitled to be dealt with on their individual merits, not dismissed from consideration due to stereotyping and discrimination based on their noncitizen status.[118]

[131]In *Austin v. British Columbia (Ministry of Municipal Affairs, Recreation & Culture)*[119] the British Columbia Supreme Court considered section 12 of the British Columbia *Public Service Act* [S.B.C. 1985, c. 15], which enacted that the Government of British Columbia would only hire Canadian citizens unless no qualified citizens applied for the vacant position. In that case the Government of British Columbia conceded that the impugned section violated subsection 15(1) of the Charter. In the course of finding that the legislation failed every aspect of the *Oakes* test, Maczko J. wrote that:

The discrimination displayed on the face of the statute is of the worst kind. It decides a person's employment opportunities on the basis of status rather than merit or achievement. Discrimination of that sort is inherently repugnant to a society which values achievement through personal enterprise and hard work. In my view the right to pursue one's career of choice, significantly outweighs the government's objective in this instance.[120]

[132]The conclusion,[121] then, is that courts must look with a sceptical eye at legislation which differentiates between people based on their status as citizens or non-citizens. Allowing citizenship-based distinctions without demonstrably justifiable reasons runs generally counter not only to the supreme law of the land, but also to the principles of inclusiveness and diversity which are enshrined in that law.

VI. A brief history of the citizenship preference

[133]Like citizenship generally, the citizenship preference currently enacted in paragraph 16(4)(*c*) of the PSEA evolved from an earlier provision. A requirement that all persons attending the civil service examination be British subjects resident in Canada for at least three years appeared in section 14 of *The Civil Service Amendment Act, 1908*.[122] At that time, the Honourable Sydney Fisher stated on second reading of the bill that:

The intention was to take real residents of Canada into the Service. But for this provision, a person might come here "on spec," just to go up for the examination.[123]

The three-year residency requirement corresponded with the residency requirement set down by *The Naturalization Act, Canada,* 1881.[124]

[134]In 1918 *The Civil Service Act, 1918*[125] created an exception by which the Governor in Council could authorize those who did not meet the requirements of *The Civil Service Amendment Act, 1908* to sit for the civil service examination. In 1932 the citizenship preference[126] was again amended, increasing the residency requirement from three to five years [S.C. 1932, c. 40, s. 6]. This corresponded with the *Naturalization Act* which had also been amended, increasing the residency requirement for naturalization to five years [S.C. 1931, c. 38, s. 4]. At that time, the Honourable Mr. O. Boulanger argued for the Government that:

The amendment proposed by the bill is to change the term of three years residence to a term of five years. I believe this change would be in accordance with our whole system of granting Canadian citizenship to aliens. As the law stands at the present time a residence of five years is required before a man is granted Canadian citizenship. . . . A man cannot be naturalized as a Canadian citizen unless he has resided in Canada for a term of five years, and he is not granted the right to vote unless he is here for a similar period. I respectfully submit that the same requirements should apply when application is made for a position in the Canadian civil service. If it is proper to stipulate a period of five years before a vote is allowed, if it is right that five years' residence must be established before a person may become a citizen of this country, then a similar period should be necessary before a person obtains a position in the public service. That is the purpose of the second amendment.[127]

[135]After citing the media attention that ensued when, in 1930, "a little insignificant paper published in Montréal" printed a list of exceptions which had been made to the residency requirement for the civil service, the Honourable Mr. Boulanger summarized the objectives of the provision, saying that:

Surely it is possible to find men in Canada who will act as prison guards and chiefs of services. Members of the Civil Service Commission should not have such matters left in their own hands. . . .

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. I trust therefore that the Civil Service Act will

be amended as the proposed measure suggests. 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.[128]

[136]In 1946 Parliament passed *The Canadian Citizenship Act* and formally created the status of Canadian citizenship. While doing so, Parliament intentionally maintained the requirement that those attending the civil service examinations be British subjects (including Canadian citizens) who had been resident in Canada for five years.[129] In 1961 the citizenship preference was enacted more or less in its present form, withdrawing preferential treatment from British subjects who were not Canadian citizens.

[137]In 1979, the Special Committee on the Review of Personnel Management and the Merit Principle in the Public Service produced its final report, known as the D'Avignon Report. That Report considered the citizenship preference and concluded that:

In all but exceptional circumstances, employment in the public service is limited to Canadian citizens. Both landed immigrants and public servants have criticized this provision of the PSEA as being discriminatory. Noting that the federal government encourages employers in the private sector to hire new Canadians it would seem appropriate for external competitions to be open to landed immigrants. We therefore recommend

that permanent residents of Canada be eligible to compete on the same basis as Canadian citizens.[130]

The Government did not act on the recommendation.

[138]In 1985 the Parliament's Standing Committee on Justice and Legal Affairs, Sub-committee on Equality Rights, considered the citizenship preference in light of the newly enacted *Canadian Charter of Rights and Freedoms*. The Sub-committee's First Report concluded that:

In any open competition for public service positions pursuant to the *Public Service Employment Act*, preference must be given first to war veterans and second to Canadian citizens. In the result, permanent residents do not enjoy the same opportunities as Canadian citizens to obtain public service appointments.

We believe that this represents a form of discrimination, on the basis of national origin, that offends section 15 of the *Charter*. Such a preference may encourage permanent residents to follow the desirable course of taking out Canadian citizenship as soon as they are able to do so. However, the failure to become a Canadian citizen should not be taken as a mark of lack of commitment to this country. As we pointed out earlier, the rights of some individuals may be severely prejudiced, if they become Canadian citizens, as a result of foreign laws. We believe it is unfair to favour Canadian citizens over permanent residents who are eligible for Canadian citizenship but have not yet taken that step.

We are unable to find any justification for a preference for Canadian citizens over permanent residents of less than 3 years' standing so far as public service employment is concerned. Canadian citizenship is not a condition of employment in the public service. Therefore the citizenship factor cannot be a *bona fide* occupational qualification in the sense of the *Canadian Human Rights Act*. Nor do we believe that it can be demonstrably justified as a reasonable limit, in the sense of section 1 of the *Charter*, on freedom from discrimination on the basis of national origin.

38. We recommend that the general preference in favour of Canadian citizens in job competitions in

the public service, pursuant to the *Public Service Employment Act*, be eliminated so that permanent residents may compete for public service jobs on an equal footing with Canadian citizens.[131]

[139]The Mulroney government responded with a report, entitled *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*. In that report, the government disagreed with the Sub-committee's recommendation, writing that:

The Government does not agree with this recommendation. It takes the view that the current preference granted to citizens is a reasonable and justified limitation permitted by the *Charter* and the *International Covenant on Civil and Political Rights.*

This view is based on considerations of the nature of citizenship and its relation to the role of the Public Service. In their work, public servants serve and represent the Canadian community by guaranteeing its security, ensuring its safety, advancing its physical and economic welfare and representing its interests, in Canada and abroad.

Citizenship carries with it both privileges and responsibilities. The privileges include the right to vote; one responsibility is to promote the security and welfare of the country and protect the country's way of life. The Government is of the opinion that one of the legitimate benefits of Canadian citizenship should be the right to seek and receive employment in the federal Public Service on a preferential basis. This right is subject to certain obligations, such as the limitations on political activity, but it remains one of the advantages of citizenship and a recognition of the value placed on citizenship by Canadian society.

It is to be noted that this view seems to prevail in other Western democracies, some of which (e.g., United States, France, Great Britain, Australia) go farther than Canada in making citizenship a requirement for entry into the civil service, rather than a preference.

Under the current system, non-Canadians can be employed in public service jobs for which no qualified Canadian citizens are found.[132]

[140]In 1986 the Report of the Sub-committee on Equality Rights was debated in the House of Commons. Speaking in support of the Government response, the Honourable Mr. Pierre Cadieux said:

The main purpose of this step is to recognize that all of us, you and I and every other Canadian, cherish and appreciate our citizenship which involves some duties such as the promotion of welfare within the community. It also includes a number of rights, including the right to vote, Mr. Speaker. And one of the legitimate benefits of Canadian citizenship must be the right of priority access to jobs within the federal Civil Service. It is only reasonable that we should thus recognize the value and particular importance of Canadian citizenship.

If permanent residents wish to acquire the same rights and duties, they have the possibility to do so by applying for Canadian citizenship. After all, we only ask them to wait three years before they can say they are Canadians and proud of it. Any Canadian citizen has the right to claim certain benefits resulting from Canadian citizenship due to the status which Canadian citizenship confers to citizens. Moreover, Canada is not the only country which feels that its Civil Service should be made up entirely of its own citizens. As a matter of fact, countries such as the United States, France, Great Britain and Australia go even further than Canada, making citizenship a *sine qua non* condition for joining their Civil Services and not merely a criteria for preference as in this country. I should emphasize that, through an international agreement,

whoever serves in the foreign service or diplomatic corps of a country must be a citizen of that country.[133]

[141]Since 1986 there has been little legislative activity relating to the citizenship preference, even though *Andrews*, *supra*, was decided in 1989.

VII. The Canadian approach to equality

[142]The Canadian approach to equality has always given a large and liberal interpretation to anti-discrimination legislation. Recently, the Supreme Court, speaking unanimously on this point, summarized the ideals which underlie the Canadian approach to equality:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.

The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity.[134]

[143]When an equality claim is brought pursuant to subsection 15(1) of the Charter, Canadian courts approach the case in the light of the large, liberal, and purposive approach which is the cornerstone of Charter interpretation. In *Hunter et al. v. Southam Inc.*, Dickson J. (as he then was) wrote:

I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.[135]

And in *R. v. Big M Drug Mart Ltd. et al.* Dickson J. (as he then was) made the position of the purposive approach to Charter interpretation abundantly clear:

This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc*. . . ., this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.[136] [Citation omitted.]

It is from this viewpoint that we consider the constitutionality of paragraph 16(4)(*c*) of the PSEA.

VIII. Does paragraph 16(4)(*c*) of the PSEA violate subsection 15(1) of the Charter?

The proper approach to subsection 15(1) of the Charter

[144]While in the past there has been some variation in the views of the Supreme Court Justices regarding the proper approach to subsection 15(1) of the Charter, these differences of opinion have diminished over time,[137] and finally have been laid to rest in the recent decision of *Law v. Canada (Minister of Employment and Immigration)*,[138] a turning point in equality jurisprudence in Canada. In *Law*, Iacobucci J. masterfully synthesized the divergent views regarding the proper application of subsection 15(1) of the Charter into a new approach, unanimously accepted by his colleagues. *Law* is now the starting point for any analysis of discrimination under the Charter.

[145]The proper approach to subsection 15(1) was summarized by Iacobucci J. at paragraph 39 [pages 523-524] of his reasons:

In my view, the proper approach to analyzing a claim of discrimination under s. 15(1) of the *Charter* involves a synthesis of these various articulations. Following upon the analysis in *Andrews*, *supra*, and the two-step framework set out in *Egan*, *supra*, and *Miron*, *supra*, among other cases, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

[146]There are, accordingly, not unlike the position before *Law*, three questions to be answered by a party seeking to prove a violation under subsection 15(1) of the Charter. First, the claimant must show that the impugned legislation or state action"or its effects"draws a distinction between the claimant and others. Second, the claimant must show that the distinction has been drawn on an enumerated or analogous ground.[139] Third, the claimant must show that the distinction drawn on the basis of an enumerated or analogous ground is discriminatory in its nature. The first two aspects of this analysis are similar to the earlier position; it is in the treatment of the third aspect that there has been some blending and rethinking, the details of which will be discussed later.

Does this legislation deny one of the four equalities?

[147]The first inquiry is whether the impugned legislative provision denies one of the four equalities. In *Egan*, *supra*, I noted that the analysis at this stage is meant to be straightforward, taking into account whether the complainants are pursuing individual or systemic remedies, but ignoring considerations of whether the impugned distinction is unreasonable, invidious, or irrational.[140]

[148]It is obvious that, as the Trial Judge found, paragraph 16(4)(*c*) of the PSEA does not grant equal benefits to all individuals. The section is drafted to do otherwise, because it denies non-citizens equal benefit

of the law *vis à vis* citizens.

Does this legislation deny one of the four equalities on the basis of an enumerated or analogous ground?

[149]The second question is whether the distinction is drawn on the basis of an enumerated or analogous ground. While this is sometimes a difficult consideration,[141] in this case it is quite simple.

[150]Canada's history of prejudice against non-citizens, and especially against immigrants,[142] is such that non-citizens are properly protected by subsection 15(1) of the Charter. In *Andrews*, the Supreme Court held that non-citizens are a group analogous to those expressly protected by subsection 15(1) of the Charter. As discussed above, Canadian scholarship and jurisprudence since *Andrews* has taken the position that non-citizenship is an analogous ground for purposes of section 15 of the Charter. The Supreme Court's reasons in *Law*, *supra*, expressly affirm the conclusion in *Andrews* that non-citizens are an analogous group which must be protected by section 15(1) of the Charter.[143] The matter is settled: the distinction in this case is made on the analogous ground of non-citizenship.

Differentiating discriminatory and non-discriminatory distinctions.

[151]It is in the determination of whether a distinction drawn on the basis of an enumerated or analogous ground constitutes impermissible discrimination under subsection 15(1) of the Charter that *Law*, *supra*, charts a new course. This new approach is significant because it both integrates the older jurisprudence and adds some new elements. Two introductory points are necessary. First, there is no fixed formula or rigid test for determining whether a distinction drawn on an enumerated or analogous ground is discriminatory.[144] Second, as mentioned above, the analysis of discrimination in Canada is a purposive one. *Law*, *supra*, expressly states that each stage of the analysis is to be purposive.[145] This is as it should be, for there is no room in the Canadian context for a reading of subsection 15(1) which impoverishes or diminishes the special nature of the equality guarantee in our supreme law. Parliament and the Supreme Court speak in unison on this issue"the equality guarantee is meant to be taken seriously.

[152]Despite the unanimous reasons of the Supreme Court in *Law*, *supra*, differentiating discriminatory and non-discriminatory distinctions remains a complex matter. In determining whether there has been impermissible discrimination for purposes of subsection 15(1) of the Charter, much of the view of equality contained in *Andrews*, *supra*, remains relevant today. The teachings of *Andrews*, i.e., that discrimination does not exist in a vacuum and requires some comparative work,[146] that substantive rather than formal equality is the focus of the subsection 15(1) analysis,[147] and that a law may discriminate in its effects as well as on its face,[148] are still an important part of the equality analysis. The Supreme Court also restated that, where a distinction is drawn exclusively on the basis of an enumerated or analogous ground, that will generally suffice to establish discrimination.[149] It is, of course, not the case that distinctions drawn on the basis of enumerated or analogous grounds will always be discriminatory. In this regard, Iacobucci J. also reminded us that legislation or state action which is designed to take into account the merits and capacities of individual claimants will rarely be found to be discriminatory:

At this point, it is sufficient to note that the Court in *Andrews* held that the fact that a distinction is drawn on the basis of a ground expressly enumerated in s. 15(1) or one analogous thereto, although generally sufficient to establish discrimination, does not automatically give rise to this conclusion. In some circumstances a distinction based upon an enumerated or analogous ground will not be discriminatory. As

mentioned, McIntyre J. in *Andrews* gave an indication as to one such type of permissible distinction, namely a distinction which takes into account the actual differences in characteristics or circumstances between individuals in a manner which respects and values their dignity and difference.[150]

[153]None of these matters, which were established in *Andrews*, are new to the fresh subsection 15(1) analysis outlined in *Law*; they have been integrated into the new approach.

[154]The reasons in *Law*, however, offer substantial new insights on the subject of establishing that discrimination has occurred in a substantive sense. At paragraph 41 [page 525] of his reasons, Iacobucci J. emphasizes the proposition that, in order to hold that a law or some state action violates subsection 15(1), the Court must make a finding that the state action conflicts with the purpose of subsection 15(1):[151]

Since the beginning of its s. 15(1) jurisprudence, this Court has recognized that the existence of a conflict between an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. This principle holds true with respect to each element of a discrimination claim. The determination of whether legislation fails to take into account existing disadvantage, or whether a claimant falls within one or more of the enumerated and analogous grounds, or whether differential treatment may be said to constitute discrimination within the meaning of s. 15(1), must all be undertaken in a purposive and contextual manner. [Emphasis added.]

[155]More significantly, *Law*, *supra*, asserts categorically that "the fundamental purpose of subsection 15(1) is the protection of human dignity."[152] This is consistent with many of the earlier comments about equality, *supra*, see note 134, articulated by the entire Supreme Court in *Vriend v. Alberta*, where the majority and concurring reasons noted that the dignitary element was inherent in violations of subsection 15(1). In that case, L'Heureux-Dubé J. wrote, in concurring reasons, that:

In *Egan v. Canada*, . . . I articulated the approach to equality in a similar vein:

> [A]t the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the *Charter* when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. These are the core elements of a definition of "discrimination""a definition that focuses on impact (i.e. discriminatory effect) rather than on constituent elements (i.e. the grounds of the distinction). [Emphasis in original.]

Integral to the inquiry into whether a legislative distinction is in fact discriminatory within the meaning of s. 15(1) is an appreciation of both the social vulnerability of the affected individual or group, and the nature of the interest which is affected in terms of its importance to human dignity and personhood.[153]

[156]Thus human dignity is now solidly at the centre of the analysis under subsection 15(1) of the Charter. Any court which deals with subsection 15(1) of the Charter must carefully consider the relationship between the impugned law or state action and the human dignity of the claimant. At paragraph 51 [page 529] of his reasons [in *Law*], Iacobucci J. wrote that:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom

through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society. [Emphasis added.]

[157]The reasons in *Law*, *supra*, make an attempt to define human dignity in the context of subsection 15(1). Iacobucci J. notes that dignity involves concerns of personal autonomy, self-determination, feelings of self-respect and self-worth, physical and psychological integrity, and the prevention of marginalization and devaluation of persons and groups within Canadian society. He wrote [at paragraph 53, page 530]:

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)* . . . the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capa- cities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? [Emphasis added; citation omitted.]

[158]The reasons in *Law*, *supra*, also mandate the proper vantage point from which to evaluate a claim that subsection 15(1) has been violated. In order to prove a violation of subsection 15(1), it is obviously not enough for a claimant merely to assert that his or her dignity has been adversely affected by a law. The relevant point of view is both subjective and objective; we must examine the situation from the point of view of a reasonable and reasonably informed person who is in the shoes of the claimant.[154] Iacobucci J. is, however, careful to caution against using this hybrid subjective-objective test as a means of subverting the guarantee of equality contemplated by subsection 15(1). At paragraph 61 [pages 533-534] of his judgment he writes that:

I should like to emphasize that I in no way endorse or contemplate an application of the above perspective which would have the effect of subverting the purpose of s. 15(1). I am aware of the controversy that exists regarding the biases implicit in some applications of the "reasonable person" standard. It is essential to stress that the appropriate perspective is not solely that of a "reasonable person""a perspective which could,

through misapplication, serve as a vehicle for the imposition of community prejudices. The appropriate perspective is subjective-objective. Equality analysis under the *Charter* is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1). [Emphasis added.]

[159]*Law* also examines the importance of context in the equality analysis. A determination that a law or state action has adverse effects on the dignity of the claimant must be made from the appropriate context. *Law* outlines four important contextual factors which may assist in the analysis of whether a claimant's dignity is demeaned by the state action in question: a) pre-existing disadvantage or vulnerability, b) relationship between the ground on which the claim is based and the actual needs and capacities of the claimant, c) the possible ameliorative purpose or effects of the legislation on disadvantaged groups, and d) the nature and scope of the interest affected by the impugned state action. It is important to note that none of these four factors is dispositive, that there may be other factors to consider and not all the factors listed will be relevant in every case.[155] At all times the goal is to evaluate whether, from the perspective of the reasonable person in the shoes of the claimant, the legislative imposition of differential treatment has the effect of demeaning his or her human dignity.[156] Iacobucci J. summarizes these four helpful contextual factors that may be considered at paragraph 88 [pages 550-552] of his reasons:

(A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. Although the claimant's association with an historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.

(B) 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. Although the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.

(C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.

and

(D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

[160]The reasons of the Supreme Court in *Law* make three explicit points regarding the onus which rests on

the claimant seeking to argue an infringement of subsection 15(1) of the Charter. First, conclusive proof of the violation of the claimant's dignity is not required. Judicial notice and logical reasoning may be a sufficient basis for the determination that impugned state action infringes subsection 15(1).[157] Second, claimants do not have to prove anything that is not reasonably within their knowledge. Claimants are not required to establish that the intent of the legislature in enacting the impugned legislation was discriminatory"claimants need only establish that either the purpose or the effect of the impugned legislation infringes subsection 15(1) of the Charter. Third, as a practical matter, some cases will be focussed on whether the impugned state action discriminates in a dignitary sense. Iacobucci J. writes at paragraph 82 [page 545] of his reasons that:

For example, in cases where it is clear that a law draws a formal distinction upon enumerated or established analogous grounds, the issue in the case will largely be limited to that of whether the law discriminates in a sense which interferes with the claimant's dignity. Similarly, through the process of demonstrating that the adverse effect of a law is to produce substantive inequality through formally identical treatment, a claimant will often also make clear that the law infringes the human dignity of those affected, thus satisfying two elements of the s. 15(1) inquiry at once.

Does this legislative distinction violate subsection 15(1) of the Charter?

[161]In my view, the Trial Judge was correct when he held that the citizenship preference violates subsection 15(1) of the Charter. Simply, this legislative distinction denies non-citizens employment on the basis of non-citizenship alone. As *Law* reiterates, it is rare that legislation which denies equal opportunity on the basis of a personal characteristic alone will not violate subsection 15(1). This is because the enumerated and analogous grounds approach specifically seeks to prevent the state from drawing differences on the basis of characteristics which are frequently the basis of stereotyping and discrimination.[158] *Law* also recognizes that there may be cases in which state action draws distinctions exclusively on the basis of an enumerated or analogous ground in such a way as to avoid the devaluation of the claimant's dignity. Courts must, therefore, assess the ways in which the human dignity of claimants are maligned by the legislation or state action at hand. I have identified four reasons why this legislation demeans the human dignity of non-citizens in the circumstances of the claimants. As advised by Justice Iacobucci, I have used the contextual factors he listed as well as others, but I have not employed them as a definitive formula.

[162]First, as pointed out by the late Justice Tarnopolsky, one of the principal ways in which Canada has historically discriminated against non-citizens (and immigrants) is by denying them employment, particularly within the public service.[159] Thus, in enacting paragraph 16(4)(*c*) of the PSEA, Parliament has harmed a minority group, against whom Canada has traditionally discriminated through the denial of employment and further damaged them by denying them opportunities for employment. While the denial of public service employment may not be an affront to other groups, it definitely is that to non-citizens, for whom the denial of employment represents the repetition of invidious discrimination from an earlier age. Thus, paragraph 16(4)(*c*) of the PSEA exacerbates the historic, present and pre-existing disadvantages borne by non-citizens in our society. Such pre-existing disadvantage is one of the contextual factors enumerated by Iacobucci J. in *Law* (A). When current legislation maintains today the very attitude which gave rise to the shameful history of discrimination against immigrants and non-citizens, the Crown should be required to justify that behaviour in light of the Charter. To hold otherwise would be to allow the mistakes of the past to continue to rule us today. As Iacobucci J. wrote at paragraph 63 [pages 534-535] of his reasons in *Law*, a pre-existing disadvantage or vulnerability on the part of the individual or group is "probably the most compelling factor" underpinning a conclusion that differential treatment imposed by legislation is "truly

discriminatory":

As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group: see, e.g., *Andrews*, . . . at pp. 151-53, *per* Wilson J., p. 183, *per* McIntyre J., pp. 195-97, *per* La Forest J.; *Turpin*, . . . at pp. 1331-33; *Swain*, . . . at p. 992, *per* Lamer C.J.; *Miron*, . . . at paras. 147-48, *per* McLachlin J.; *Eaton*, . . . at para. 66. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable. [Emphasis added; citations omitted.]

[163]Second, denying people the chance to work is far more serious than refusing them some monetary benefit or procedural right. Work, along with the family, is the primary way by which people in our society identify themselves. One's self-image and self-worth are largely based on their work. The classic statement of this proposition in the Canadian context comes from Professor David Beatty, who in his seminal article, "Labour is not a Commodity", wrote that:

So it is then that the social institutions through which society's production has been generated have always been understood to have a profound and in some cases total bearing on the identities of its participants, on the meaning of their very being, in the community at large. All societies seem to have recognized that what individuals do in such activities has a meaning beyond what they produce; that the doing, the forty hours every week, is important and has an existence and purpose of its own. . . .[160]

. . .

Consistent with the traditional understanding of work relationships generally, this Labour Charter [the Treaty of Versailles] confirmed the existence of a discrete, personal meaning of employment to be defined by other than its social (production) purposes. At its most basic level, this personal end of the relationship is one of subsistence, of physical survival. As we have noted, for most individuals in our own society their physical needs can only be satisfied within this institution. However, at a more sophisticated level, and reflecting the characterization of humans as, for the most part, doers and makers, the identity aspect of employment is increasingly seen to serve deep psychological needs as well. It recognizes the importance of providing the members of society with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution. As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and concern from others. It is this institution through which most of us secure much of our respect and self-esteem. With such an emphasis on contributing to society one avoids the demoralization that inevitably attends idleness and exile, even when it is assuaged by social assistance. It ensures that the basis of survival remains within the individual's control. This aspect of employment, then, satisfies one of the driving psychological forces of our existence to develop our abilities, and in consequence, makes secure the dignity and integrity of our identities.[161]

[Emphasis added; footnotes omitted.]

[164]When the government acts to deny employment to an enumerated or analogous group, the human dignity and self-worth of the group are always impugned. To deny someone the opportunity to even compete for employment denies that person the opportunity to participate economically in our society. For many, that would be more serious than to deny them other rights, such as for example, the right to vote. Placing this point in the context of this case, the impact on the appellants of the impugned legislation is therefore "severe and localized,"[162] to utilize another of Justice Iacobucci's contextual factors (D). People define who they are in large part by what they do. If the state shuts an enumerated or analogous group out of employment solely on the basis of group membership, it should be called upon to demonstrably justify that decision.

[165]Third, since *Andrews*, it has been questionable to what extent the government may "enhance" citizenship by derogating from the rights of non-citizens. Citizenship is a concept which is inexorably linked to community. A concept of citizenship creates a concept of "insiders", which by definition means that there will be "outsiders". Cases like as *Andrews* , *supra*, *Pearkes*, *supra*, and *Austin*, *supra*, make the point that defining the "in-group" through denigration of the "out-group" is not usually tolerable in the Canadian context. We do not enhance the concept of citizenship when we identify citizenship by stripping away the rights of non-citizens. To use citizenship as a tool for exclusion denies the dignity of those who are excluded and rebukes that which is uniquely Canadian. Where the state sees fit to denigrate others in order to define ourselves, it must be called upon to demonstrably justify that choice.

[166]Fourth, this provision is a blanket provision which makes no reference to the needs and capacities of the targeted group (non-citizens). The correspondence between the ground of the equality claim and the needs and capacities of the claimants and others within their analogous ground is another of the contextual factors enumerated by Iacobucci J. in *Law* (B). This provision denies the opportunity to compete for employment to those who are already in a disadvantaged position when seeking employment. By virtue of foreign accents, differently coloured skin, foreign educational accreditation, foreign work experience, lack of business networks, and invidious discrimination, Canada's immigrants are frequently disadvantaged when seeking employment. Non-citizens' feelings that their human dignity is degraded when employment opportunities, particularly with the government, are curtailed by state action, must be taken seriously, considering the context in which they live their lives.

[167]Further, the legislation does not take into account the needs or circumstances of non-citizens. Human dignity is comprised of values such as self-esteem and self-worth. Part of self-worth is being evaluated on your own individual merits and capa-cities, not being judged on your personal characteristics over which you have little or no control. Being told that your "kind" is not permitted to apply for a job, seriously demeans the human dignity of the applicant. If the government wishes to make that kind of statement, then it must demonstrate that doing so is reasonably and demonstrably justified in a free and democratic society.

[168]It has been argued by the respondent, invoking another of Mr. Justice Iacobucci's contextual factors (C), that this provision has an "ameliorative" purpose because it encourages non-citizens to naturalize. I do not see how the exclusion of non-citizens from one quarter of a million jobs can be said to ameliorate non-citizens' disadvantaged position in Canada. In any event this argument is misleading. Ameliorative purpose refers to state action which has the effect of excluding one group in order to address the greater need of another, more disadvantaged group. In *Law* , for example, it was held that the legislation denying the younger widows survivorship benefits, existed primarily to assist seniors, who would have more difficulty securing employment, to the detriment of younger people, who would have less difficulty obtaining

employment. Withholding benefits in the circumstances could not be said to harm their dignity as human beings. Further, Iacobucci J. cautions at paragraph 71 [pages 538-539] of his reasons that legislation which, though ameliorative, excludes members of a historically disadvantaged group will "rarely escape the charge of discrimination."

[169]Placing human dignity at the centre of the equality analysis is not new to Commonwealth jurisdictions. A striking example comes from South Africa, where dignity has been said to be an "underlying consideration" in the determination of whether a law is unfairly discriminating, and is thus at the heart of the equality analysis in that country. In *Larbi-Odam* ,[163] a case decided by the Constitutional Court of South Africa, Mokgoro J. wrote for a unanimous court that:

Once discrimination has been established, the next enquiry is whether that discrimination is unfair. The unfairness enquiry is concerned with the impact of the impugned measures on the complainants. As was held in Hugo,

"To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination." In *Harksen* the focus of the unfairness enquiry was further explained as follows:

"In *[Hugo]* dignity was referred to as an underlying consideration in the determination of unfairness. The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner. However, as L'Heureux-Dubé J acknowledged in *Egan v. Canada*, `Dignity [is] a notoriously elusive concept . . . it is clear that [it] cannot, by itself, bear the weight of s.15's task on its shoulders. It needs precision and elaboration.' It is made clear in . . . *Hugo* that this stage of the enquiry focuses primarily on the experience of the `victim' of discrimination. In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination." [Emphasis added; footnotes omitted.]

[170]In the *Larbi-Odam* case, the claimants were non-citizens who were barred from tenured or permanent positions as teachers because of a citizenship preference. As in this case, the government argued that there was an interest in putting citizens first, that the provisions only affected certain positions, and that the effects of the provision were temporary, since permanent residents could apply for citizenship. The Constitutional Court held that such discrimination violated the equality provision of the South African Constitution. The Court noted that employment interests are "undoubtedly a vital interest",[164] and that security of tenure is integral to self-autonomy. The Court reasoned that "it makes little sense to permit people to stay permanently in a country, but then to exclude them from a job they are qualified to perform."[165] The Court concluded:

I hold that regulation 2(2) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been permitted to enter the country permanently. The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence and commitment is a harsh measure.[166] [Emphasis added.]

[171]I am persuaded by the reasoning of the Constitutional Court of South Africa that allowing people to stay permanently in our country while excluding them from jobs which they are qualified to perform on the basis of citizenship alone is a discriminatory practice, one which robs the excluded group not only of the dignity which accompanies employment, but also of the dignity which accompanies meaningful personal autonomy.

[172]Thus, in my view, this legislation violates the human dignity of non-citizens by denying them the opportunity to compete in a free and fair labour market. In effect, this legislation is tantamount to holding up a disturbing stop sign which says: "Canada demands that its public service be staffed by the best qualified people, without discrimination. Non-citizens need not apply."

IX. Is paragraph 16(4)(*c*) of the PSEA saved by the operation of section 1 of the Charter?

The approach to section 1 of the Charter.

[173]Any approach to section 1 of the Charter begins with the words of section 1 itself:

1. 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.

[174]The basic framework for a section 1 analysis set out in *The Queen v. Oakes*, remains in place, but has been elucidated by subsequent decisions. The analytical framework was recently restated in *Egan v. Canada*, and quoted with approval in *Eldridge* and *Vriend*:

A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to obtain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.[167]

[175]Thus, it must be established that the objective which the limitation is designed to promote is "of sufficient importance to warrant overriding a constitutionally protected right or freedom." At a minimum, an objective must be "pressing and substantial in a free and democratic society" to qualify as sufficiently important.

[176]If this requirement is met, the second re-quirement involves a proportionality test. The proportionality test includes three components. First, the measure limiting the Charter right must be rationally connected to the intended objective. In other words, the measure must be carefully designed to achieve its objective without being arbitrary, unfair, or based on irrational considerations. Second, the limiting measures must impair the Charter right as little as possible. This condition has been modified by decisions subsequent to *Oakes*, *supra*. Third, the effects of the measures must be proportional to the significance of the objective which is to be achieved. An objective that is merely pressing and substantial should not override a Charter right, if the effect of the means used to accomplish that objective severely compromise the rights of an individual or group. A provision limiting a Charter right that fails to satisfy any one of these criteria will not

be saved under section 1.

[177]Cases decided since the judgment of the Trial Division in this case have added sophistication to our understanding of the *Oakes* test. First, the Supreme Court has reminded us that the words of section 1 itself are not to be forgotten. Only those infringements which are reasonable and demonstrably justifiable will be permitted. In *RJR-MacDonald*, McLachlin J. wrote that:

. . . to meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration . This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.[168] [Emphasis in original.]

[178]Second, the Supreme Court has emphasized that, under the section 1 analysis, context matters. While the Supreme Court notes the obvious point that any weighing of legislative objective requires some canvassing of "the nature of the social problem which it addresses,"[169] the Court goes on to emphasize that proportionality can only be measured through close attention to the details and facts of the matter.

[179]The Supreme Court also notes that it is only within the context of the case that the proper standard of proof can be established. In many cases, scientific and conclusive proof of the effects of legislation is impossible. While the onus always remains on the government to justify Charter violations on the balance of probabilities, a court should be willing to find causal connection between legislation and its intended benefits on the basis of reason, deduction, or inference.[170]

Is the legislative objective of the impugned section pressing and substantial so as to warrant the compromise of a Charter right?

[180]In this Court, judges are slow to overturn findings of adjudicative facts. Any judge who sits on a Court of Appeal"and particularly one who has served as a trial judge"is mindful of the fact that it is the trial judge who hears and evaluates *viva voce* evidence, and that it is to the trial judge that the most complete presentation of the facts is made. While findings of legislative fact are not entitled to the same level of deference as findings of adjudicative fact, such findings are still entitled to respect. In this case, while I agree with the Trial Judge's finding that this provision was enacted in order to enhance citizenship and encourage naturalization, I have concluded for the reasons which follow that the 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.

[181]Appellate evaluation of legislative objectives is no easy matter. The respondents conceded in oral argument that the finding was one of legislative fact and was therefore entitled to less deference than a finding of adjudicative fact.[171] The respondents correctly point out, however, that appellate courts must still remain sensitive to the fact that the trial judge has had the advantage of hearing competing expert testimony first hand, and that a case such as this necessarily involves a large body of documentary and *viva voce* evidence which an appellate court, by its very nature, will not be able to fully canvas.

[182]Further, in 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.[172] 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.

[183]The Trial Judge found that the purpose of the citizenship preference was two-fold: to enhance citizenship and to encourage naturalization. I agree with his conclusion about the existence of these two purposes.

[184]However, I also believe that there is ample evidence of an additional purpose underlying the citizenship preference"concerns of loyalty and commitment. The reasons for judgment below refer to at least two examples to make this point.

[185]First, the Trial Judge quotes from the speech of the Honourable Mr. Sydney Fisher, whose speech in the House of Commons manifests a clear suspicion that people who are not "real residents" might find their way into the civil service:

The intention was to take real residents of Canada into the service. But for this provision, a person might come here "on spec," just to go up for the examination.[173] [Emphasis added.]

[186]Second, the Trial Judge quotes from *Equality Issues in Federal Law: A Discussion Paper*, at pages 49-50, the 1985 paper on equality circulated by the Minister of Justice. The words of the Report make clear that loyalty and commitment concerns are partly responsible for this preference:

The rationale [for the citizenship preference] is threefold. First is the argument that one of the benefits of Canadian citizenship is the right to seek . . . employment in the federal Public Service. . . .

Secondly, employees must recognize the authority of and faithfully serve the employer. In the Public Service, the Crown is the employer. Citizenship implies loyalty to the Crown, but non-Canadians, even if permanently resident in this country, owe loyalty to another state.

This rationale, however, raises questions because non-citizens can be granted Public Service positions. This preference for citizens does not, therefore, imply a want of recognition of service, loyalty or reliability on the part of the non-citizen. The citizenship requirement is merely a preference, although its effect is that very few positions in the federal Public Service are held by non-citizens. The same question applies to the third rationale which is a concern for national security if non-Canadians are employed.[174] [Emphasis added.]

[187]I, therefore, find that the purpose of the citizenship preference is threefold:

1. to enhance the value of citizenship;

2. to encourage naturalization; and,

3. to address concerns of commitment and loyalty which arise when non-citizens are hired to serve the Canadian public.

[188]I am bolstered in my conclusion by the oral argument of the respondent, who before this Court willingly conceded that, while they disagreed that the objective was commitment and loyalty to the government as employer, they agreed that one aspect of enhancing the value of citizenship was ensuring commitment and loyalty to Canada. Specifically, the Crown, arguing that the preference has always been animated by citizenship concerns, notes that citizenship usually involves a commitment to Canada. While there is still some distance between the appellants and the respondent on this issue, it is proper to infer from the record and from the arguments that one of the objectives of this legislation was to address concerns of commitment and loyalty which arise when non-citizens are hired to serve the Canadian public.

[189]The Trial Court Judge was correct to hold as he did, that two purposes of enacting this legislation were to encourage naturalization and to enhance citizenship. I believe that a reading of the legislative history of the provision, however, makes clear that there was a third purpose"to address concerns of commitment and loyalty. The Supreme Court has repeatedly rejected the notion that purposes may change and shift over time, preferring instead to seek and analyze the purposes of the legislation at the time it was passed.[175] I agree with the parties that in cases when the legislation was passed with little or no fanfare, common sense dictates that courts must use what evidence is available to determine what the purpose was at the time the legislation was passed. In this case, the historic record clearly demonstrates a third purpose to deal with concerns of commitment and loyalty but the Trial Judge below ignored that evidence by reading out that third, more archaic, purpose.

[190]At this point it is important to note that the purpose of paragraph 16(4)(*c*) is actually at odds with the purpose of the Act generally. While this is in no way determinative of the question, it is instructive to the contextual analysis which follows.

[191]Turning to the facts of the case before this Court, the first question to be answered is whether the objectives of the impugned provisions are pressing and substantial in a free and democratic society. Are the objectives of the provisions in question so important as to warrant overriding the equality rights of non-citizens? In this case, the objective of the provision in question is threefold: (a) to enhance the value of citizenship, (b) to encourage naturalization, and (c) to address concerns of security and loyalty which arise when non-citizens are hired to serve the Canadian public.

[192]On this issue, the parties are talking past one another. The respondents argue that since citizenship is an inherently distinctive status, enhancing the value of citizenship and encouraging naturalization must mean drawing distinctions between citizens and non-citizens. The appellants counter-argue that the purpose of the legislation is only to ensure loyalty, and that is an invalid purpose rooted in the invidious discrimination which the Charter seeks to eliminate.

[193]I would agree with the Trial Judge that, on balance, the objectives of enhancing Canadian citizenship and encouraging naturalization are sufficiently important to warrant the compromise of equality between

citizens and non-citizens. While citizenship may be a concept which is on many levels incompatible with the emerging global village, it remains a relevant and important status which forms an indispensable part of our national life. The Supreme Court has repeatedly upheld citizenship-based distinctions where those distinctions are rooted in the status of citizenship as described by the Charter itself. Giving value"whether tangible or otherwise"to our citizenship is something which our government is entitled, expected, and justified in doing.

[194]The loyalty of permanent residents in Canada is a more problematic concern which, on the evidence, might not by itself be considered a pressing and substantial objective outside limited circumstances. Nevertheless, the other two objectives are pressing and substantial objectives which may warrant some compromise of equality rights.

Is the legislation rationally connected to the objectives it seeks to further?

[195]Despite some confusion as to the proper approach to the "rational connection" test, it is my view that a rational connection is just that. The test is not the "proven connection" or the "established connection" test, it is the "rational connection" test. Hence, discussion of the effects of the legislation is best left to the proportionality test below. Legislation will be rationally connected to its intended objective if it (i) is designed to meet its objective; (ii) is not arbitrary; and, (iii) is based on assumptions which, logically applied, further the objective.

[196]Supporting this view, Wilson J. summarized the standard of justification under the rational connection test in *Lavigne v. Ontario Public Service Employees Union*:

The *Oakes* inquiry into "rational connection" between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt.[176]

[197]At this stage, calls for scientific and conclusive proof of the effects of legislation must be rejected. While the onus always remains on the government to justify Charter violations on the balance of probabilities, a court should be willing, where appropriate, to find sufficient causal connection between legislation and its intended benefits on the basis of reason, deduction, or inference.

[198]In this case, it is logical to infer that giving citizens preferential treatment in public service employment will further the substantial objectives of enhancing citizenship and encouraging people to naturalize. In my view, which is consistent with that of the Trial Judge, the objectives of this legislation are rationally connected to Parliament's goals.

Does the legislation minimally impair the violated equality right?

[199]There is considerable debate between the parties as to whether a modified minimal impairment test is warranted in this case. The respondents claim that this case is not one in which the government acts as a "singular antagonist" against the group, nor is it one where the government is allocating scarce resources or choosing between the rights of competing groups. The appellants argue otherwise.

[200]The issue of when the modified version of the minimal impairment branch of the proportionality test is applicable and when the conventional *Oakes* version should be relied upon is not entirely settled. There is general agreement, however, that the modified approach to minimal impairment may be applied where the

rights of different groups come in conflict and must, to some extent, be mediated. Under this approach, the minimal impairment condition depends on whether Parliament could "reasonably have chosen an alternative means which would have achieved the identified objective as effectively." In *Benner* , I described the modified approach in the following way:

Where competing rights must be balanced, a court may rely on the lesser standard of the modified approach to minimal impairment. Under the modified approach, the question is whether Parliament could reasonably have chosen an alternative means which would have impaired the right in question less or not at all but which would have achieved the identified objective as effectively.[177]

[201]In *Thomson Newspapers*, *supra*, Bastarache J. wrote for the Court that the context of each case would determine the amount of deference given by the courts to Parliament's impairment of the Charter right.[178] He wrote in that case that factors which determine the level of deference included the vulnerability of the group sought to be protected,[179] the presence of a logical inference refuting the existence of harm or social problem,[180] the opposition of group interests,[181] and whether the harm against which the legislation is intended to act is actual or potential.[182]

[202]In this case, an argument can be made that the rights of two groups are being balanced and a choice is being made. This is evident from the fact that, in 1979 and 1985, Parliamentary committees concluded that Parliament had come to the wrong balance.[183] Debate over the legitimacy of Parliament's choice ensued, following which Cabinet made a decision not to change the legislation.[184] Given that Parliament debated the balancing of rights in this case, one might argue that this Court has no business applying a strict test.

[203]Considering the context of the case, however, the modified approach might not be in order. First, this Court heard uncontested evidence that the effect of this provision is potentially to exclude some 600,000 people from about 250,000 jobs. Those are big numbers. Second, the group benefited by the provision"citizens"is not a historically disadvantaged group. The group disadvantaged by the provision, however, is the very group that has suffered invidious discrimination at the hands of those to whom the provision yields advantage. In general, I would hold that a law which elevates the privileged by expressly and systemically harming the disadvantaged is a law which must be strictly scrutinized. Third, the harms which the citizenship preference seeks to remedy, i.e., undervalued citizenship, naturalization problems, and an uncommitted non-citizenry, are at best only potential harms. The government has shown not one scintilla of evidence that any of these are problems facing our country today. On the contrary, this Court heard evidence that Canadian citizenship is an extremely valuable status, and that Canada has one of the highest naturalization rates in the world. This accords with common sense.

[204]I would therefore hold that a deferential approach to minimal impairment is not warranted in this case. Even using a modified test, however, I doubt whether this legislation is constitutionally valid.

[205]On one hand, the citizenship preference seems carefully designed to impair the right in a sub-maximal way. First, non-citizens are not prohibited outright from participation in the Canadian public service. Indeed all three appellants have held term or contract public service positions. Second, the citizenship preference may only be invoked where there is a sufficient number of Canadian citizens to establish an adequate pool of candidates. Third, even if there is a sufficient number of Canadians to establish an adequate pool of candidates, paragraph 16(4)(*c*) gives the Commission discretion to confine its selection"it does not mandate doing so. Finally, the preference does not exist in closed competitions.

[206]On the other hand, there are many options by which the citizenship preference could exist in a way which impairs the right less than the current preference. First, the preference could be legislated to apply only after a functional analysis of the open position revealed it to be one which was appropriate for non-citizens. This is not unlike the citizenship preference employed in the 50 states of the United States.[185] Similarly, evidence was adduced in this case to explain that New Zealand imposes a citizenship requirement for positions which can be classified as "security positions." Second, the preference could be legislated to apply only after people were eligible for citizenship and chose not to apply for it. This is similar to the citizenship preference as it exists in Australia. In my view, it is one thing to tell someone that, regardless of merit, they may not because of their immigration status have a job; it is completely another to inform those who merit a job that one condition of keeping that employment is eventual naturalization. Third, the citizenship preference could be eliminated in the case of permanent residents, but maintained for non-landed visa holders. The Crown has provided neither evidence nor argument of the harm which might result from such a position. Fourth, the citizenship preference could apply as a true affirmative action program"if all other considerations were equal, citizens would be preferred over non-citizens. Finally, the preference could be struck entirely, following which the Commission could rely on subsection 12(3) of the PSEA, which would permit a position to be limited on the basis of a *bona fide* occupational requirement, e.g., a residence requirement to ensure familiarity with the country, and perhaps commitment and loyalty with regards to those positions which require it.

[207]Considering these arguments, it is important to recall that since the decision in this case was decided by the Court below, McLachlin J. of the Supreme Court has reiterated the importance of recalling the government's section 1 onus with regards to the minimal impairment test:

Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the *Charter*. The Constitution, as interpreted by the courts, determines those limits. Section 1 specifically stipulates that the infringement may not exceed what is reasonable and "demonstrably justified in a free and democratic society", a test which embraces the requirement of minimal impairment, and places on the government the burden of demonstrating that Parliament has respected that limit.[186] [Emphasis added.]

[208]In this case the government has argued that the legislation is not as bad as it could be. I agree. The government, however, has not shown evidence that Parliament, in response to a problem or in furtherance of a pressing and substantial objective, has passed legislation which is carefully tailored to minimize impairment of the Charter right. While the legislative history reveals that Parliament has defended the legislation, it gives no indication that Parliament turned its mind to alternatives other than the complete repeal of the citizenship preference as it is written. Further, the Crown conceded that the government almost never exercises its discretion to permit non-citizens to compete in open competition. Hence, the discretion vested in the Commission is largely illusory and, therefore, significantly increases the impairment of the equality right. Finally, while the respondents argue that Parliament sought the least impairing means by replacing the (former) citizenship requirement with a citizenship preference, the legislative history shows no evidence that this was a consideration in 1961, or at any other time. On balance, I would hold that it has not been demonstrated by the Crown that, on the evidence, this legislation does not impair the Charter right beyond what is tolerable in a free and democratic society.

Are the effects of the legislation proportional to the objective involved?

[209]The third part of the proportionality test involves an inquiry into whether the effects of the measures

are proportional to the significance of the objective which is to be achieved. Weighing the significance of a legislative objective against the degree to which the Charter rights of an individual or group are impeded is always a difficult and imprecise process.

[210]In recent jurisprudence, the Supreme Court has given distinct scope and function to the proportionality analysis. A court weighing the proportionality between the measures and the pressing and substantial objective of the provision must take into account factors such as:

" the significance of the objectives;
" evidence of the effectiveness of the objectives;
" the benefits of the legislation;
" the extent to which the Charter right is interfered with; and,
" the manner, e.g., direct or indirect, in which the Charter right is compromised.[187]

[211]In *Dagenais*, Lamer C.J.C. summarized his reformulation of the proportionality analysis as follows:

I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question, and there must be proportionality between the deleterious and salutary effects of the measures.[188] [Emphasis in original.]

[212]In *Thomson Newspapers*, Bastarache J. expanded on the analysis between the deleterious and salutary effects in the context of the *Oakes* test generally. He wrote that:

The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which the *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.[189]

[213]In this case, decided before *Thomson Newspapers*, the Trial Judge felt that the infringement of the equality guarantee was not particularly serious, since (a) over half of the public service, broadly defined, is not subject to the citizenship preference, (b) the restriction can be temporary and can be lifted through naturalization, and (c) the objectives which underlie the preference are important and justified.

[214]With great respect, I am unable to agree. There are five reasons why this is so. First, the burden imposed is significant regardless of the level of analysis. From a systemic point of view, it is the case that over 600,000 people are potentially excluded from nearly 250,000 jobs. Those are big numbers. The federal government has recently lifted a hiring freeze which lasted nearly a decade. As a result, cases such as these are bound to become more common and thus take on added importance. With this in mind, the jobs which are currently available to permanent residents are temporary or contract positions, which necessitate moving on after a short period of time, thus depriving the employee of any ability to plan his or her career in the medium- or long-term.

[215]From an individual point of view, this provision halts individual growth and opportunity at self-attainment in order to ensure that cooks, deckhands and curators, and for that matter interpreters, prison guards and secretaries, are Canadian citizens. Justice Maczko made the point succinctly in *Austin*, *supra*:

I must also consider whether the symbolism the government seeks to achieve is more important than the right of a person to pursue job opportunities. I see very little symbolic value in requiring a cook, deck-hand or indeed even a museum curator to be a citizen. What little symbolic value may be achieved does not outweigh the interference with an important fundamental right.

The discrimination displayed on the face of the statute is of the worst kind. It decides a person's employment opportunities on the basis of status rather than merit or achievement. Discrimination of that sort is inherently repugnant to a society which values achievement through personal enterprise and hard work. In my view the right to pursue one's career of choice, significantly outweighs the government's objective in this instance.[190]

[216]Second, Canada permits naturalization but does not require it. The Government of Canada has long recognized that people have many and varied reasons not to naturalize. Canada further recognizes"through mechanisms such as permitting dual citizenship"that people have legitimate reasons to maintain their connection with their homelands. This does not reduce the benefit which Canada receives from non-citizens, nor does it reduce Canada's commitment to treat non-citizens fairly. In *Andrews* , *supra*, La Forest J. noted that:

Our nation has throughout its history drawn strength from the flow of people to our shores. Decisions unfairly premised on citizenship would be likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned and . . . such persons are likely not to have faith in social and political institutions which enhance the participation of individuals and groups in society, or to have confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of vocational and personal development".[191]

[217]This legislation, however, flies in the face of that sentiment. It explains to permanent residents that, while we encourage them to settle, work, and pay taxes here, they are not allowed to serve our country as public servants until they take out citizenship. Justice La Forest's vision of Canada is preferable to that presented by paragraph 16(4)(*c*) of the PSEA.

[218]Third, while the objectives of enhancing citizenship and encouraging naturalization are important ones, concerns regarding commitment and loyalty, except in rare situations, are remnants from an earlier era. It may be that there are positions which should be held by citizens for security reasons. It is disproportionate, however, to exclude virtually all non-citizens from open competition on the basis that some jobs might legitimately need to be held by citizens. Further, Canada can give value to its citizenship in ways other than by excluding them from civil service employment. For example, the Minister of Citizenship has recently tabled a bill in the House of Commons,[192] the purpose of which is to "strengthen the value of Canadian citizenship by modernizing the Act."[193] The new Act contains many measures which are specifically intended to strengthen the value of Canadian citizenship. None of these measures mention or modify the citizenship preference. None of these measures achieve the goal of enhancing citizenship by undercutting the rights or privileges of non-citizens.

[219]Fourth, the benefits of this preference are meagre indeed. This Court heard no evidence that the

preference succeeds in enhancing citizenship. Counsel for the appellants presented evidence that indicates, rather, that Canada's naturalization rates are among the highest in the world. Hence, the benefits are hard to see. On the contrary, the burdens imposed are significant. Let me explain.

[220]Citizenship is not as easy to get as the Crown would have us believe. The application for citizenship[194], which comprises some 17 pages, sets out a series of application and pre-application requirements. Assuming that one has passed through the necessary and significant hurdles of obtaining the necessary visas and permanent resident status,[195] the successful applicant for citizenship will have

" paid $100 in the form of a "Right of Citizenship fee" and a $100 "Grant of Citizenship" fee;

" sent photocopies of their immigration record and provided proof of identification;

" provided two photographs;

" calculated and submitted the number of days in which they have been resident in Canada during the last four years, including at a discount time spent in Canada in the two years immediately prior to obtaining landed immigrant status;

" studied for and passed a citizenship test in either English or French;

" taken an oath of loyalty to Canada; and,

" given out basic personal information, as well as all addresses in Canada and absences from Canada in the last four years.

[221]As has already been discussed, Canada recognizes the attachment which people may legitimately have to their homelands. In many circumstances, the citizenship laws of other countries dictate that taking out Canadian citizenship means giving up one's original citizenship. Canada has no such requirement, recognizing that people do not have to choose between countries and allegiances to be good Canadians. In the case at bar, one of the applicants, Bailey, testified that she needed to retain the right to enter and remain in Holland in order to care for aging parents there. In my view, it is wrong to pass a law which has the effect of forcing our permanent residents to choose between curtailed career opportunities here and curtailed rights of access to their former homeland.

[222]In this case, the respondent suggests that since certain international agreements contemplate or accommodate a citizenship preference in civil service hiring, then a finding that paragraph 16(4)(*c*) of the PSEA impermissibly violates subsection 15(1) condemns international human rights treaties and other international treaties as discriminatory. This argument is shortly dealt with: Canadian laws must stand up to the scrutiny of Canada's Charter. It is one thing to note that treaties may have been negotiated to carve out exceptions which permit citizenship preferences in civil service hiring. It is a very different thing to argue that the existence of such exceptions necessitates similar treatment of our citizenship preference by courts applying our Charter.

[223]Fifth, I am bolstered in my conclusion that the effects of the provision are disproportionate to its objectives because one of the effects of the provision is to undermine the merit principle underlying the statute as a whole. While the objectives of the legislation as a whole are not generally the focus of the *Oakes* test, they are part of the context within which the *Oakes* test must operate. I have discussed the role of context in the *Oakes* analysis at length above. If Parliament has as its goal the encouragement of non-discriminatory, merit-based hiring, then it seems disproportionate to bar non-citizens, who may be the most meritorious candidates, from competing in virtually all open competitions.

X. Disposition

[224]For all the reasons given above, I would hold that the citizenship preference impermissibly violates subsection 15(1) of the Charter and cannot be saved by section 1 of the Charter. I would, therefore, declare paragraph 16(4)(*c*) of the PSEA to be of no force and effect, and refer the matter back to the Federal Court (Trial Division) for a hearing as to damages. The appellants should have their costs throughout.

[1] [1999] 1 S.C.R. 497.

[2] [1989] 1 S.C.R. 143.

[3] ;*The Queen. v. Oakes*, [1986] 1 S.C.R. 103.

[4] By the terms of the *Civil Service Act*, S.C. 1960-61, c. 57, a citizen preference was to be applied on a discretionary basis to the selection of qualified candidates for referral to any competition (s. 38(3)) and on a mandatory basis to the listing of candidates on eligibility lists in the case of open competition (s. 40(1)). By the enactment of the *Public Service Employment Act*, S.C. 1966-67, c. 71, the citizen preference was made applicable only to open competition.

[5] S. 14 of *The Civil Service Amendment Act, 1908*, S.C. 1908, c. 15, prohibited the admission of any person to examination for entry into the Civil Service unless he was a natural-born or naturalized British subject, and had been a resident of Canada for at least three years.

[6] Mr. Justice McIntyre, in *Andrews*, was obviously quite sensitive to that reality as shown by some of his comments, including the following where, at p. 164, he noted with respect to equality:

> It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.

[7] The concept of citizenship is constitutionally recognized in Canada. S. 23(2) and 31(2) of the *Constitution Act, 1867* provide that only British subjects may be appointed to the Senate. (As noted by McIntyre J. in *Andrews*, the concept of citizenship in early Canada was embodied in the term "British subject".) Further, ss. 3, 6(1) and 23 of the Charter guarantee certain rights to citizens only.

[8] 426 U.S. 88 (1976).

[9] Those reasons of Mr. Justice Rehnquist, to which other judges concurred, were dissenting reasons, but the dissent and indeed the majority opinion was exclusively concerned with the delegation of authority to the Civil Service Commissioner, not with the absolute power of Congress.

Here are two other passages of this earlier *Lem Moon Sing* [*Lem Moon Sing v. United States*, 158 U.S. 538 (1895)] judgment from which the quote was taken which are equally unequivocal [at pp. 541-542]:

> In the *Chinese Exclusion Case*, 130 U.S. 581, 603, this court said: "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is

an incident of every independent nation. It is part of its independence."

and later [at p. 543]:

This court, observing that, according to the accepted maxims of international law, every sovereign nation has the power, inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe, said: "In the United States this power is vested in the national government."

[10] [1995] 2 F.C. 623 (T.D.), at pp. 646-647.

[11] To a non-expert, the overall U.S. position is all the more difficult to master in that two amendments were found to be involved, the 5th and the 14th, and a difference is always drawn between terms and conditions of entry and residence and protection through the due process requirement in deportation proceedings, for example, or discharge for cause, etc. But, in any event, as far as I could see, never has the exercise by Congress of its powers toward aliens been made subject to any review by the judiciary.

[12] [1992] 1 S.C.R. 711.

[13] *Supra*, note 2.

[14] ;*Miron v. Trudel*, [1995] 2 S.C.R. 418.

[15] ;*Egan v. Canada*, [1995] 2 S.C.R. 513.

[16] ;*Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

[17] ;*Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

[18] ;*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

[19] *Supra*, note 1.

[20] [1995] 3 S.C.R. 199.

[21] R.S.C., 1985, c. P-33. The *Public Service Employment Act* applies only to that portion of the federal public service that is legislatively defined as the "Public Service". It comprises all the government departments and agencies listed in Part I of Schedule I to the *Public Service Staff Relations Act* , R.S.C., 1985, c. P-35, and some of the separate employers listed in Part II of the Schedule. The Trial Judge stated that as of December 31, 1989, the total population of the Public Service was 227,545 and comprised 42.6% of the full public service of 534,343. The Public Service includes only civilian positions ranging from the clerical to the assistant deputy minister level and includes a broad range of occupational categories. See *Lavoie v. Canada*, [1995] 2 F.C. 623 (T.D.), at p. 636.

[22] ;*Lavoie v. Canada*, [1995] 2 F.C. 623 (T.D.), at p. 637.

[23] ;*Lavoie v. Canada*, [1995] 2 F.C. 623 (T.D.).

[24] *Ibid.*, at pp. 657-658.

[25] *Ibid.*, at p. 661.

[26] *The Queen v. Oakes*, [1986] 1 S.C.R. 103.

[27] R.S.C., 1985, c. I-2, s. 2.

[28] R.S.C., 1985, c. C-29.

[29] [1951] S.C.R. 887.

[30] *Ibid*., at p. 918.

[31] *Citizenship Act*, R.S.C., 1985, c. C-29.

[32] R.S.C., 1985, c. E-2.

[33] For example, s. 14 of the *Canadian Payments Association Act*, R.S.C., 1985, c. C-21 specifies that "No person who is not a Canadian citizen. . . may be a director of the Association."

[34]Members of the Board of Directors of the Bank of Canada, *Bank of Canada Act*, R.S.C., 1985, c. B-2, s. 10(4); Directors of the Canadian Broadcasting Corporation, *Broadcasting Act*, S.C. 1991, c. 11, ss. 36, 38; Chairperson of the Canada Deposit Insurance Corporation, *Canada Deposit Insurance Corporation Act*, R.S.C., 1985, c. C-3, s. 6; Member of the Canada Labour Relations Board, *Canada Labour Code*, R.S.C., 1985, c. L-2, s. 9; Director or President of the Canada Mortgage and Housing Corporation, *Canada Mortgage and Housing Corporation Act*, R.S.C., 1985, c. C-7, s. 8; Member of the Board of Trustees of a Museum, *Museums Act*, S.C. 1990, c. 3, s. 18; Member of the Public Service Staff Relations Board, *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, s. 13(1).

[35] For example, s. 5(1) of the *Canadian Radio-television and Telecommunications Commission Act*, R.S.C., 1985, c. C-22 provides that "A person is not eligible to be appointed or to continue as a member of the Commission if the person is not a Canadian citizen ordinarily resident in Canada".

[36] *International Centre for Human Rights and Democratic Development Act*, R.S.C., 1985 (4th Supp.), c. 54 s. 13(1).

[37] *International Development Research Centre Act*, R.S.C., 1985, c. I-19, s. 3, 10.

[38] R.S.C., 1985, c. I-19 s. 11.

[39] R.S.C., 1985, c. Y-1.

[40] R.S.C., 1985, c. R-10, s. 9.1 (2) [as enacted by R.S.C., 1985 (2nd Supp.), c. 8, s. 4].

[41] R.S.C., 1985, c. T-15.

[42] R.S.C., 1985, c. T-15, s. 3.

[43] *Criminal Code*, R.S.C., 1985, c. C-46, s. 279.1 [as enacted by R.S.C., 1985 (1st Supp.), c. 27, s. 40; S.C. 1995, c. 39, s. 148] and s. 7(3.1) [as enacted by R.S.C., 1985 (1st Supp.), c. 27, s. 4].

[44] R.S.C., 1985, c. C-46.

[45] S. 290(1)(*b*).

[46] R.S.C., 1985, c. O-5.

[47] R.S.C., 1985, c. O-5, s. 13.

[48] S. 4(1)(*i*).

[49] *Juries Act*, R.S.N.S. 1989, c. 242, s. 4(a), *Jury Act*, S.A. 1982, c. J-2.1, s. 3(b); *Jury Act*, R.S.B.C. 1996, c. 242, s. 3(1)(a); *Jury Act*, R.S.N.B. 1973, c. J-3.1, s. 2; *Jurors Act*, R.S.Q., c. J-2, s. 3(a); *Juries Act*, R.S.O. 1990, c. J-3, s. 2(b); *Jury Act, 1991*, S.N. 1991, c. 16, s. 4; *Jury Act*, S.S. 1980-81, c. J-4.1, s. 3; *Jury Act*, R.S.P.E.I. 1988, c. J-5, s. 4; *Jury Act*, R.S.M. 1987, c. J30, s. 3.

[50] *Jury Act*, R.S.N.W.T. 1988, c. J-2, s. 4(b).

[51] *Jury Act*, R.S.Y. 1986, c. 97, s. 4(b).

[52] Department of Justice Canada, Minister of Supply and Services Canada, 1985.

[53] *Equality Issues in Federal Law: A Discussion Paper*, at p. 49.

[54] *Ibid.*, at pp. 49-50.

[55] *Equality for All: Report of the Parliamentary Committee on Equality Rights*. Ottawa: Queen's Printer, 1985, Appeal Book, Common Appendix I, vol. V, at p. 763.

[56] *Toward Equality: The Response to the Report of the Parliamentary Committee on Equal Rights*. Ottawa: Supply and Services Canada, 1986, [at p. 31], Appeal Book, Common Appendix I, vol. V, at p. 780.

[57] *House of Commons Debates*, Vol. VIII, 1st Sess., 33rd Parl., (March 26, 1986), at p. 11916.

[58] [1999] 1 S.C.R. 497.

[59] See para. 104, p. 560.

[60] Ivan L. Head, "The Stranger in our Midst: A Sketch of the Legal Status of the Alien in Canada" (1964), 2 *Can. Y.B. Int'l L.* 107.

[61] [1989] 1 S.C.R. 143, at pp. 196-197.

[62] *Ibid.*, at p. 197.

[63] [1995] 2 S.C.R. 418, at p. 502.

[64] *Ibid.*, at p. 504.

[65] [1986] 1 S.C.R. 103.

[66] [1998] 1 S.C.R. 493.

[67] *Vriend*, at para. 108, p. 554. This same summary was stated in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182, p. 605, and quoted with approval in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 84, pp. 684-685.

[68] [1995] 3 S.C.R. 199.

[69] *Ibid.*, at para. 62, p. 270.

[70] *Ibid.*, at para. 133, pp. 330-331.

[71] *Ibid.*, at para. 137, p. 333. Note, however, that La Forest J. suggested, in dissent, at para. 82, p. 290, that the civil standard of proof does not apply to determining when a rational connection exists.

[72] *Ibid.*, at paras. 139 to 141, pp. 333-335.

[73] Memorandum of fact and law submitted on behalf of the appellants, at pp. 30-31, para. 78.

[74] [1989] 1 S.C.R. 143, at p. 197.

[75] GA Res. 217 A (III), UN GAOR, December 10, 1948.

[76] December 19, 1966, [1976] Can. T.S. No. 47. Ratified by Canada in 1976.

[77] *Statut des fonctionnaires*, 172.221.10, juin 1927, s. 2. See Appeal Book, Common Appendix I, Vol. IV, at p. 666 (French) and at p. 667 (English); *Règlement des employés*, 172.221104, novembre 1959, s. 6. See Appeal Book, Common Appendix I, Vol. IV, at p. 668 (French) and at p. 669 (English); *Règlement des fonctionnaires*, 172.221.103, 24 juin 1987, s. 4(4) and (6). See Appeal Book, Common Appendix I, Vol. IV, at p. 671 (French) and at p. 673 (English).

[78] *Mathews v. Diaz*, 426 U.S. 67 (1976), at pp. 78-80; *Mow Sun Wong v. Hampton*, 435 F. Supp. 37 (Dist. Ct. Cal. 1977), at pp. 42-44.

[79] *Sugarman v. Dougall*, 413 U.S. 634 (1973).

[80] *Mathews v. Diaz*, 426 U.S. 67 (1976), at pp. 81-82.

[81] *Sugarman v. Dougall*, 413 U.S. 634 (1973), at p. 647.

[82] *Public Service Act* 1922-1973, ss. 34 and 82(1A). See Appeal Book, Common Appendix I, Vol. IV, at pp. 710-712.

[83] *Report of the Royal Commission on Australian Government Administration* (Canberra: Australian Government Publishing Service, 1974), à la p. 173. Voir le dossier d'appel, annexe commune I, vol. IV, aux p. 723 et 724.

[84] *Public Service Reform Act 1984*, No. 63, 1984, s. 26. See Appeal Book, Common Appendix I, Vol. IV, at p. 734; *Public Service Legislation (Streamlining) Act 1986*, No. 153, 1986, s. 25. See Appeal Book, Common Appendix I, Vol. IV, at p. 747.

[85] Ss. 33 and 116 of the German *Basic Law*. See Appeal Book, Common Appendix I, Vol. IV, at pp. 634-635 (German) and 636-637 (English); *Federal Civil Service Framework Act* (1977) (*Beamtenrechtsrahmengesetz*), s. 4. See Appeal Book, Common Appendix I, Vol. IV, at p. 638 (German) and p. 642 (English); *Civil Servants (Amendment) Act* (1993) (*Zehntes Gesetz zur Aenderung dienrechtlicher Vorschriften*), s. 1. See Appeal Book, Common Appendix I, Vol. IV, at p. 646 (German) and p. 649 (English). See also: France: Loi n^{o} 83-634, juillet 1983, s. 5(1) amended by Loi n^{o} 91-715, 26 juillet 1991, s. 2. See Appeal Book, Common Appendix I, Vol. IV, at pp. 600 and 624.

[86] *The Act of Settlement 1700*, (U.K.), 12 & 13 Will. III, c. 2, s. III.; *Aliens Restriction (Amendment) Act, 1919*, (U.K.) 9 & 10 Geo. 5, c. 92, s. 6. See Appeal Book, Common Appendix I, Vol. IV, at p. 680; *Aliens' Employment Act*, 1955 (U.K.), 4 Eliz. 2, c. 18, s. 1. See Appeal Book, Common Appendix I, Vol. IV, at p. 687. It is important to note that the *Civil Service Commission General Regulations 1983* provide that, for more important and sensitive civil service positions, applicants must have a greater level of connection with the country.

[87] [*Treaty establishing the European Economic Community*, March 25, 1957] 298 U.N.T.S. 11.

[88] Case 149/79, [1981] 2 C.M.L.R. 413 (E.C.J.) and [*Re Public Employees (No. 2): E.C. Commission v. Belgium*] [1982] 3 C.M.L.R. 539. See Appeal Book, Common Appendix I, Vol. III, at p. 544.

[89] [1981] 2 C.M.L.R. 413, at p. 433. See Appeal Book, Common Appendix I, Vol. III, at p. 564.

[90] [1981] 2 C.M.L.R. 413, at p. 433. See Appeal Book, Common Appendix I, Vol. III, at p. 564.

[91] Memorandum of fact and law submitted on behalf of the appellants, at p. 27, para. 69.

[92] [1997] 3 S.C.R. 569, at pp. 605-606, paras. 58-59.

[93] P. W. Hogg, *Constitutional Law of Canada*, Loose-leaf ed., Vol. 2 (Toronto: Carswell, 1992) para. 35.11(b), at p. 35-32.2, footnote 160 explains:

> The European Court of Human Rights, interpreting the limitation clauses in the European Convention on Human Rights, has allowed member states "une marge d'appréciation", which is usually mechanically rendered into English as "margin of appreciation", although measure of discretion would be much better. This concept allows the Court to tolerate different levels of derogation of Convention rights out of respect for the different conditions and values of the European states that adhere to the Convention.

See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 999; D. Pannick, Comment: "Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment", [1998] *P.L.* 545.

[94] See *Canadian Citizenship: A Sense of Belonging: Report of the Standing Committee on Citizenship and Immigration*, June 1994, at p. 15; Appeal Book, Common Appendix I, Vol. II, 253, at p. 269.

[95] P. W. Hogg, *Constitutional Law of Canada*, Loose-leaf ed., Vol. 2 (Toronto: Carswell, 1992), para. 35.12, at pp. 35-36.

[96] See D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990), where the author [at p. 74], after an analysis of *Andrews* writes:

> . . . no court facing an equality issue can avoid somehow determining whether the person or group relying on section 15 is sufficiently similar to other persons or groups in relevant respects to merit equal treatment.

For a vigorous treatment of the "similarly situated test", see *Catholic Children's Aid Society of Metropolitan Toronto v. S. (T.)* (1989), 69 O.R. (2d) 189 (C.A.), at pp. 205-206, *per* Tarnopolsky J.A. who wrote after *Andrews*.

[97] See *Law v. Canada Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paras. 56 to 58 incl., pp. 531-532.

[98] R.S.C. 1985, c. P-33, hereinafter "PSEA".

[99] The respondents contest that the appellant Jeanne To Thanh Hien has shown evidence that she was denied the opportunity to compete for a public service position on the basis of PSEA s. 16(4)(*c*). A full outline of the three plaintiffs' stories can be found in the judgment of Wetston J., reported at [1995] 2 F.C. 623 (T.D.).

[100] The merit principle was the driving objective behind *The Civil Service Amendment Act, 1908*: see the speech of the Honourable Sydney Fisher, Official Report of the *House of Commons Debates*, 4th Session, 10th Parliament (June 25, 1908), at pp. 11318-11321.

[101] See, e.g., Alan C. Cairns, "The Fragmentation of Canadian Citizenship" in Douglas E. Williams (ed.)

Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays by Alan C. Cairns (Toronto: McClelland & Stewart, 1995), at p. 157; see also Richard Sigurdson, "First Peoples, New Peoples, and Citizenship in Canada" (1996) 14 *ICJS* 53; Jane Jenson and Susan Phillips, "Regime Shift: New Citizenship Practices in Canada" (1996) 14 *ICJS* 111.

[102] See, e.g., Peter J. Spiro, "Dual Nationality and the Meaning of Citizenship" (1997), 46 *Emory L.J.* 1411; Peter H. Schuck, "The Re-evaluation of American Citizenship" (1997), 12 *Georgetown Immigration L. J.* 1; Douglas G. Smith, "Citizenship and the Fourteenth Amendment" (1997), 34 *San Diego L. Rev.* 681; Note, "The Functionality of Citizenship" (1997), 110 *Harv. L. Rev.* 1814; Katherine A. Trisolini, Book Note "Rights Across Borders: Immigration and the Decline of Citizenship" (1997), 33 *Stanford J. of Int'l L.* 165.

[103] Cairns, *supra*, Note 101.

[104] Sigurdson, *supra*, note 101.

[105] Francisco Colom-González, "Dimensions of Citizenship: Canada in Comparative Perspective" (1996), 14 *IJCS* 95.

[106] See, e.g., Heather Lardy, "Citizenship and the Right to Vote" (1997), 17 *Oxford J. of L. Studies* 75, at p. 78.

[107] See, e.g., Note, "The Functionality of Citizenship" (1997), 110 *Harv. Law Review* 1814, at p. 1818.

[108] *Ibid.*, at p. 1814; see also Peter Schuck, "The Re-evaluation of American Citizenship" (1997), 12 *Georgetown Immigration L. J.* 1 at 13.

[109] See, e.g., Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe, 1933-1948* (Toronto: Lester & Orpen Dennys, 1982). See also W. S. Tarnopolsky, "Discrimination and the Law in Canada" (1992), 41 *U.N.B.L.J.* 215 at pp. 215-224.

[110] See especially William Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*. (Oxford: Clarendon Press, 1995).

[111] Robert J. Sharpe, "Citizenship, the Constitution Act, 1867, and the Charter" in William Kaplan (ed.) *Belonging: The Meaning and Future of Canadian Citizenship* (Montréal and Kingston: McGill-Queen's University Press, 1993) 221, at p. 236.

[112] ;*Glynos v. Canada*, [1992] 3 F.C. 691 (C.A.), at p. 701.

[113] [1992] 1 S.C.R. 711, at p. 736.

[114] [1990] 2 F.C. 299 (C.A.), at pp. 310-311.

[115] [1989] 1 S.C.R. 143, at pp.196-197 (hereinafter *Andrews*). See also, the judgment of McIntyre J. at pp. 182-183.

[116] *Ibid.*, at p. 152.

[117] See, e.g., Sharpe, *supra*, note 111; see also Desmond Morton, "Divided Loyalties? Divided Country?" in William Kaplan (ed.) *Belonging: The Meaning and Future of Canadian Citizenship* (Montréal: McGill-Queen's University Press, 1993) 50, at p. 60 ("The Charter of Rights and Freedoms deliberately left citizens with few advantages over other residents of Canada.")

[118] *Pearkes v. Canada* (1993), 72 F.T.R. 90 (F.C.T.D.), at p. 95.

[119] (1990), 66 D.L.R. (4th) 33 (B.C.S.C.).

[120] *Ibid.*, at p. 41.

[121] See also *Steward v. Law Society of New Brunswick* (1990), 108 N.B.R. (2d) 178 (Q.B.), at p. 180 "[T]he **Law Society Act** of New Brunswick permits permanent residents who are not citizens, but declare under oath an intention to apply for citizenship, to seek admission to the bar of New Brunswick. However, I fail to see where this can save the offending sections in light of the clear direction of the Supreme Court in Andrews". But see *Benmansour c. Québec (Directeur de l'État civil)* [1994] A.Q. No. 1259 (S.C.) (QL) [at paras. 29-30]. [translation] "Furthermore, it would run counter to the principle of name stability for a permanent resident to be able to use two names, the one in his passport and the other which he seeks to use in the instant case. Although a permanent resident deprived of the right to change his name does suffer a disadvantage, it does not outweigh the ensuing objective of stability, control and possibly security.")

[122] S.C. 1908, c. 15.

[123] Speech of the Honourable Sydney Fisher, *House of Commons Debates*, 4th Sess., 10th Parl. (June 25, 1908), at p. 11397.

[124] S.C. 1881, c. 13, s. 10.

[125] S.C. 1918, c. 12, ss. 38 and 41(1).

[126] Enacted as part of the *Civil Service Act*, R.S.C. 1927, c. 22 [s. 33(1) (as am. by S.C. 1932, c. 40, s. 6)].

[127] Speech of the Hon. O. Boulanger, *House of Commons Debates*, 2nd Session, 17th Parliament (May 1, 1931), at p. 1197.

[128] *Ibid.*, at p. 1198.

[129] Speech of the Hon. Paul Martin, *House of Commons Debates*, 2nd Sess., 20th Parl. (April 29, 1946), at pp. 1015-1016.

[130] *Report of the Special Committee on the Review of Personnel Management and the Merit Principle*, September 30, 1979, at p. 86.

[131] Parliament of Canada, Sub-committee on Equality Rights of the Standing Committee on Justice and Legal Affairs. First Report, October 25, 1985, at pp. 66-67.

[132] *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*, 1985, at p. 31.

[133] *House of Commons Debates*, Vol. VIII, 1st Sess., 33rd Parl. (March 26, 1986) at p. 11916.

[134] ;*Vriend v. Alberta*, [1998] 1 S.C.R. 493, *per* Cory J., at paras. 67-68, pp. 535-536.

[135] [1984] 2 S.C.R. 145, at p. 156. .

[136] [1985] 1 S.C.R. 295, at p. 344.

[137] Compare the decisions of the Supreme Court in *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Egan v. Canada*, [1995] 2 S.C.R. 513 with the decisions in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[138] [1999] 1 S.C.R. 497 (herein after *Law*).

[139] Alternatively, the claimant may show that the state action draws a distinction against a group based on a convergence of enumerated or analogous grounds. For example, the state may not pass legislation which discriminates on two bases, say race and gender, and then claim that the second test is not met because no one ground is the basis of the impugned law. The manner in which a convergence of grounds may affect a subsection 15(1) analysis is, of course, better left for another day. *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689 (C.A.), at pp. 727-728; see also *Law*, *supra*, note 138, at para. 37, p. 523.

[140] ;*Egan v. Canada*, [1993] 3 F.C. 401 (C.A), at p. 430; see also *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1328, *per* Wilson J.

[141] See, *Egan*, *supra*, note 140, at pp. 424 et. seq.; *Schachtschneider v. Canada*, [1994] 1 F.C. 40 (C.A.), at pp. 68 et. seq.; *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689 (C.A.), at pp. 719 et. seq.

[142] In any discrimination case, it is helpful to review the writing of the late Mr. Justice Walter Tarnopolsky, one of the great heroes on the Canadian journey towards equality. Justice Tarnopolsky's article "Discrimination and the Law in Canada" (1992), 41 *U.N.B.L.J.* 215, at pp. 215-224 provides a concise, striking review of Canada's history as regards discrimination against immigrants. His insights, wisdom and courage are sorely missed today.

[143] *Law*, *supra*, note 138, at para. 78, pp. 542-543. .

[144] *Law*, *supra*, note 138, at para. 3, p. 508.

[145] *Law*, *supra*, note 138, at para. 7, p. 509.

[146] *Law*, *supra*, note 138, at para. 24, p. 517.

[147] *Law*, *supra*, note 138, at paras. 25 and 38, pp. 517-518 and 523.

[148] *Law*, *supra*, note 138, at paras. 25 and 36, pp. 517-518 and 522-523.

[149] *Law*, *supra*, note 138, at paras. 28 and 82, pp. 519 and 544-545.

[150] *Law*, *supra*, note 138, at para. 28, p. 519.

[151] It is noteworthy that the Supreme Court does not require that the purpose of the state action conflict with the purpose of subsection 15(1); *Law*, *supra*, did not alter the long-standing Canadian view that the effects of state action may constitute a violation of subsection 15(1).

[152] *Law*, *supra*, note 138, at para. 48, p. 528.

[153] *Vriend*, *supra*, note 134, at para. 183, p. 580.

[154] *Law*, *supra*, note 138, at paras. 59-60, pp. 532-533.

[155] *Law*, *supra*, note 138, at paras. 62 and 75, pp. 534 and 540-541.

[156] *Law*, *supra*, note 138, at para. 75, pp. 540-541.

[157] *Law*, *supra*, note 138, at paras. 77-79, pp. 541-543.

[158] *Law*, *supra*, note 138, at para. 29, pp. 519-520.

[159] Tarnopolsky, *supra*, notes 109 and 142, at pp. 218, 222-223.

[160] David Beatty, "Labour is not a Commodity" in Reiter and Swan, (eds.) *Studies in Contract Law* (Toronto: Butterworths, 1980), at p. 320.

[161] *Ibid.*, at p. 324.

[162] See *Law*, *supra*, note 138, at para. 74, p. 540.

[163] *Larbi-Odam and Others v. Member of the Executive Council for Education*, CCT 2-97, at para. 17.

[164] *Ibid.*, at para. 23.

[165] *Ibid.*, at para 24.

[166] *Ibid.*, at para. 25.

[167] ;*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182, p. 605, *per* Iacobucci J.; *Eldridge*, *supra*, note 137, at para. 84, pp. 684-685, *per* La Forest J.; *Vriend*, *supra*, note 134, at para 108, p. 554, *per* Iacobucci J.

[168] [1995] 3 S.C.R. 199, at paras. 128-129, pp. 328-329.

[169] See *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para 87, p. 939.

[170] *RJR-MacDonald Inc.*, *supra*, note 168, at para. 88, p. 295.

[171] *Ibid.*, at paras. 79-81, pp. 285-289 *per* La Forest J. "I conclude that an appellate court may interfere with a finding of a trial judge respecting a legislative or social fact in issue in a determination of constitutionality whenever it finds that the trial judge erred in the consideration or appreciation of the matter."

[172] See *R. v. Big M Drug Mart Ltd. et al.*, [1985] 1 S.C.R. 295, at p. 335, *per* Dickson J.

[173] [1995] 2 F.C. 623 (T.D.), at p. 651 citing *House of Commons Debates*, 4th Sess., 10th Parl., Vol. LXXXVII, June 25, 1908, at p. 11397.

[174] [1995] 2 F.C. 623 (T.D.), at p. 653.

[175] See, e.g., *R. v. Big M Drug Mart Ltd. et al.*, [1985] 1 S.C.R. 295, at p. 334; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 754-755; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 973; *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 760-761; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 494.

[176] [1991] 2 S.C.R. 211, at p. 291; adopted by La Forest J. in *RJR-MacDonald*, *supra*, note 168, at para. 82, p. 290.

[177] ;*Benner v. Canada (Secretary of State)*, [1994] 1 F.C. 250 (C.A.), at p. 283. See also *Egan*, *supra*, note 140.

[178] See *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra*, note 169, at paras. 111-117, pp. 955-962.

[179] *Ibid.*, at para. 111, p. 955.

[180] *Ibid.*, at para. 113, pp. 956-957.

[181] *Ibid.*, at para. 114, pp. 957-958.

[182] *Ibid.*, at para 116, pp. 960-961.

[183] [1995] 2 F.C. 623 (T.D.).

[184] *Ibid.*

[185] Professor Peter Schuck, one of the government's expert witnesses in this case, briefly described the jurisprudence regarding the civil service preference in the United States in his 1997 article "The Re-evaluation of American Citizenship" (1997), 12 *Georgetown Immigration L. J.* 1 at 14:

> The U.S. policy of barring aliens from federal employment, which is similar to the practice of most nations, is likely to be a greater concern to aliens than the bar to jury service for most aliens. Few if any legal permanent residents ("LPRs") are likely to seek high elective or appointive offices prior to naturalization. Many LPRs, however, might want to pursue employment in the federal, state, and local civil service systems. In two Supreme Court decisions in the mid-1970s, the Court applied the constitutional principles relating to discrimination against aliens in the civil service setting. It held that the Constitution permitted Congress and the President to limit federal civil service jobs to citizens (which has been done since the 1880s) but that the states could not impose citizenship requirements for their own civil service systems. The Court emphasized the exclusive federal interest in regulating immigration, a principle that is discussed more fully below. It recognized, however, the state's power to exclude LPRs from particular job categories that represented the state's "political function," such as schoolteachers and police officers. This distinction, between jobs involving a political function and those that do not, has proved exceedingly difficult to apply but continues to enjoy the Court's support.

It should be noted that the constitutional framework within which citizenship law is made in the United States differs greatly from the Canadian constitutional framework: see Note, "The Functionality of Citizenship" *supra* , note 107, at p. 1821 "The Supreme Court's invalidation of state alienage distinctions relies squarely on the Equal Protection Clause of the Fourteenth Amendment, which does not apply to the federal government. Instead, judicial review of federal alienage distinctions rests on the Fifth Amendment's Due Process Clause and is review in name only." See also *Graham v. Richardson* , 403 U.S. 365 (1971), at p. 372 "[state] classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny". As of 1977, the only rights that states could clearly withhold from aliens were the rights to vote, to hold elective public office, and to serve on a jury: see Note, "The Functionality of Citizenship" *supra* , note 107, at footnote 41.

[186] *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra*, note 168, at para. 168, p. 346, *per* McLachlin J. See also *Vriend*, *supra*, note 134, at paras. 126-127, pp. 561-562, *per* Iacobucci J.

[187] See *Thomson Newspapers*, *supra*, note 169, at paras. 123-127, pp. 967-971; see also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 888-889.

[188] *Dagenais*, *supra*, at p. 889.

[189] *Thomson Newspapers*, *supra*, note 169, at para. 125, at p. 969.

[190] *Austin*, *supra*, note 119, at p. 41.

[191] *Andrews*, *supra*, note 115, at p. 197, citing *Kask v. Shimizu, Doe, Bloggs and Charles Camsell Hospital* (1986), 69 A.R. 343 (Q.B.), at p. 349.

[192] An *Act respecting Canadian Citizenship*, Bill C-63, 1st session, 36th Parliament (First reading, December 7, 1998).

[193] See Citizenship and Immigration Canada, *Citizenship of Canada Act* available at <http://cicnet.ci.gc.ca/english/ about/policy/citact_e.html>.

[194] [*Application Kits/Forms*] available on the World Wide Web at <http://cicnet.ci.gc.ca/english/coming/index.html> [*Trousses et formulaires de demande*].

[195] The process for obtaining permanent resident status in Canada includes but is not limited to a $975 "Right of Landing Fee"; a $500 fee which must accompany an "Application for Permanent Residence"; a $275 "Order in Council-A38(1) Landing fee," and unspecified "processing fees". For a complete list of fees, see Citizenship and Immigration Canada. *Fee Schedule for Citizenship and Immigration Services* available at <http://cicnet.ci.gc.ca/ english/info/fees-e.html>.