ABDICATING RESPONSIBILITY: THE UNPRINCIPLED USE OF DEFERENCE IN *LAVOIE V. CANADA*

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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.[1]

Deference must not be carried to the point of relieving the government of the burden which the *Charter* places on it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.[2]

I. INTRODUCTION

To entrench a bill of rights is to protect the individual by removing certain powers from the state. As Wilson J. observes in *R. v Morgentaler*, entrenchment serves to "erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."[3] But the Canadian experiment with entrenchment, *The Canadian Charter of Rights and Freedoms*,[4] comes with a caveat in the form of s. 1, which essentially allows the state in certain circumstances to violate enshrined rights and freedoms in the name of the greater good. The crucial questions in *Charter* disputes often revolve around s. 1, specifically whether impugned government actions are "reasonable limits" that are "demonstrably justified." The courts are empowered to make the crucial determinations: it is the courts, to quote Wilson J. from *Morgentaler* again, that are called upon "to map out, piece by piece, the parameters of the fence."[5]

In *R. v. Oakes*, the Supreme Court of Canada established a four-part test to deal with the s. 1 component of a *Charter* claim, and in this seminal case, Dickson C.J.C. demanded that the state meet a "stringent standard of justification" before a violation of an entrenched right could be accepted.[6] But in subsequent jurisprudence, the concept of deference to the legislature has emerged — a concept that can lead to a temporary adjustment of the "stringent

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

2 Justice McLachlin (as she then was) in *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 136 [*RJR-Macdonald*].

3 [1988] 1 S.C.R. 30 at 164 [*Morgentaler*].

4 *Supra* note 1.

5 *Morgentaler*, *supra* note 3 at 164.

6 [1986] 1 S.C.R. 103 at 136 [*Oakes*].

standard" of *Oakes*.[7] Because this adjustment can work to the detriment of individual rights, a great deal of caution must be exercised when deference is invoked by the courts. In particular, the specific circumstances that can warrant deference must be carefully established and respected. Disturbingly, in a recent Supreme Court of Canada case, *Lavoie v. Canada*,[8] the concept of deference is invoked without adequate cause. Indeed, in the majority judgment in *Lavoie*, one senses that this concept is dangerously out of control. This comment will examine this judgment in detail and will demonstrate that it contains an unprincipled application of deference that compromises the integrity of the s. 1 analysis. In *Lavoie*, the Court fails to provide the appellants the protection that is due to them under the Canadian constitutional arrangement — a failure that, to borrow the language of McLachlin J. (as she then was) in *RJR-MacDonald*, amounts to an abdication of responsibility.[9]

II. PRELIMINARY CONSIDERATIONS

The bulk of this comment will consist of a detailed analysis of the majority's judgment in *Lavoie*. However, first a brief consideration of the relevance of the issue of judicial review and a discussion of the principles of deference in Supreme Court of Canada jurisprudence will be provided.

A. THE RELEVANCE OF THE ISSUE OF JUDICIAL REVIEW

There is a natural tendency for a discussion of deference to be drawn into the larger discussion of the merits of judicial review under the *Charter*. It is unnecessary, however, for the present investigation to venture into this well travelled, albeit rocky, terrain.[10] The concern of this comment is not with whether deference is desirable or undesirable, or with whether the categories of deference should be expanded or contracted. Rather, the concern here is with the highly unprincipled use of deference in a recent Supreme Court of Canada decision. The judgment in question is a cause for alarm regardless of the stand that one takes on judicial review, because this judgment reveals a violation of s. 1 jurisprudence. Such a violation cannot be in the interests of any critic seriously concerned about the state of the Canadian constitutional arrangement.

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7 It should be noted that the focus of this comment is on deference only in the context of s. 1 of the *Charter*. The application of deference to other contexts, such as those that arise in the area of administrative law, is not at issue here.

8 [2002] 1 S.C.R. 769 [*Lavoie*].

9 *Supra* note 2 at para. 136.

10 F.L. Morton & Rainer Knopff, in *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), and Christopher Manfredi & James Kelly, in "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask. L. Rev. 323, have argued strenuously against the merits of judicial review. Kent Roach, in *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), has vociferously taken the opposite view. Other critics such as Leon Trakman, William Cole-Hamilton, & Sean Gatien, in "*R. v. Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83, Timothy Macklem & John Terry, in "Making the Justification Fit the Breach" (2000) 11 Sup. Ct. L. Rev. 575, and Guy Davidov, in "The Paradox of Judicial Deference" (2000-2001) 12 N.J.C.L. 133, have embraced the merits of judicial review but argue that the *Oakes* test needs to be refined.

B. THE PRINCIPLES OF DEFERENCE

While deference in the context of s. 1 of the *Charter* has been raised as an issue in many Supreme Court of Canada decisions, there is without doubt a single foundational case on the subject: *Irwin Toy v. Quebec (AG)*.[11] Before discussing this case, however, mention should be made of *R. v. Edwards Books and Art Ltd.*, in which Dickson C.J.C. acknowledged that the *Oakes* test must accommodate the fact that legislatures, and not courts, are charged with making policy.[12] Chief Justice Dickson also concluded that it may be appropriate for the courts to accept a reasonable legislative decision as to where a specific line must be drawn.[13] *Edwards Books* is notable because it was delivered within months of *Oakes*, and thus suggests how quickly the Court recognized the potential need for some kind of deference in the s. 1 analysis. What *Edwards Books* does not provide is specifics about when deference may be appropriate. Such specifics are provided in *Irwin Toy*, in which the majority observed that in cases where the government was "mediating between the claims of competing groups," in cases where the government was acting to protect "vulnerable groups" and in cases where "conflicting social science evidence" was at play, the courts should be "mindful of the legislature's representative function."[14] Although the majority is not categorical here ("mindful" is hardly imperative), the implication is that in the above circumstances the standard of justification under the *Oakes* test will be temporarily adjusted in the government's favour. The rationale for such an adjustment is that difficult social policy decisions should often be left to democratic institutions, which are, after all, "meant to let us all share in the responsibility for these difficult choices."[15]

The three principles discussed above from *Irwin Toy* have often been restated[16] and have never been rejected; as such, it seems legitimate to refer to them as established principles of deference. In subsequent decisions, the Court has been fairly circumspect about enlarging the list of circumstances in which deference may be appropriate.[17] In *McKinney v. University of Guelph*, La Forest J. advanced incrementalism as a viable ground for deference,[18] but this principle was strongly attacked when applied in a later decision. Justice La Forest's argument in *McKinney* was that the courts should recognize that the goals of the *Charter* cannot be reached all at once, and thus legislatures must be accorded some leeway in making gradual social changes.[19] Justice Sopinka relied extensively on this idea in *Egan v. Canada*,[20] and he

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11 [1989] 1 S.C.R. 927 [*Irwin Toy*].

12 [1986] 2 S.C.R. 713 at 783 [*Edwards Books*].

13 *Ibid.* at 781-82.

14 *Supra* note 11 at 993-94.

15 *Ibid.* at 993.

16 For example in *RJR-MacDonald, supra* note 2 at paras. 68-69; *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 91 [*Adler*]; and *Thomson Newspapers Co. v. Canada*, [1998] 1 S.C.R. 877 at paras. 88-90 [*Thomson Newspapers*].

17 A notable exception here is Bastarache J.'s opinion in *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 294-321, in which a wide variety of grounds for deference are presented. Because Bastarache J. was only writing for himself in this case, and because many of his grounds have no clear foundation in previous jurisprudence and have not been restated since, their present status is unclear.

18 [1990] 3 S.C.R. 229 at 317-18 [*McKinney*].

19 *Ibid.*

20 [1995] 2 S.C.R. 513 at paras. 108-11 [*Egan*]. In this case, which involved the issue of same-sex spousal benefits, Sopinka J.'s opinion was decisive. While four members of the Court found a s. 15 violation that could not be justified under s. 1, and four members of the Court found no s. 15 violation at all,

was forcefully criticized for doing so by Iacobucci J. in the same case.[21] Justice Iacobucci stated that the idea of incrementalism could perhaps inform a court's determination of remedy but should not inform a court's determination of whether a *Charter* violation was justified under s. 1.[22] The idea of incrementalism has not resurfaced as a ground for deference in subsequent cases and thus appears to have been abandoned.

The one other case, besides *Irwin Toy*, that appears to occupy a fairly central place in the jurisprudence surrounding deference is *RJR-MacDonald*.[23] In this case there was substantial disagreement on the extent to which deference should modify the s. 1 analysis. Justice La Forest (L'Heureux-Dubé, Gonthier, and Cory JJ. concurring), writing in dissent, found that the government legislation in question violated the freedom of expression rights of the plaintiff tobacco company, but also found that the legislation could be upheld under s. 1. In the course of his s. 1 analysis, he relied on the concept of deference, affirming the *Irwin Toy* principles[24] and advancing the nature of the interest affected as a relevant principle as well.[25] Justice McLachlin (as she then was) (Major and Sopinka JJ. concurring) also found a violation of the right to freedom of expression and accepted that a degree of deference is appropriate in certain circumstances, particularly relating to social policy choices.[26] Furthermore, she did not reject any of the grounds of deference advanced by her colleague. However, both McLachlin J. and Iacobucci J. (Lamer C.J.C. concurring) took issue with La Forest J. on the extent to which deference should be granted to the government in the case at bar. It will be recalled that in *Irwin Toy*, the majority observed that in specified situations the courts should be "*mindful* of the legislature's representative function."[27] In *RJR-MacDonald*, however, La Forest J. seems to be quite unreserved about deferring to the government on social policy issues.[28] Both Iacobucci J. and McLachlin J. appear to find this lack of reserve problematic. Justice Iacobucci specifically registers "reservations about the somewhat attenuated minimal impairment analysis propounded by La Forest J.,"[29] while McLachlin J. repeatedly observes that deference is not an unlimited concept and does not relieve the government of the burden of making a convincing case.[30] In particular, she states that

> care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also

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Sopinka J. agreed that there was a violation, but upheld the impugned provision under s. 1 by relying on deference. For a critical reading of this case and Sopinka J.'s decision, see Bruce Ryder, "Egan v. Canada: Equality Deferred, Again" (1996) 4 C.L.E.L.J. 101.

21 *Egan*, *supra* note 20 at paras. 215-16.

22 *Ibid.*

23 *Supra* note 2.

24 *Ibid.* at paras. 68, 70.

25 *Ibid.* at paras. 62-63. This principle has been reaffirmed as a ground for deference in both *Adler*, *supra* note 16 at paras. 92-95, and *Thomson Newspapers*, *supra* note 16 at para. 91.

26 *RJR-MacDonald*, *supra* note 2 at para. 135.

27 *Supra* note 11 at 993 [emphasis added].

28 *Supra* note 2 at paras. 68, 70.

29 *Ibid.* at para. 182.

30 *Ibid.* at paras. 129, 134, 136, 138.

> have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.[31]

In the view of McLachlin J. and Iacobucci J., the government did not meet its "burden" in the case at bar, and as a result the impugned legislation could not be upheld under s. 1.

Supreme Court of Canada cases in which deference plays a divisive and deciding role are not common, but because deference adjusts the relationship between entrenched rights, the state and the courts, and thus implicates the very core of the constitutional arrangement under the *Charter*, even rare cases where disagreements on the issue surface are disturbing. Attention will now be directed to *Lavoie*,[32] where a highly unprincipled application of deference far exceeds anything in the prior jurisprudence.

III. *LAVOIE V. CANADA*

A. BACKGROUND

Lavoie involved a challenge to s. 16(4)(c) of the Canadian *Public Service Employment Act*,[33] a provision which gave discretion to government officials to choose Canadian citizens over permanent residents in the referral stage of certain civil service employment competitions. The appellants, three citizens of foreign countries (Austria, Holland, and France) who were also permanent residents of Canada, claimed that the provision infringed their equality rights under s. 15 of the *Charter*.

At the Federal Court, Trial Division, Wetston J. ruled that s. 16(4)(c) of the *PSEA* discriminated against the claimants in a manner that violated s. 15, but he went on to rule that the violation was justified under s. 1 of the *Charter*. He reached the latter conclusion in part by deferring to Parliament during the s. 1 analysis. The Federal Court of Appeal delivered three separate opinions, but upheld the trial decision. Justice Marceau did not find a s. 15 violation at all, while Desjardins J.A. agreed with the trial judge that there was a s. 15 violation that was justified under s. 1. Justice Desjardins also held that deference to the legislature was appropriate in this instance. Justice Linden, writing in dissent, found a s. 15 violation that could not be supported under s. 1, regardless of the level of deference applied to the legislation.

The Supreme Court of Canada delivered four separate opinions. Justice Bastarache (Gonthier, Iacobucci, and Major JJ. concurring) essentially sided with Wetston J. and Desjardins J.A., and found that while a s. 15 violation occurred, this violation was justified under s. 1 because deference to the legislature was appropriate in this case. Chief Justice McLachlin and L'Heureux-Dubé J. (Binnie J. concurring) delivered a dissenting opinion in which they, like Linden J.A., held that there was a s. 15 violation that could not be upheld under s. 1. In a third opinion, Arbour J. held that there was no s. 15 violation, and she

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31 *Ibid.* at para. 136.
32 *Supra* note 8.
33 R.S.C. 1985, c. P-33 [*PSEA*].

strongly criticized the tendency of the Court to find such violations too readily — a tendency that she argued necessitated a vitiated and overly deferential s. 1 analysis. Finally, LeBel J., in a very brief decision, concurred with the conclusion of Arbour J. that there was no s. 15 violation, but also observed that if there was a violation, deference to the legislature would be appropriate in the circumstances to justify the breach under s. 1.

B. ANALYSIS

1. PREFACE

While the Supreme Court decided against the appellants in *Lavoie* by a margin of 6-3, on the issue of deference under s. 1, the court divided 5-4. Indeed, the divisiveness of the concept of deference in this case is arguably underlined by the fact that two members of the Court took a stand on the issue despite the fact that they found no s. 15 violation and thus did not provide a s. 1 analysis. The following discussion will focus on those parts of Bastarache J.'s s. 1 analysis in which the concept of deference figures prominently: specifically, his brief contextual introduction and his handling of the rational connection and minimal impairment stages of the *Oakes* test. The other two parts of Bastarache J.'s s. 1 analysis (the determination of the pressing and substantial objectives and the weighing of the deleterious effects) are not of particular relevance to the present investigation.

It will be convenient to consider aspects of the minority decision written by McLachlin C.J.C. and L'Heureux-Dubé J. in the course of the analysis of Bastarache J.'s majority decision. This dissenting opinion is quite brief, quite focused and offers a powerful indictment of the majority position. The opinion of Arbour J. will not be considered, for although she criticizes the majority decision and the concept of deference, these criticisms address s. 1 only on a very general level and are inextricably tied to a complex s. 15 analysis.

2. JUSTICE BASTARACHE'S CONTEXTUAL INTRODUCTION: CONSTRUCTING DEFERENCE

After determining that the appellants' equality rights under the *Charter* are violated by s. 16(4)(c) of the *PSEA*, Bastarache J. turns his attention to the *Oakes* test and begins by observing that the test should be "applied with varying levels of rigour depending on the context of the appeal."[34] He then cites *Irwin Toy* and *Thomson Newspapers* as authorities and applies four factors to the case at bar in order to determine the appropriate level of deference to the legislature:

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

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[34] *Lavoie*, *supra* note 8 at para. 53.
[35] *Ibid.*

While the jurisprudential foundation is solid here (see the discussion of "The Principles of Deference," above), Bastarache J.'s conclusion that "some degree of deference is required" because Parliament is engaged in "balanc[ing] the interests of competing groups"[36] cannot stand scrutiny. This principle of deference was first stated in *Irwin Toy*, where the majority observed that the Court should be "mindful" of "a legislature mediating between the claims of competing groups," for such a legislature "will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck."[37] But in *Irwin Toy*, the impugned legislation was the result of an attempt by the government to balance a *pre-existing* conflict between two groups with valid interests (children and advertisers). Similarly, in *RJR-MacDonald*, where this principle of deference was later applied,[38] the Court was faced with legislation that attempted to balance the interests of two groups (the users of a dangerous product and advertisers) who were in conflict *prior* to any action by the government. The logic of the argument for deference in both of these cases was that such balancing is a policy decision that is best left to the policy-making organ of government (i.e. the legislature). In *Lavoie*, however, the situation is very different, for the two groups allegedly in conflict, citizens and non-citizens, are only in conflict *as a result* of the government action. Citizens and non-citizens are not in conflict, at least as far as Public Service employment is concerned, prior to the enactment of the impugned legislation itself. Of course individuals are always in conflict with other individuals in employment competitions — this kind of conflict is natural. But it is only by virtue of s. 16(4)(c) of the *PSEA* that citizens as a group are in conflict with non-citizens for jobs in the Public Service. The government intervention, in other words, constructs the very opposition that Bastarache J. attempts to use to legitimize deference. This is certainly problematic, for it amounts to taking the result of the legislation and translating it into a presupposition — a presupposition that commands a particular response from the Court in the s. 1 analysis.

The crucial point here is not whether the government has the authority to enter into the social arena and create a conflict between citizens and non-citizens in a given employment context. Rather, the point is that in the event of a *Charter* challenge, the government must defend its actions under s. 1 and cannot use the very result of its legislation to distract the Court, which has a responsibility to carefully investigate whether a given violation can be upheld. If s. 16(4)(c) of the *PSEA* pursues a valid objective and pursues such an objective through valid means, then it is possible that a conflict between groups has been created that passes constitutional muster. The creation of such a conflict, however, cannot legitimate the form of balancing contemplated in the central deference cases of *Irwin Toy* and *RJR-MacDonald*.[39]

If one accepts that there is no legitimate *pre-existing* conflict between competing groups in *Lavoie* to warrant deferring to the government in the first place, then Bastarache J.'s sole jurisprudential source for deference is removed. In other words, what should follow the

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36 *Ibid.*

37 *Supra* note 11 at 993.

38 *Supra* note 2 at paras. 69-70.

39 Interestingly, in *Thomson Newspapers*, Bastarache J. himself rejected balancing competing groups as a ground for deference because the groups involved, voters and pollsters, were not legitimate social interests in conflict. Both *Irwin Toy* and *RJR-MacDonald* were distinguished in the process (*Thomson Newspapers*, *supra* note 16 at para. 114).

majority's contextual introduction is a rigorous s. 1 analysis. Such an analysis is demanded by the dissenting justices, who cite *Adler* to the effect that "cases will be rare where it is found reasonable in a free and democratic society to discriminate,"[40] and *Andrews v. Law Society of British Columbia*[41] to the effect that the "burden of justification" in s. 15 cases involving discrimination on the basis of citizenship will be "'onerous.'"[42] Far from being "onerous," however, Bastarache J.'s application of the *Oakes* test does not even meet his own suspect determination that "some degree of deference is required."[43]

3. APPLICATION OF THE OAKES TEST

Justice Bastarache and the majority justices in *Lavoie* accept the objectives of s. 16(4)(c) of the *PSEA* to be those advanced by the government: "first, to enhance the meaning of citizenship as a unifying symbol for Canadians; and second, to encourage permanent residents to naturalize."[44] The majority also accept that these objectives are "sufficiently important to justify limiting the appellant's equality rights."[45] But the ensuing discussion of rational connection does not carefully interrogate these objectives in light of the impugned legislation, and this failure compromises the entire s. 1 analysis, for no amount of minimal impairment (or weighing of deleterious effects, for that matter) can make up for a lack of rational connection.

a. Rational Connection

Justice Bastarache's consideration of rational connection comprises only two paragraphs in his decision. The first of these paragraphs will be quoted in full to facilitate the ensuing discussion:

> With respect to rational connection, the appellants suggest it is irrational to pursue Canada's citizenship policy by making *Public Service employment* a privilege of citizenship. In their view, there is no end to the amount of discrimination Parliament could inflict on non-citizens if such an objective is accepted. Moreover, they argue that s. 16(4)(c) actually *undermines* Parliament's objective by making Canada a less desirable country in which to live. In my view, this opinion is unrealistic; furthermore, this is something for Parliament to decide. While there is a point at which granting privileges to citizens may be unjustifiable under s. 1 — banning immigrants from social housing, perhaps — that point is not the same as the point at which this Court finds a s. 15(1) violation. Rather, as contemplated by s. 1 of the *Charter*, Parliament is entitled to some deference as to whether one privilege or another advances a compelling state interest. In this case, Parliament's view is supported by common sense and widespread international practice, both of which are relevant indicators of a rational connection. Short of rejecting Canada's entire citizenship policy, it seems rather speculative to suggest that this privilege is so arbitrary and unreasonable that it *detracts* from the value of

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40 *Supra* note 16 at para. 95.

41 [1989] 1 S.C.R. 143 at 201.

42 *Lavoie*, *supra* note 8 at para. 6.

43 *Ibid.* at para. 53.

44 *Ibid.* at para. 54.

45 *Ibid.* at para. 58. Chief Justice McLachlin and L'Heureux-Dubé J. also accept, with some qualification, that the government's objectives are sufficiently important (at para. 8). Justice Arbour, however, is more sceptical (at para. 85).

> Canadian citizenship. If this logic were accepted, even the less intrusive alternatives proposed by Linden J.A. would have to be rejected as failing the rational connected test.[46]

The first comment that needs to be made about this paragraph is that there is no real discussion here of the rational connection between the two stated objectives and s. 16(4)(c) of the *PSEA*. Justice Bastarache starts with an assertion by the appellants and returns to this assertion at subsequent points in the paragraph, and while it is certainly legitimate to employ an argument made by the appellants as a point of departure, the meat of the rational connection discussion must deal with the government's case. The comments made about deference to the legislature and the very broad statement made about "common sense and widespread international practice" (which is not developed) do not meaningfully achieve this end, nor does the balance of the paragraph, which again seems to criticize the appellants' arguments rather than focus on the provision in question.

The centrepiece of the above paragraph is arguably not a detailed rational connection argument at all, but rather a description of the Canadian constitutional structure, which is bracketed by calls for deference. When Bastarache J. states that "[w]hile there is a point at which granting privileges to citizens may be unjustifiable under s. 1 — banning immigrants from social housing, perhaps — that point is not the same as the point at which *this Court* finds a s. 15(1) violation,"[47] he projects the constitutional relationship between the legislature and the courts onto a spectrum. At one end of the spectrum are government enactments that do not violate the *Charter*. Then, as one moves along the spectrum, a point is reached where a *Charter* right is violated. This point does not constitute a violation of the *Charter* itself, because the violation can be potentially upheld under s. 1. It is only at a further point on the spectrum that s. 1 is violated, and at this point, and at any subsequent point, the government enactment is unconstitutional.

While Bastarache J.'s spectrum provides a viable description of the Canadian constitutional structure, this description is bracketed by assertions of deference that arguably change the structure. Of particular concern is the statement: "Rather, as contemplated by s. 1 of the *Charter*, Parliament is entitled to some deference as to whether one privilege or another advances a compelling state interest."[48] Parliament is certainly entitled to make enactments, but under the *Charter* it is the courts that are the arbiters of Parliament's activities. Justice McLachlin (as she then was) states in *RJR-MacDonald*: "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."[49] When Bastarache J. says, "Rather, as contemplated by s. 1 of the *Charter*," he cannot be referring to the constitutional document itself, because s. 1 of the *Charter* does not speak of deference, only of the state justifying its enactments as "reasonable limits" that are "demonstrably justified." If there is some relevant piece of s. 1 jurisprudence that supports the idea of deferring on the basis of the government choosing "privilege[s]" (no cases come readily to mind), that specific authority must be clearly cited — deference cannot

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46 *Ibid.* at para. 59 [emphasis in original].

47 *Ibid.* [emphasis added].

48 *Ibid.*

49 *Supra* note 2 at para. 168.

be allowed to vaguely hover over the circumstances of a given appeal. In Bastarache J.'s spectrum itself, "this Court" plays a central role. But in his call for deference, this role is virtually taken over by the government, which, in the absence of careful judicial scrutiny, is allowed to decide the key points along the line.

The invocation of the concept of deference in the above quoted paragraph from *Lavoie* is ultimately very unsatisfactory. This is both because there is no specific source offered for the contention that "choosing privilege[s]" warrants deference, and because the paragraph does not deal in any specific way with the rational connection between the means and the ends of the impugned legislation. One could argue that Bastarache J., as a member of the Supreme Court of Canada, is free to develop new grounds for deference. This is true, but such development must follow the time-honoured incremental method of the common law. This would surely involve a careful exposition of the need for deference in general terms, a careful exposition of the existing grounds for deference, and finally, a careful discussion of why the present case necessitates the creation of a new ground for deference. Needless to say, none of this is provided in the above paragraph. Instead, there appears to be an assumption that the existing jurisprudence accommodates the claim being made. Authority must be cited to this effect.

The above quoted paragraph is also all that Bastarache J. offers to substantiate a rational connection between the first objective (that of "enhanc[ing] the meaning of citizenship as a unifying symbol") and the impugned provision. In the second paragraph of his rational connection argument, he turns to the government's second objective, encouraging naturalization, and states that "the appellants question whether granting employment privileges to non-citizens actually persuades permanent residents to naturalize."[50] He then observes: "From a statistical perspective, however, Canada's citizenship policy seems generally to have worked. There is a very close relationship between immigration and naturalization rates in Canada."[51] While recognizing that "this may be due to several factors,"[52] Bastarache J. does not provide any evidence at all that the impugned legislation plays a role in Canada's high naturalization rates. One is simply left with a classic example of the logical fallacy of *post hoc ergo propter hoc*: permanent residents tend to naturalize; one of the reasons must be the impugned legislation. Then, after this questionable logic and after an overly broad assertion that this is a "common sense view" that "is shared by almost every country in the world," comes another invocation of deference: "In this context, it would not be appropriate to hold Parliament to an exacting standard of proof."[53] As authority for this invocation, Peter Hogg, citing *Oakes*, is offered.[54] The relevant page in Hogg, however, provides a discussion of minimal impairment and the "margin of appreciation" appropriate in that stage of the s. 1 analysis — and not rational connection at all. As for the *Oakes* reference, Dickson C.J.C. states that "cogent and persuasive" evidence will generally be required to substantiate claims under s. 1, and he then goes on to observe "that there may be

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50 *Lavoie*, *supra* note 8 at para. 60.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 Justice Bastarache cites the loose-leaf version of Hogg's *Constitutional Law of Canada*, vol. 2 (Scarborough: Thomson Canada, 1997) at 35-38, and *Oakes*, *supra* note 6 at 138.

cases where certain elements of the s. 1 analysis are obvious or self-evident."[55] It is hard to see how Bastarache J.'s logical fallacy, which takes up most of the paragraph from *Lavoie* under discussion, can qualify as being either "cogent and persuasive" or "obvious or self-evident." On the subject of *Oakes*, it is perhaps worth noting that Dickson C.J.C. subsequently states, specifically on the subject of rational connection, that "the measures adopted must be carefully designed to achieve the objective in question."[56] Justice Bastarache's cursory treatment does nothing to demonstrate that s. 16(4)(c) of the *PSEA* is "carefully designed" to achieve any objective, let alone the two advanced by the government.

Both of the paragraphs on rational connection in the majority judgment in *Lavoie* reveal a similar phenomenon: a discussion that does not clearly grapple with the legislation or the stated objectives in any detail is held up by vague appeals to the concept of deference. Simply put, Bastarache J. proves unwilling to hold the government to a demanding standard of proof or argumentation and does not provide a solid basis in the jurisprudence for taking this stance. A very different situation is evident in the dissenting opinion of McLachlin C.J.C. and L'Heureux-Dubé J., in which a compelling reason is advanced for not being deferential in the case at bar. The dissenting justices note that in *Irwin Toy* deference is offered to legislation that seeks to protect a vulnerable social group, and they go on to state: "It follows from this principle that '[a] less deferential stance should be taken and a greater onus remain on the state to justify its encroachment on the *Charter* right,' where, as here, 'the nature of the infringement lies at the core of the rights protected in the *Charter* and the social objective is meant to serve the interest of the majority.'"[57] While Bastarache J. acknowledges that s. 16(4)(c) of the *PSEA* does not protect a vulnerable group,[58] the dissenting justices go further and imply that a law that victimizes a vulnerable group and benefits the whole of society must bear greater judicial scrutiny. For the dissent, such scrutiny proves fatal to the legislation in question.

Chief Justice McLachlin and L'Heureux-Dubé J. prove unwilling to accept the government's failure to provide evidence to substantiate the various claims made,[59] and prove unable to find a rational connection between the stated objectives and the means employed to achieve them. Regarding the first objective, that of enhancing the value of citizenship, they observe that

> [a] law that favours the relatively advantaged group of Canadian citizens over the relatively disadvantaged group of non-citizens serves to undermine, not further, the value of Canadian citizenship, based as it is on principles of inclusion and acceptance. The anomaly of this reasoning is accentuated by the majority's contention that the citizenship preference only *minimally advantages* citizens. The notion that a trivial advantage, secured at the cost of violating s. 15(1)'s equality guarantee, could enhance citizenship, is difficult for us to fathom.[60]

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55 *Supra* note 6 at 138.

56 *Ibid.* at 139.

57 *Lavoie*, *supra* note 8 at para 13. The internal quotations here are from *Adler*, *supra* note 16 at para. 95, in which L'Heureux-Dubé J. argued against deference when she was confronted with an impugned law that benefited the majority and threatened a minority.

58 *Lavoie*, *supra* note 8 at para. 53.

59 *Ibid.* at paras. 12, 16, and 19.

60 *Ibid.* at para. 11 [emphasis in original].

This is a powerful charge against the government's case, and really should be answered by the majority. The following charge against the second objective, that of encouraging naturalization, also needs to be answered: "the majority's assertion that the citizenship preference confers a minimal advantage upon citizens *militates against* finding a rational connection."[61]

It is perhaps not surprising that the dissenting justices end their opinion abruptly after their rational connection discussion, because, very simply, there is nothing left to say: the justices find no rational connection. They demand evidence, they refuse to defer, and they find the arguments advanced by the government to be illogical. Justice Bastarache does not grapple with the rigour of his colleagues' arguments and instead ends his brief consideration of rational connection with a segue into the minimal impairment test: "The real issue, in my view, is whether the law is tailored in such a way that it does not unduly burden non-citizens in its laudable efforts to promote Canadian citizenship."[62]

b. Minimal Impairment

The discussion of minimal impairment is the longest part of the s. 1 analysis in the majority judgment, and it consists primarily of looking at "the features of s. 16(4)(c) which render it less intrusive than it might be."[63] Justice Bastarache observes that the provision in question establishes only "a preference for Canadian citizens, as opposed to an absolute bar on non-citizens," and he points out that this preference leaves open the possibility that non-citizens could be referred to the employment positions in question.[64] He also observes that s. 16(4)(c) applies to open as opposed to closed competitions, that the latter constitute the majority of the employment competitions in the Public Service and that the provision only applies to the referral stage of open competitions.[65] These are all valid points: it is clear that the legislation is less impairing than it could be. Canvassing the various policy alternatives found in other countries also appears to be a valid enterprise at the minimal impairment stage, for evidently some countries have more restrictive policies than Canada.[66]

The main problem with the majority's minimal impairment section is that it rests on an inadequate foundation: no amount of tailoring should be able to save a piece of legislation that has not passed a meaningful rational connection discussion. In this respect, *Lavoie* is arguably quite distinct from important deference cases such as *Irwin Toy* and *RJR-MacDonald*, for in both of these cases, a rigorous rational connection analysis precedes the application of deference in the minimal impairment stage.[67] This is not to say that deference cannot be applied in the rational connection stage of the argument. Rather, it is simply to observe that a minimal impairment analysis only makes sense once a rational connection is

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61 *Ibid.* at para. 17 [emphasis in original].

62 *Ibid.* at para. 60.

63 *Ibid.* at para. 61.

64 *Ibid.* at para. 62.

65 *Ibid.* at paras. 63-64.

66 *Ibid.* at paras. 66-68.

67 As discussed above in Part II.B, "The Principles of Deference," La Forest J. and McLachlin J. (as she then was) differed in *RJR-MacDonald* on the extent of deference to be granted to the government. Nevertheless, they both engaged in substantial rational connection arguments before moving to the issue of minimal impairment.

firmly established. If deference is to be applied at the rational connection stage, such deference should be convincing enough to hold the weight that will soon be placed on it.

Justice Bastarache actually calls for deference twice near the end of his minimal impairment discussion. First, he observes that

> [i]n the final analysis, there is little doubt that certain individuals fall through the cracks of s. 16(4)(c) of the *PSEA*.... What is less certain, however, is whether a *reasonable alternative* is available that would fill these cracks in a fair, consistent, and principled manner.[68]

In *RJR-MacDonald*, McLachlin J. stated:

> 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.[69]

Justice Bastarache cites this very passage at the outset of his minimal impairment discussion in *Lavoie*,[70] and thus there is little doubt that he is invoking it when he refers to "individuals fall[ing] through the cracks" of the legislation. The problem is that he has stripped his jurisprudential source of some of its context. In *RJR-MacDonald*, McLachlin J. makes the above statement in her minimal impairment discussion after a careful rational connection analysis, in which some parts of the impugned tobacco advertising legislation passed and others failed.[71] It was at this point that she considered the question of minimal impairment and spoke of the possible need to defer to a legislature that had made a choice between a "range of reasonable alternatives." Importing this concept into the s. 1 analysis in *Lavoie*, as Bastarache J. does, is very unsatisfying, because it is only after one accepts that s. 16(4)(c) pursues valid objectives and is rationally connected to those objectives that the "cracks" created by the legislation can have any legitimacy. Justice Bastarache deferred so extensively in his rational connection discussion that there is no firm foundation on which to rest this subsequent application of deference. Ironically, the "cracks" created by the legislation mirror the "cracks" in the argument and reveal a shaky edifice that will not bear much weight.

The second call for deference in Bastarache J.'s discussion of minimal impairment comes right at the end. He observes that between 1981 and 1985 there were several reviews of the legislation in question, and he then states that "Parliament has conscientiously considered alternatives to s. 16(4)(c) and chosen not to pursue them. The role of this Court is not to order that Parliament should have decided otherwise. This is precisely the type of policy review that is beyond our reach, particularly given the delicate balancing that is required in this area of the law."[72] This passage is on firm ground only when it is considered in the isolated context of a discussion of minimal impairment. In such a context, the earlier reference to *RJR-MacDonald* and the "range of reasonable alternatives" is directly on point and so too is Dickson C.J.C.'s comment in *Edwards Books* that "[t]he courts are not called

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68 *Lavoie*, *supra* note 8 at para. 69 [emphasis added].
69 *Supra* note 2 at para. 160.
70 *Supra* note 8 at para. 61.
71 *Supra* note 2 at paras. 158-59.
72 *Lavoie*, *supra* note 8 at para. 69.

upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line."[73] But once it is acknowledged that Bastarache J. is calling for deference on top of previous calls for deference, the fact that "Parliament has conscientiously considered alternatives to s. 16(4)(c)" does not appear compelling. Again the lack of a firmly established rational connection leaves the question of alternatives somewhat moot. It should also be noted that the appeal at the end of the above passage to "the delicate balancing that is required in this area of the law" recalls the very inadequacy of Bastarache J.'s sole basis for deference in his contextual introduction. This is not a case of balancing competing interests, but of creating competing interests. Why, after all, is there a need for "delicate balancing" in the area of citizenship law that extends to employment in the Public Service? This is really one of the crucial questions that must be answered by the government in this case if the call for deference is to make any sense. For the majority, however, the need for "delicate balancing" appears to serve more as a presupposition than as a point to be proved.

IV. CONCLUSION

The majority judgment in *Lavoie* provides a s. 1 edifice that cannot stand. The foundation for this edifice is, first, a call for deference that is suspect, and second, a rational connection analysis in which further invocations of deference are advanced to buttress arguments that are themselves insufficient. At the minimal impairment stage, the building begins to topple. What one is left with is an acknowledged s. 15 violation and appellants who fall through the "cracks" of both the legislation and the reasoning of the majority of the Court. Ultimately, this judgment exists as a very disturbing example of what deference can do to a *Charter* analysis at the Supreme Court of Canada level: it can lead the Court to abdicate its responsibility within the Canadian constitutional structure.[74]

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[73] *Supra* note 12 at 782.

[74] Also disturbing is the decision of the Supreme Court in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, which came out several months after *Lavoie*. In the later judgment, deference again proved divisive. While the majority upheld the *Charter* rights of the appellants, four members of the Court advanced a lengthy argument in favour of deference which was not adequately grounded in the jurisprudence, and which appeared to manipulate the existing principles of deference rather than clearly apply them or systematically extend them.