

# THE CHILL SETS IN: NATIONAL SECURITY AND THE DECLINE OF EQUALITY RIGHTS IN CANADA

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*“The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so.”<sup>1</sup>*

## I INTRODUCTION

On September 11, 2001, individuals claiming to act in the name of Islam and coming from Arab countries (mainly Saudi Arabia) launched co-ordinated terror attacks on the U.S. In the aftermath of the attacks, North Americans were told that the world had changed. Three thousand American civilians<sup>2</sup> died in one fell swoop as a group of fanatics declared war on the values “we” in the West hold dear. The attacks were ostensibly intended as retribution for years of post-colonial American meddling in the Muslim world. The U.S. and its allies rose to the occasion and proclaimed their own battle: the “War on Terror,” which commenced in October 2001 with the aerial bombardment of Afghanistan, and culminated in the invasion of Iraq in March 2003.

As the “clash of civilizations,” or, perhaps more appropriately, “clash of fundamentalisms,”<sup>3</sup> was playing itself out with increasing bloodiness abroad, the *Anti-terrorism Act* [“ATA”] was quickly introduced in Canada.<sup>4</sup> On its surface, the ATA purported to protect Canadians from the threat of terrorism both within and without our borders. Many observers raised concerns that the ATA went too far. They argued

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<sup>1</sup> *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 at para. 4 [per Iacobucci and Arbour JJ.].

<sup>2</sup> The total number of documented victims is 2,973 (U.S., National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (Washington, D.C.: United States Government Printing Office, 2004) at 311).

<sup>3</sup> Tariq Ali, *The Clash of Fundamentalisms: Crusades, Jihads and Modernity* (London: Verso, 2002), playing on the thesis in Samuel Huntington, “The Clash of Civilizations” (1993) 72:3 *Foreign Affairs* 22.

that the government adopted it too hastily and without adequate safeguards to prevent its arbitrary or discriminatory application.<sup>5</sup> At the time of writing, the ATA is before a Senate Review Committee.<sup>6</sup> The findings of this Review Committee will likely reiterate widely-held concerns that the ATA could lead to severe violations of the human rights of suspected and accused “terrorists”, and to the targeting and profiling of Muslims and Arabs in Canada.

The assault on the civil liberties of Arabs and Muslims takes place within a political climate in which fear is the driving force of public policy. The culture of fear has given rise to a dogma of national security, the effects of which are widespread and include the erosion of equality rights. Protecting Canadians is a legitimate goal. However, in the post-September 11, 2001 era, ensuring “national security” has become a euphemism for ethnic and religious profiling, and the ATA has become a guise for the systematic targeting and demonization of Muslims and Arabs. Any Canadian of Arab or Muslim heritage can attest to this reality.<sup>7</sup> The world may or may not have changed on September 11, 2001, but for the victims of the subsequent assault on civil liberties in its aftermath, Canada has most certainly changed.

While the direct victims of the “War on Terror” are Muslims and Arabs, the collateral victims are disadvantaged Canadians in general, including racialized minorities, women, children and people with disabilities. In times of instability, there is a tendency to defer to the decisions of those who wield the power to protect, namely, the government. Just as citizens are lulled by fear into subservience, the courts too are at risk of abandoning their oversight function and transforming from an activist judiciary into an acquiescent one. This trend can be seen in Canada since the September 11, 2001 attacks, as the chilling of equality has taken hold at the Supreme Court of Canada. In this paper, I propose to trace the profiling of Muslims and Arabs and the erosion of protections for equality seekers generally to the shared root cause of September 11, 2001 and, more specifically, to the government’s response to the

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<sup>4</sup> Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism* 1st Sess., 37th Parl., 2001 (assented to 18 December 2001), S.C. 2001, c. 41 [*Anti-terrorism Act or ATA*].

<sup>5</sup> The Canadian Bar Association, the Coalition of Muslim Organizations, the Canadian Labour Congress, the Ligue des droits et libertés, the Barreau du Québec, the B.C. Civil Liberties Association and the National Association of Women and the Law all made submissions expressing serious concerns about the impact on civil liberties and equality to the Senate Special Committee reviewing the proposed legislation in October 2001 and December 2001. See Canada, Senate, Special Committee on Bill C-36, *Committee Proceedings*, online: <[http://www.parl.gc.ca/common/committee\\_SenProceed.asp?Language=E&Parl=37&Ses=1&comm\\_id=90](http://www.parl.gc.ca/common/committee_SenProceed.asp?Language=E&Parl=37&Ses=1&comm_id=90)>.

<sup>6</sup> Pursuant to section 145 of the ATA, a comprehensive review of the legislation was commenced in December 2004.

<sup>7</sup> See Sheema Khan, “Don’t shackle us to 9/11” *Globe and Mail* (September 12, 2002). In a poll con-

tragic events of that day. I will begin in Part II with a survey of the impact of “national security” as an official national preoccupation and I will show how this undermines the human dignity of Muslims and Arabs. In Part III, I will review a selection of judgments of the Supreme Court since September 11, 2001 which deal with section 15. I will attempt to illustrate the decline of equality rights in this country, to the detriment of those Canadians who require the Charter’s protection the most. In Part IV, I attempt to gather what can be salvaged from this period, with a view to the future of equality in Canada.

## II The Hunt for ‘Terrorists’ in our Midst

### 1. Legislating against terror

The *ATA* provides the government with far-reaching authority to intrude on the lives of Canadians if there are grounds to believe that they are involved in “terrorist activity.” The requisite involvement can be through fundraising, facilitating, instructing or harbouring.<sup>8</sup> Law enforcement agencies now have the power to preventively arrest and detain, without charge, persons for whom there are “reasonable grounds to suspect” involvement in planning an imminent act of terror.<sup>9</sup> Groups for which there are “reasonable grounds to believe” are involved in terrorism are listed as “terrorist entities”, on the basis of secret and often unchallenged intelligence information. Persons can be convicted of collateral crimes, such as facilitation,<sup>10</sup> without proof of criminal intent or even knowledge of a terrorist act.<sup>11</sup> Where terrorism is alleged, the criminal process incorporates investigative hearings and secret evidence, raising significant obstacles to the accused’s traditional rights of defence. Penalties for failure to cooperate in interrogation also encroach on the right to silence.

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ducted by the Council on American-Islamic Relations Canada (CAIR-CAN), 60 percent of respondents indicated that they had been personally subject to some form of discrimination between September 2001 and September 2002, while 80 percent indicated they knew of someone who had been.

<sup>8</sup> See *Anti-terrorism Act*, *supra* note 4, s. 2(2).

<sup>9</sup> Note the departure from the usual standard of “reasonable grounds to believe”, a bulwark against abuse of power.

<sup>10</sup> See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 83.19(1)-(2)(a) [the *Code*] which states “Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence...whether or not...the facilitator knows that a particular terrorist activity is facilitated”.

<sup>11</sup> Of particular concern has been the precarious position in which lawyers representing accused terrorists have been placed. Aside from undermining solicitor-client privilege, lawyers could face prosecution for “facilitating” terrorist activities as a result of representing clients. The U.S. case of attorney Lynne Stewart is illustrative of this concern. The civil rights lawyer, along with her translator and paralegal, was prosecuted for aiding and abetting her client, Sheikh Omar Abdel Rahman, in the commission of terrorist activities after federal agents monitored her privileged communications with Abdel Rahman. At the time of writing, the jury is deliberating. See Elaine Cassel, “The Lynne Stewart Case: When Representing an Accused Terrorist Can Mean the Lawyer Risks Jail, Too” *Counterpunch* (October 12, 2002); online: <http://www.counterpunch.org/cassel1012.html>.

Data on the enforcement of the anti-terrorism provisions of the *Code* is limited. The *ATA* requires the Attorney General to report annually to Parliament on the use of provisions that allow for recognizance with conditions and investigative hearings. The Solicitor General must report annually on the number of arrests without warrant.<sup>12</sup> The reports produced so far contain only brief descriptions of the provisions and state that the powers of investigation and preventive arrest have not yet been used.<sup>13</sup> While the reports to date cover only the period up to December 23, 2003, there are two known cases since then in which Canadian authorities used the extraordinary powers granted them under the *ATA*. In the first instance, the RCMP raided an Ottawa home on March 29, 2004 and arrested Mohammad Momin Khawaja, a Muslim Canadian of Pakistani origin, on charges of participating in the activities of a terrorist group and facilitating a terrorist activity.<sup>14</sup> In the other case, prosecutors retroactively used investigative hearings under section 83.28 in the Air India trial,<sup>15</sup> a terrorism-related criminal prosecution involving events that occurred more than 15 years prior to the adoption of the *ATA*.<sup>16</sup>

Critics say that the reporting process established under the *ATA* is too narrow in scope, because it fails to accurately reflect the impact of the *ATA* on Muslims and Arabs, as well as on others such as anti-globalization and aboriginal rights activists.<sup>17</sup> Moreover, the International Civil Liberties Monitoring Group (ICLMG) noted the adverse impact of the *ATA* and related legislation<sup>18</sup> on non-governmental advocacy and humanitarian assistance groups. The ICLMG Report cites the lack of a single

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<sup>12</sup> See *Code*, *supra* note 10 at s. 83.31.

<sup>13</sup> Two such reports have been produced, the most recent of which was presented to Parliament on October 21, 2004. See Canada, Department of Justice, *Annual Report concerning Investigative Hearings and Recognizance with Conditions* (Ottawa: Department of Justice, 2004), online: <[http://canada.justice.gc.ca/en/terrorism/annualreport\\_2002-2003.html](http://canada.justice.gc.ca/en/terrorism/annualreport_2002-2003.html)>.

<sup>14</sup> Khawaja was denied bail in May 2003 and, as of December 2004, remained incarcerated in solitary confinement awaiting trial. See "Bail review delayed for man held under anti-terrorism law" CBC News (December 20, 2004) online: CBC <<http://www.cbc.ca/story/canada/national/2004/12/20/khawaja-041220.html>>.

<sup>15</sup> See *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248 at para. 4 [per Iacobucci and Arbour JJ.], the Supreme Court ruled that the provision did not violate section 7 of the *Charter*.

<sup>16</sup> On June 23, 1985, Air India flight 182 was blown up by Sikh extremists while *en route* from Toronto to New Delhi. The attack left 329 people dead.

<sup>17</sup> International Civil Liberties Monitoring Group, *In the Shadow of the Law: A Report by the International Civil Liberties Monitoring Group (ICLMG) in response to Justice Canada's 1st annual report on the application of the Anti-Terrorism Act (Bill C-36)* (14 May 2003); online: Development and Peace <[www.devpp.org/pdf/shadow.pdf](http://www.devpp.org/pdf/shadow.pdf)> ["ICLMG Report"].

<sup>18</sup> The government's anti-terrorism strategy involved adopting not only the *Anti-terrorism Act*, *supra* note 4, but also amendments to the *Customs Act*, R.S.C. 1985 (2nd Supp.), c. 1, and the *Citizenship Act*, R.S.C. 1985, c. C-29, and the enactment of the *Public Safety Act*, 2002, S.C. 2004, c. 15.

oversight mechanism with a mandate to monitor and assess the enforcement of the interconnected security measures as a significant problem. According to the ICLMG, the current mechanism lacks transparency and gives rise to a reasonable probability of abuse of power.<sup>19</sup>

## 2. Racism and stereotyping

Since September 11, 2001, Muslims and Arabs in Canada have been thrust involuntarily into the spotlight of the national consciousness. The Canadian public now views Muslims and Arabs as a fifth column: a potentially threatening, suspicious minority community of terrorist sympathizers who hate “our” freedoms. Equality jurisprudence in Canada historically places human dignity at the centre of the *Charter’s* equality guarantee.<sup>20</sup> Stereotyping and treatment based on stereotypes undermine human dignity by stigmatising members of the stereotyped group with imputed characteristics. The image of the “Muslim terrorist” was prevalent prior to September 11, 2001, but now has unprecedented currency and acceptance.

Evidence indicates that Muslim and Arab Canadians have experienced widespread negative backlash in a variety of sectors, including services, housing, education and employment. Much of the evidence is anecdotal, reported in the media or gathered by community organizations. Due to the anecdotal nature of this evidence and the inadequacy of the official reporting mechanisms, it is difficult to discern a clear picture of abuses and discrimination. One documented example is the case of a Muslim employee who was dismissed from his employment shortly after September 11, 2001 for allegedly making a remark in the workplace that “America got what they deserved”.<sup>21</sup> The employee denied making the comment and commenced a complaint at the Ontario Human Rights Commission against his former employer for discrimination. The employee claimed that the workplace became poisoned after September 11, 2001, as colleagues used terms such as “Muslim terrorists” and suggested that Afghanistan be “carpet-bombed”. When the man complained to his employer about such comments, the employer refused to investigate and instead terminated the complainant on the basis of the comments he denied making.<sup>22</sup> This incident was likely not a unique occurrence.

Without a doubt, public perception and attitudes towards Muslims and Arabs fundamentally changed after September 11, 2001. Recent polls in the United States

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<sup>19</sup> *ICLMG Report*, *supra* note 18 at p. 4.

<sup>20</sup> *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at paras. 47-51.

<sup>21</sup> *Ali v. Axia Netmedia Corporation et al.* (10 June 2004), HR 546/03 (OHRC).

<sup>22</sup> The matter was settled for payment to the complainant of \$24,000.00 in lieu of damages for discrimination.

and Europe reveal a disturbing picture. Nearly half of all Americans surveyed in a poll conducted by Cornell University believe the U.S. government should restrict the civil liberties of Muslim Americans.<sup>23</sup> The survey also found that 27 percent of Americans support requiring Muslim Americans to register their address with the federal government. Twenty-nine percent believed federal agents should infiltrate Muslim charitable and community organizations. In a similar poll conducted in a number of western European countries, 52 percent of respondents believed there was a widespread unhappiness about Muslims.<sup>24</sup> Interestingly, the highest level of European disapproval of Muslims was in Europe's most tolerant societies: Sweden (75 percent) and the Netherlands (72 percent).

In Canada, advocacy and monitoring groups such as the Council on American-Islamic Relations Canada ("CAIR-CAN") and the Canadian Arab Federation ("CAF") report increased incidences of hate crimes and discrimination against Muslim and Arab Canadians, as well as decreased morale and a growing sense of insecurity among these populations.<sup>25</sup> Moreover, community groups express concern that public suspicion of Arab and Muslim institutions has a chilling effect on those groups and prevents them from engaging in the community.<sup>26</sup>

### 3. Profiling and the impact on Muslims and Arabs in Canada

Racism and stereotyping of Muslims and Arabs has moved beyond the private sphere and embedded itself in public policy since September 11, 2001. Quiet religious leaders,<sup>27</sup> curious foreign students<sup>28</sup> and an unassuming

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<sup>23</sup> William Kates, "Poll: Nearly half of all Americans support restricting rights of Muslim-Americans" *Detroit Free Press* (17 December 2004), online: *Detroit Free Press* <[http://www.freep.com/news/latestnews/pm1873\\_20041217.htm](http://www.freep.com/news/latestnews/pm1873_20041217.htm)>.

<sup>24</sup> John Elliott, "Muslims face rising suspicion in Europe" *The Sunday Times* (19 December 2004).

<sup>25</sup> See Canadian Arab Foundation, *Arabs in Canada: Proudly Canadian and Marginalized*, (Toronto: Canadian Arab Federation, 2002). See also note 7.

<sup>26</sup> Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling: Inquiry Report* (Toronto: Ontario Human Rights Commission, 2003) at p. 36 ["Paying the Price"].

<sup>27</sup> Ahmad Kutty and Abdool Hamid, both moderate Muslim religious leaders from Toronto, were denied entry into the United States after being handcuffed and detained for 16 hours at an airport in Fort Lauderdale on September 11, 2003; their apparent crime: their religion and their choice of travel date. See Colin Freeze, "U.S. detains, kicks out two Canadian Muslims" *Globe and Mail* (13 September 2003).

<sup>28</sup> In August 2003, 21 Muslim men of Indian and Pakistani origin were arrested under "Project Thread", for being part of an alleged al-Qaeda sleeper cell in Canada. One of the men, a student pilot who flew a regular route which passes by the Pickering power plant outside Toronto spent 44 days in protective custody at a maximum security jail before being released without any criminal or terrorism-related charges being laid. All of the known cases are being handled as immigration matters, and allegations of terrorism connections have largely dissipated. See Thomas Walkom, "Suspicious Win the Day in Absence of Evidence" *The Toronto Star* (29 August 2003).

engineer<sup>29</sup> have become front-page stories simply because their ethnic or religious identity matched a “terrorist” profile. What forms the basis for such suspicions remains a matter of conjecture. The ongoing Maher Arar inquiry, while, in theory, a “public” inquiry, will likely not shed light on Canada’s monitoring, evidence gathering or tracking of suspected persons, or on the make-up of the “terrorist profile.”<sup>30</sup> The question of who decides, and on what basis persons and groups are deemed to constitute a risk to “national security” will not be sufficiently articulated in the near future. The government assured Canadians the ATA would protect not just their safety and security, but also their fundamental rights.<sup>31</sup> However, the veil of secrecy, which conceals evidence, allows for secret trials, and imprisons people without trial, makes it very difficult for Canadians to obtain the information necessary to hold the government to account.

Profiling is a simplistic response to complex problems; it involves highlighting a specific characteristic about a person, unrelated to that person’s actual deeds, and extrapolating to reach a presumptive conclusion about the person’s intentions and probable conduct.<sup>32</sup> The same logic that presumes all black youth are drug dealers and gangsters, or that all gay men are paedophiles, found affirmation in September 11, 2001 for the presumption that all Muslims and Arabs are terrorists unless they can prove otherwise.<sup>33</sup> Effectively reversing the presumption of inno-

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<sup>29</sup> Maher Arar, a Canadian citizen born in Syria, was detained and deported to his country of birth from the United States while *en route* to Ottawa from a family vacation in Tunisia in September 2002. He was imprisoned in Syria, where he claims to have been tortured, for 16 months. While initially, Canadian officials claimed not to have been informed of Arar’s detention and deportation from the U.S., new information suggests there may have been some degree of coordination. The public inquiry is ongoing at the time of writing. Arar has also commenced separate civil actions against both the Canadian and U.S. governments. See “In Depth: Maher Arar” CBC News (26 November 2004), online: CBC News <<http://www.cbc.ca/news/background/arar>>.

<sup>30</sup> At the time of writing, the inquiry is being held up by the government’s refusal to release information it insists is sensitive and could pose a threat to national security. The matter is presently before the Federal Court. See Thomas Walkom, “Ottawa must let Arar judge do his job” *Toronto Star* (22 December 2004).

<sup>31</sup> See Canada, Department of Justice, “The *Anti-terrorism Act*” online: Department of Justice Canada <[http://canada.justice.gc.ca/en/anti\\_terr/index.html](http://canada.justice.gc.ca/en/anti_terr/index.html)>.

<sup>32</sup> The Ontario Human Rights Commission defines racial profiling as: “...any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment” See *Paying the Price*, *supra* note 27 at 6.

<sup>33</sup> See, for example, Martin Rudner, “Challenge and Response: Canada’s Intelligence Community and the War on Terrorism” (Winter 2004) 11 *Canadian Foreign Policy* 17. Rudner, the founding director of Carleton University’s Canadian Centre of Intelligence and Security Studies, cited “evidence” of the Muslim community’s “terrorist” connections, stating: “The continued dependency of Canadian Arab and Muslim institutions on external resources renders them vulnerable to extremist influences that can threaten Canadian multicultural values, public safety and national security”.

cence, profiling undermines the very basis of due process. The ATA has sacrificed the principles of fundamental justice at the altar of “national security”.

Scholars argued that profiling does little to increase national security, but rather “undermines national security while harming Arabs, Muslims, and other racialized groups by heightening their vulnerability and reinforcing their exclusion from Canadian society”.<sup>34</sup> Because it is rooted in generalizations and used exclusively against disadvantaged minorities, profiling is necessarily discriminatory. It is impossible to uphold the principles of a pluralistic democracy while engaging in the systematic targeting of persons based on who they are rather than on what they have done. It is up to governments and, ultimately, the independent, non-political judiciary to keep the hysteria of the general population in check. North Americans understandably felt threatened after September 11, 2001. However, there is reason to be concerned when government and the courts appear to lose sight of their respective functions (i.e., to adopt sound public policy and uphold the *Charter*) and, instead, become complicit in the propagation of negative stereotypes.

As fear swept across the western world post-September 11, 2001, governments, including Canada’s, reacted with an amount of alarm equal to that of their respective populations. However, state reactions to the perceived threat of global terrorism arguably heightened the level of alarm among the population rather than appeasing it. At the same time, these reactions heightened the actual threat of future terror attacks by antagonizing and radicalizing people in the Muslim and Arab world who would not otherwise harbour hostility towards the West. While states can be expected, and indeed are required under law, to protect the security of their citizens,<sup>35</sup> they must act within the bounds of human rights norms. The war on terror both abroad and at home is widely criticized as transgressing the most fundamental principles of human rights. The right not to be discriminated against necessarily includes the right not to be profiled on the sole basis of race, religion, or ethnic or national origin.

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<sup>34</sup> Reem Bahdi, “No Exit: Racial Profiling and Canada’s War Against Terrorism” (2003) 41 *Osgoode Hall L.J.* 293 at para. 2.

<sup>35</sup> *The International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Cant. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR], requires state parties to respect the rights of the Covenant, and has been interpreted to require states to protect individuals against human rights violations not only by the state, but also by private actors. The state’s duty of due diligence to prevent the violation of human rights by private actors was applied by the Inter-American Court of Human Rights in the 1988 judgment in *Velásquez-Rodríguez*. See Thomas Buergenthal, “Inter-American Court of Human Rights: Judgment in *Velásquez-Rodríguez* Case (Forced Disappearance and Death of Individuals in Honduras) (July 29, 1988)” Case Comment (1989) 28 I.L.M. 291.

#### 4. Detention and secret trials

The case of five men, all Muslim Arabs known by their supporters as the “Secret Trial Five,”<sup>36</sup> illustrates the Canadian government’s approach to appeasing public fear of “Islamic terrorism”. The Five have been detained indefinitely without charges, trial, or access to the alleged evidence against them. The men are all held on security certificates, issued pursuant to immigration legislation.<sup>37</sup> The security certificate system is under considerable public scrutiny as a result of the “Secret Trial Five”. In an important decision, the Federal Court considered a *Charter* challenge to the detention of one of the men, Adil Charkaoui, a permanent resident of Moroccan origin detained on suspicion of “terrorism” offences in May 2003.<sup>38</sup> Charkaoui’s counsel challenged the procedure established under the *IRPA* whereby Immigration authorities can preventatively detain a person deemed by the Solicitor General and the Minister of Citizenship and Immigration to represent a danger to national security or to the safety of any person. The authorities need not lay formal charges against the person detained. Both the *IRPA* and the *ATA* provide for preventive arrest and detention. The Federal Court held that the impugned system, which includes the use of secret evidence, *in camera* hearings and detention without trial, was consistent with sections 7, 9, 10, 11(e) and 15 of the *Charter*. The Federal Court of Appeal upheld this decision in December 2004.<sup>39</sup>

Shortly after the September 11, 2001 attacks, the Supreme Court of Canada rendered judgment in an important case involving the security provisions of immigration legislation.<sup>40</sup> The case involved a Tamil refugee claimant from Sri Lanka who was a member of the Liberation Tigers of Tamil Eelam (“Tamil Tigers”), which Canada considers a “terrorist organization” for immigration purposes. The Court considered whether the government could deport the appellant to his country of origin despite a serious risk of torture or death upon his return. The Court confirmed the need for a balance between fighting terrorism and protecting civil rights:

Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fun-

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<sup>36</sup> The detainees and date of detention are: Mohammad Mahjoub (June 2000), Mahmoud Jaballah (August 2001), Hassan Almrei (October 2001), Mohamed Harkat (December 2002), and Adil Charkaoui (May 2003). See “Security certificates and secret evidence” *CBC News* (22 February 2005), online: CBC News <[http://www.cbc.ca/news/background/cdnsecurity/securitycertificates\\_secretevidence.html](http://www.cbc.ca/news/background/cdnsecurity/securitycertificates_secretevidence.html)>.

<sup>37</sup> *Immigration and Refugee Protection Act*, 2001, c. 27, entered into force June 20, 2002 [“IRPA”], formerly *Immigration Act*, R.S.C. 1985, c. I-2.

<sup>38</sup> *Charkaoui (Re)*, 2003 FC 1418 (F.C.).

<sup>39</sup> *Charkaoui (Re)*, 2004 FCA 421 (F.C.A.).

<sup>40</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3.

damental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat.<sup>41</sup>

It applied the proportionality test and concluded that the impugned provision, which allowed for the deportation of persons deemed to be threats to the security of Canada, even in the face of torture, did not violate the Charter. The Court recognized that the provision engaged section 7 rights and that section 7 required sufficient procedural safeguards, and endorsed the prohibition on deportation to torture as a norm of international law even where national security interests are at stake.<sup>42</sup> However, the Court nevertheless found that "in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1".<sup>43</sup>

In *Ewanchuk*, Justice L'Heureux-Dubé remarked that section 15 and section 7 are an important vehicle to give domestic effect to international human rights because they embody the notion of respect of human dignity.<sup>44</sup> Unfortunately, the judicial waffling of the *Suresh* decision marked a shift away from this approach by reinforcing the importance of human rights principles on the one hand while attaching gaping caveats on the other. Since the events of September 11, 2001, international political factors have outweighed both international human rights and domestic *Charter* rights, and equality has nearly been run off the road.

### III Equality at The Supreme Court of Canada POST 9/11

Between September 11, 2001 and December 31, 2004, the Supreme Court addressed equality arguments in a total of 20 cases.<sup>45</sup> In some instances, the Court decided the case on other grounds and made no substantive finding on the equality issue. In others, it passed over the section 15(1) analysis with little to no elaboration.<sup>46</sup> In some

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<sup>41</sup> *Suresh*, *supra* note 40 at para. 47.

<sup>42</sup> *Suresh* note 40 at para. 75.

<sup>43</sup> *Suresh* note 40 at para. 78.

<sup>44</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 73

<sup>45</sup> This figure represents cases in which section 15(1) was argued and received at least some mention in the judgment. Seven of these cases were negative (i.e. no s. 15 violation or justifiable at s. 1); three were positive; and in the remaining ten, section 15 was not directly decided. I have not included cases involving equality under the jurisdiction of Québec's *Charter of Human Rights and Freedoms*.

<sup>46</sup> See, for example, *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 [collective bargaining rights of agricultural workers]; *R. v. Sharpe*, [2001] 1 S.C.R. 45 [possession of child pornography]; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 [prisoners' right to vote]; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 [books in the classroom depicting same-sex relationships]; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 [political party status]; *R. v. Malmo-Lévine/R. v. Caine*, [2003] 3 S.C.R. 571 [marijuana prohibition]; *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 [operation of video lottery terminals]; *R. v. Demers*,

cases, reaching the desired result without having to “resort” to section 15(1) reflects the Court’s unwillingness to expand the scope of equality protections in the current political climate. As discussed above, many Canadians currently seem to agree that a degree of inequality is necessary and acceptable to ensure security. However, refusal to deal with section 15 is never neutral. It is a measure of how activist and equality-positive a court intends to be.

The Supreme Court’s shifting approach to the section 15 analysis since late 2001 is remarkable when measured against the tremendous strides the Court made in its equality jurisprudence in the preceding period. Equality advocates recall with fondness the seminal section 15 judgments in: *Vriend, Eldridge, Corbière, M. v. H., G.(J.), Little Sisters* and *Lovelace*,<sup>47</sup> among others. In the groundbreaking case of *Law*, the Supreme Court clarified its understanding of section 15 and expanded the scope of equality in numerous of ways. This period also saw the important equality-positive human rights decisions in *Meiorin* and *Grismer*.<sup>48</sup>

This paper does not endeavour to provide a comparative analysis of pre- and post-September 11, 2001 Supreme Court decisions. However, the assertion that equality has taken a nose-dive cannot be made in a vacuum. It requires more than a generous inference or logical leap of faith to draw the link between the events of September 11, 2001 and the decline of equality in the judgments of the Supreme Court of Canada. I contend that there has been a fundamental shift in the attitudes and priorities of the Canadian public, which has naturally impacted on the Supreme Court. This impact is most evident in the way the Court interprets and balances broad public interests with the interests of rights claimants.

In times of instability and insecurity, the public perception of the Court changes. Its perceived role is not to extend rights, but to limit them out of the necessity to protect citizens. The public conceives of protection and security as preconditions to economic growth and prosperity. Economic burdens are seen to prevent the government from exercising its protective function. Section 1 of the *Charter* requires

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[2004] 2 S.C.R. 489 [criminal proceedings involving those unfit to stand trial]; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 [third-party election spending]. Also included in this number is the discrimination case of *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, in which s.15 was used as an interpretive tool of human rights legislation.

<sup>47</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *M. v. H.*, [1999] 2 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

<sup>48</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [“*Meiorin*”]; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [“*Grismer*”].

the Court to consider justificatory arguments advanced by the government. The government usually argues that its actions further the “public good” and reflect the “public will”. In such times as these, the public generally demands more conservative fiscal management, robust law enforcement and the protection of vested interests. The Supreme Court’s consideration of such factors, both at section 1 and at the breach stage itself, dilutes the section 15 guarantee, in the name of a public concern for national security gone wild.

### 1. The end to judicial activism?

In *Law*, the Court outlined the basic methodology for assessing whether a section 15 breach has occurred. It set human dignity as the defining standard of equality in Canada.<sup>49</sup> It also incorporated a flexible, contextual approach to resolving claims of discrimination. The approach set down in *Law* examines the claimant’s actual circumstances, informed by the person’s membership in a historically disadvantaged or stereotyped group, and measures the nature of the interest affected against the broader societal interest at stake. Critics of this approach claim that it imports a degree of balancing at the rights definition stage when it should be left to the government to justify a breach at section 1.<sup>50</sup> However, in the pre-September 11, 2001 equality cases, the Supreme Court generally struck an appropriate balance, assessing the discrimination claim with a view to the surrounding circumstances without allowing justificatory considerations to play a determinative role at the rights definition stage.

The most notable shift in the Court’s approach to section 15 is the generous degree of deference it now affords to government policy considerations. Some commentators characterize this as an all-out shift to the right, while others note that the Court is simply more cautious and less overtly interventionist.<sup>51</sup> Certainly the progressive decisions of the late 1990s earned the Court much unwanted attention. Critics accused the Court of hijacking the democratic process by overturning and reading into legislation in ways that, some argued, were never intended by the drafters of the *Charter*.<sup>52</sup> If, in the pre-September 11 era, the Court was indeed scripting the agenda of social change, it has since relinquished this role to government. Government now sets the priorities and determines the parameters of *Charter* protection in the post-September 11, 2001 world.

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<sup>49</sup> *Law*, *supra* note 20 at para. 51.

<sup>50</sup> Sheila Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 8 Can. Bar Rev. 299 at 326-327 [specifically discussing *Lovelace*].

<sup>51</sup> Kirk Makin, “Judicial activism debate on decline, top judge says” *Globe and Mail* (January 8, 2005).

<sup>52</sup> For a good discussion of the debate over judicial activism, see Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

## 2. Deference to government objectives and the return to formal equality

The function of the Supreme Court as an independent check on the potentially tyrannical power of the majority has never been more significant than it is post-September 11, 2001. Yet, during precisely this time, the Court has chosen to curb its principled, sometimes radical and often unpopular approach, in favour of toned-down deference to government. A group of cases that demonstrates the effect of this new deferential stance are those in which disadvantaged claimants, especially women and children, have mounted persuasive claims for government protection of their interests.

The decision in *Auton*<sup>53</sup> illustrates this point. In that case, a unanimous Court refused to find that the equality rights of children with autism were breached when British Columbia failed to provide provincial health care coverage for certain treatments. The claimants argued that these treatments were exceptionally effective and substantially improved their children's quality of life.<sup>54</sup> The Court ruled that, while the treatment in question might be medically necessary for children with autism, government's refusal to fund it did not breach section 15. The effect of the decision is that parents continue to shoulder the burden of providing necessary treatment to children with autism alone. The social impact is that families already disadvantaged by economic status who have a child with autism are left in the virtually impossible position of privately caring for their child. Naturally, this has a disproportionately greater impact on persons with disabilities, racialized minorities, immigrants and refugees, and women.<sup>55</sup>

The section 15 analysis in *Auton* marks a grand departure from the broadly defined, purposive conception of equality previously and consistently elucidated by the Court. In *Law*, Iacobucci J. (as he then was) cautioned against applying the section 15 test mechanically or in a formulaic manner.<sup>56</sup> The move towards a more flexible, contextual analysis was meant to ensure that judges would consider broad historical and social circumstances when assessing each claimant's position and needs. Yet, in *Auton*, the Court applied *Law* in the opposite manner, reverting to a narrow construction and formal model of equality.

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<sup>53</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 245 D.L.R. (4th) 1, 2004 SCC 78.

<sup>54</sup> The method of treatment at issue is known as Applied Behavioural Analysis ("ABA"), Intensive Behavioural Analysis ("IBI") or "Lovaas", the name of the psychologist, Dr. Ivar Lovaas, who developed the methodology. While its effectiveness was challenged in the Court, it is generally accepted in scientific circles to be the most successful early intervention program in terms of clinical results.

<sup>55</sup> In a joint intervention, the Women's Legal Education and Action Fund (LEAF) and the Disabled Women's Network (DAWN) urged the Court to consider the impact of intersecting grounds of discrimination.

<sup>56</sup> *Law*, *supra* note 20 at para. 88.

This formalistic approach to the equality analysis is also evident in *Canadian Foundation for Children, Youth and the Law*.<sup>57</sup> In that case, the Supreme Court ruled that the Criminal Code's sanction of corrective force by parents and teachers did not violate section 15 of the *Charter*. The majority of the Court refused to confer the same rights on children as on adults, and justified the distinction based on the vastly different social and historical circumstances of the two groups. It found that equality in this instance mandated differential treatment. In so finding, the Court characterized the needs of children as being twofold. Firstly, it recognized their need to be protected from abuse. It then added:

Yet this is not the only need of children. Children also depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.<sup>58</sup>

By characterizing the impugned provision as a protection for children as opposed to a protection for parents and teachers, the majority framed the issue in terms of children's twin interests, which it found were appropriately balanced in the legislation. It added that preventing the criminalization of the home and the school was in the best interests of children.

These aspects of the decision are best characterized as adult-centric, given the focus on "the family" from a parents' point of view, and the desire to avoid subjecting teachers or parents to the criminal law. Rather than focusing on the child's best interests from a subjective perspective, the Court accepted the government's paternalistic characterization of children's needs through adult eyes. This was in stark contrast to the statements of the Court in its pre-September 11, 2001 judgment in *Eaton*. In that decision, the Court considered the equality rights of children with disabilities, and stated that accommodation must be "from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life".<sup>59</sup>

The majority's characterization of the claimants' needs in *Children, Youth and the Law* was determinative at the section 15 breach stage. Finding that the first three contextual factors of the *Law* analysis were satisfied, the claim failed on the fourth factor, i.e., whether there was a correspondence between the actual needs and circumstances of children and the diminished protection they enjoyed under the impugned section of the *Code*. The majority found such a correspondence, based on

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<sup>57</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 ["Children, Youth and the Law"].

<sup>58</sup> *Children, Youth and the Law*, *supra* note 57 at para. 58.

<sup>59</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 77.

the needs identified above. Binnie J. provided a thoughtful and critical dissenting judgment on this point. He criticized the majority's characterization of the second "interest," the importance of a stable and secure family and school, as being properly reserved for the "reasonable objective" standard under section 1:

My respectful disagreement with the majority opinion is not only with the narrowed scope of s. 15(1) protection, but with the technique by which this narrowing is accomplished, namely by moving into s. 15(1) a range of considerations that, in my view, ought properly to be left to government justification under s. 1.<sup>60</sup>

He stated that the majority misapplied the "correspondence" factor in a manner that could potentially transform it from its proper use as a "marker for discrimination" into a back-door entrance for section 1 arguments.<sup>61</sup> Rather than using the "correspondence" factor to determine if the legislative distinction demonstrated equal consideration of people despite treating them unequally, the majority used "correspondence" to justify the alleged breach. The concern with this application of the "correspondence" factor is that it re-introduces the discredited "relevancy" test into the section 15 analysis.<sup>62</sup> Under the relevancy test, an equality claim can be defeated at the breach stage if the Crown shows that the ground of complaint was "relevant" to achieving a legitimate legislative objective.<sup>63</sup> After *Law*, the Supreme Court decisively discarded the relevancy test. The Court clarified that, as a measure of accommodation, correspondence between the legislation and the claimant's needs should not be determinative. It is simply a factor that can be of assistance in assessing whether the claimant's human dignity has been undermined.

### 3. Considering budgetary constraints

While the Court in *Auton* did not directly address the issue of budgetary constraints, the government aggressively argued that the cost implications of finding for the claimants would impose an unreasonable burden on the public purse.<sup>64</sup> The spectre

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<sup>60</sup> *Children, Youth and the Law*, *supra* note 57 at para. 74.

<sup>61</sup> *Children, Youth and the Law*, *supra* note 57 at para. 97.

<sup>62</sup> The relevancy inquiry was introduced in the 1995 "equality trilogy" of *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.

<sup>63</sup> *Egan*, *supra*, note 62 at 532.

<sup>64</sup> A similar argument has been advanced by academics concerned that using the *Charter* to widen the scope of medicare with such high cost implications would necessarily mean less of the health care pie would be available to other patients in needs. See Donna Greschner & Steven Lewis, "Auton and Evidence-Based Decision-Making: Medicare in the Courts" (2003) 82 Can. Bar Rev. 501.

of bursting floodgates likely influenced the Court to rule against the claimants.<sup>65</sup> This is consistent with its tendency towards increasing deference to government fiscal arguments in recent decisions. This was evident in the judgment in *NAPE*, which involved Newfoundland's denial of pay equity adjustments to female public service employees on the basis of budgetary constraints.<sup>66</sup> The Court had no difficulty finding that the Newfoundland government discriminated against over 5,000 female hospital workers on the basis of their sex. In fact, the Court found a history of chronic underpayment of women for performing equal work to men. However, the Court accepted the government's justification at section 1 that due to a serious fiscal crisis, it simply could not afford to pay the arrears, which amounted to some \$24 million.<sup>67</sup>

In the past, *Charter* jurisprudence was relatively clear that governments seeking to justify a *Charter* breach could raise budgetary constraints as a factor but such arguments were never given significant weight.<sup>68</sup> If the Court accepted budgetary reasons every time a government raised this defence, most of the progressive *Charter* jurisprudence of the past twenty years would never have occurred. In *NAPE*, the Court surveyed the previous cases on the issue and came to two conclusions. The first, was that the "sole purpose test", which holds that a measure whose "sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1",<sup>69</sup> was still valid. In order to sustain this position, the Court went to great lengths to characterize what were effectively simple financial justifications as being more complex and having wide-reaching social implications.

The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, was undertaken to promote other values of a free and democratic society.<sup>70</sup> The second thing the Court did was distinguish the case at bar from virtually every other judgment on point by virtue of the sheer magnitude of the cost: "Judicial statements made in less drastic circumstances about the inadequacy of

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<sup>65</sup> The cost of ABA/IBI is expensive, ranging between \$40,000 to \$65,000 per year, per child. The problem is that if cost was a determinative factor, the Court should only have considered it, if at all, at section 1, not at the breach stage.

<sup>66</sup> *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public Employees (N.A.P.E.)*, 244 D.L.R. (4th) 294, 2004SCC 66 [NAPE].

<sup>67</sup> *NAPE*, *supra* note 66 at para. 87.

<sup>68</sup> *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

<sup>69</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 284 (per Lamer C.J.), cited in *NAPE*, *supra* note 66 at para. 63.

<sup>70</sup> *NAPE*, *supra* note 66 at para. 75.

budgetary concerns must be read in context”.<sup>71</sup> Evidently, “reading in context” means that as the cost of implementation rises, the imperative to implement the right decreases. This provides a perverse incentive for governments to violate *Charter* rights in as expensive a manner as possible, given that the greater the injustice the less likely the claimant is to succeed in seeking redress.

*Auton* and *NAPE* are similar in that, if successful, both would occasion huge government expenditures in two of the most demanding areas of government budgeting: health care and the public service. Recognizing, at least in part, the inherent flaw in the Court’s approach, Binnie J. wrote in *NAPE*:

In one sense, the size of the debt illustrates the scale of discrimination experienced by women hospital workers. Nevertheless, it provides a contrast with *Eldridge*, *supra*, where the cost of compliance amounted to no more than a matter of administrative convenience.<sup>72</sup>

Unlike *Eldridge*, however, *NAPE* did not involve the distribution of resources to competing disadvantaged groups, as is the case in claims for health care funds. In Law language, there was no “ameliorative purpose” to consider. Rather, in terms of rights and entitlements, the *NAPE* case involved a clear question of gender equality. By failing to order Newfoundland to remedy its breach of the equal pay rights of its female civil servants, the Court signalled a retreat from its previous position that the purpose of section 15 was the promotion of human dignity. It is fair to predict, based on *NAPE*, that where the cost of implementation is any more than an “administrative inconvenience”, the Supreme Court will not enforce *Charter* rights with substantive remedies, irrespective of the scale of the injustice at issue.

#### **4. Closing the door on social benefits: the intersection of poverty, age and sex**

The new frontier of equality rights is the area of social and economic rights. The Supreme Court has yet to interpret the *Charter*’s neo-liberal foundations to mandate social and economic rights beyond what are provided for in the statutory framework of Canada’s social system.<sup>73</sup> For instance, education and health rights can only be enforced to the extent that the relevant legislation guarantees these rights, as reflected in the *Auton* judgment, discussed above. At the same time, it is doubtful that an

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<sup>71</sup> *NAPE*, *supra* note 66 at para. 86.

<sup>72</sup> *NAPE* *supra* note 66 at para. 87.

<sup>73</sup> Prior to adopting the *Charter*, Canada had acceded to the *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 August 1976). Note that the *Quebec Charter of Human Rights and Freedoms* does expressly protect social and economic rights.

independent right to work exists under present *Charter* jurisprudence, despite the advances made by employees and unions in the area of labour relations and employment standards. Moreover, government cutbacks to income security and social assistance programs have been unsuccessfully challenged in the courts. Thus, while there is increased recognition that an entitlement to a basic standard of living and social services exists, the use of *Charter* litigation to achieve substantive social and economic rights has met with limited success.

The *Gosselin* case was the first case in which the Supreme Court considered a *Charter* claim to an adequate level of social assistance.<sup>74</sup> The case, framed as a class proceeding, raised the important question of whether section 15 imposed a positive legal obligation on the government to ensure an adequate level of income for Canadians when they are unable to provide for themselves.<sup>75</sup> At issue was the 1980s welfare structure in Québec, which effectively penalized recipients under the age of 30 with lower levels of income support unless they participated in a government established training and education program.<sup>76</sup> In a slim majority of five to four, the Supreme Court held that the differential treatment of adults under 30 not only did not amount to discrimination, but was actually a good faith measure intended to provide an incentive to the affected persons to improve their employability.

Similar to the judgment in *Children, Youth and the Law*, the Court in *Gosselin* adopted an ageist and paternalistic approach to identifying claimants' needs and accepted Québec's argument of "good intentions" at face value. This judgment is consistent with the Court's post-September 11, 2001, tendency to defer heavily to legislatures. The Court disregarded the social science evidence of the claimants that the training programs did not really provide those affected with a meaningful opportunity to benefit from the welfare scheme. The majority's eagerness not to disrupt government policy-making in this instance served to entrench negative stereotypes of young poor persons in Canada as lazy, morally inferior and unproductive members of society who require discipline and corrective action. The Court was not yet prepared to view extreme poverty and receipt of social assistance through the lens of substantive equality, i.e., as a question of individual human dignity and a social and economic rights imperative.

The intersection in *Gosselin* of age, sex and economic status charted new territory in the potential expansion of equality protection into areas necessarily man-

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<sup>74</sup> *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429.

<sup>75</sup> The claimants also relied on section 7, security of the person.

<sup>76</sup> The impugned provision cut the welfare rate for those affected from \$470 per month to \$170. Simultaneously, the government adopted a training and education program for which participants would be credited with increased welfare payments equal to or almost equal to the regular rate.

dated by the human dignity approach to substantive equality.<sup>77</sup> For this reason, the disappointing majority judgment once again raised concern about an abandonment of *Law* and a digression from the equality-positive trajectory of the late 1990s.<sup>78</sup>

A further unsuccessful government program case, handed down nearly two years after *Gosselin*, was the *Hodge* case.<sup>79</sup> The issue was a separated common law spouse's entitlement to her former partner's Canada Pension Plan (CPP) survivor's pension. The claimant lived in a common law relationship with the deceased, a CPP contributor, for over 20 years. She left him five months prior to his death because of alleged physical and verbal abuse. In a unanimous judgment,<sup>80</sup> the Supreme Court held that the claimant was not entitled to the survivor's pension because at the time of the contributor's death she was no longer cohabitating with the contributor. She was therefore no longer a "spouse" within the meaning of the legislation. The section 15 claim was founded on a comparison between "separated common law spouses" and "separated married spouses."<sup>81</sup> If the couple were legally married, the claimant would be entitled to the pension notwithstanding the separation. The Court rejected this comparison, finding instead that the appropriate comparison was "former common law spouses" and "former married spouses". Framed in this manner, the legislation did not draw a distinction on marital status because neither group would be entitled to CPP survivor benefits.

While the Court's reasoning may appear to be consistent within a formal equality model, it is difficult to understand how a substantive equality interpretation could reach these results. The judgment failed to account for the historical disadvantage and precarious position of unmarried women in common law relationships, especially poor and elderly women. Moreover, it paid insufficient attention to the circumstances of alleged abuse, and the factors that led to the separation, namely the

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<sup>77</sup> Intersectionality is a theoretical framework which views substantive equality through a multidimensional lens reflecting the multiple experiences of oppression on the basis of intersecting identities, such as race, sex, disability, economic status and sexual orientation. It is contrasted with essentialism, which has been the conventional approach to section 15, in which claimants must fit neatly into a single enumerated or analogous ground. Intersectionality has made few forays into the Supreme Court's equality analysis: it was advanced by L'Heureux-Dubé J. in dissent in *Egan*, *supra* note 62, and in a concurring judgment in *G. (J.)*, *supra* note 47. In *Law*, *supra* note 20 at para. 94, Iacobucci J. expressly recognized that a section 15 claim can be comprised of intersecting grounds, either as an analogous ground or as a synthesis of grounds. It has not been further developed in the Court's jurisprudence since *Law*.

<sup>78</sup> It is significant to note that in a subsequent case, *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. 3d 481 (C.A.), the Ontario Court of Appeal recognized receipt of social assistance as an analogous ground of protection under section 15 of the *Charter*. The case was granted leave to appeal to the Supreme Court in March 2003, and then in September 2004, the Ontario government abruptly discontinued the appeal.

<sup>79</sup> *Hodge v. Canada (Minister of Human Resources Development)*, 244 D.L.R. (4th) 257, 2004 SCC 65.

<sup>80</sup> Only seven justices took part in the judgment due to the departure of Iacobucci and Arbour JJ.

woman's attempt to ensure her safety. Rather, the Court focused on the fact that the claimant's mind was settled that she was leaving her abusive partner for good. Again, if she were legally married and left her husband for good, this would not, in itself, disentitle her to CPP survivor benefits. Imposing a cohabitation requirement on common law spouses but not on married spouses not only creates an unfair distinction, but also implies that women in abusive common-law relationships, especially poor older women, should stay with their abusive partners or marry them before leaving the relationship.

The analogous equality ground of marital status took an earlier hit in the family law case of *Walsh*.<sup>82</sup> In *Walsh*, the Court upheld differential treatment between married and unmarried couples, ruling 8-1 that the *Charter* did not require the division of matrimonial property in common law relationships. Only L'Heureux-Dubé J. raised equality-positive arguments and focussed on the pre-existing disadvantage of unmarried cohabitants, who "have historically faced disadvantages through a legal system that fails to acknowledge them as legitimate family forms".<sup>83</sup> The majority of the Court found that respecting the personal choice of the parties was paramount, recognizing that many people choose not to marry precisely because they wish to avoid the institution of marriage and the legal consequences that flow from it. The judgment in *Walsh* was received with ambivalence among equality advocates. For the proponents of same-sex marriage rights, the case affirmed the significant differences between marriage and common law cohabitation in a way that would bolster the equality argument for the right of same-sex partners to marry. Meanwhile, other equality seekers worried that the Court's decision erased earlier advances in family law designed to protect unmarried persons (especially women),<sup>84</sup> and which expanded the law's view of families.<sup>85</sup> Unfortunately, this has been the reality in many areas of equality protection, as the advances of the 1990s are steadily being eroded.

## 5. Non-citizens: Second-class equality seekers

It has long been evident in the immigration context that Canadian law affords non-citizens a lesser degree of constitutional protection than citizens when there are grounds to believe that a person represents a threat to the security of Canada.<sup>86</sup> Citizenship is not a listed ground of discrimination under section 15, but was deemed

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<sup>81</sup> *Hodge*, *supra* note 79 at para. 38.

<sup>82</sup> *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325.

<sup>83</sup> *Walsh*, *supra* note 82 at para. 170 (per L'Heureux-Dubé J.).

<sup>84</sup> See for example *Miron*, *supra* note 62 [automobile insurance benefits to common law spouse].

<sup>85</sup> See for example *M. v. H.*, *supra* note 47 [support obligations for former same-sex partners].

<sup>86</sup> The *Charter* applies equally to all persons subject to Canadian law, even visitors.

an analogous ground early in the Supreme Court's *Charter* jurisprudence.<sup>87</sup> Differential treatment between citizens and non-citizens was found to be permissible only in respect of benefits and rights reserved exclusively for citizens in the constitution.<sup>88</sup> For instance, in *Chiarelli*,<sup>89</sup> the Supreme Court upheld the deportation of permanent residents, even where they have resided in Canada for a significant period of time, on the basis that non-citizens do not enjoy an unconditional right to remain in Canada under section 6 of the constitution. In *Suresh*, *supra*, for example, the issue was not whether authorities could deport the refugee claimant, but whether they could deport him to torture. It is settled law that non-citizens can be deported from Canada in certain circumstances. The *Charkaoui* case, *supra*, meanwhile, did not directly involve deportation. The public outcry and concern in that case was not an attempt to enhance constitutional entitlements for non-citizens, but rather to protect the *habeas corpus* rights the constitution already ensures to them. For this reason, *Charkaoui* represents the expansion of differential treatment beyond determining a non-citizen's entitlement to remain in Canada, and could open the door to further citizenship-based distinctions that go beyond what the drafters of the constitution intended. It remains an open question whether the government would extend such practices to Canadian citizens as well, who are subject to detention without trial and other security measures under the *ATA*. Given the current political and legal climate, it is likely that the legal instrument allowing for the security detention of citizens under the *ATA* will be exercised. Concerns about the potential for the arbitrary or speculative exercise of this authority are substantial, and should be seriously considered.

Fears of a slippery slope with respect to the erosion of non-citizens' *Charter* rights are not unfounded. In *Lavoie*,<sup>90</sup> the Supreme Court upheld differential treatment on the basis of citizenship. Like *Andrews*, and unlike *Chiarelli*, the case emerged in the employment context and did not raise any national security or criminal issues. The Court considered whether a discretionary policy of preference towards Canadian citizens for federal public sector jobs violated the claimants' equality rights. Bastarache J., writing for four justices, found that the distinction was justifiable in order to enhance the value of citizenship and encourage non-citizens to become naturalized. While claiming to affirm *Andrews*, Arbour J., in a concurring judgment, went even further in encouraging naturalization by suggesting that changing this personal attribute would not come at an unacceptable personal cost. All of

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<sup>87</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

<sup>88</sup> E.g., section 6 mobility rights; section 3 the right to vote and to hold public office; and section 23 minority language rights in education.

<sup>89</sup> *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.

<sup>90</sup> *Lavoie v. Canada*, [2002] 1 S.C.R. 769.

the claimants were eligible for Canadian citizenship. In post-September 11, 2001 Canada, the fear of porous borders and threats from without have evidently created an environment in which Canada's doors are slowly closing, and in which Canadians are being forced, now with the sanction of the law, to choose between "us" and "them".

The problem with the *Lavoie* judgment from a methodological perspective is that it left the clarity of *Law* behind and re-introduced obscurity and disorder into the section 15 analysis. The justices took vastly differing analytical approaches, the result of which was four separate sets of reasons that create anything but a decisive resolution of the issue or the section 15 methodology. Three justices found the section 15 breach was unjustifiable; four found that the breach was justifiable; and two found no breach at all. One of the latter two justices held that if there was a breach, it would not be justifiable.<sup>91</sup> This latter judgment, courtesy of Arbour J., adopted the position that a section 15 violation is never easily justified. In warning against the danger of "watering down" the equality guarantee by allowing every claim through the door before turning to section 1 to determine the scope of the protection, she stated:

For myself, I cannot accept that the violation of so sacrosanct a right as the guarantee of equality is justified where the government is pursuing an objective as abstract and general as the promotion of naturalization. To find that this objective is sufficiently pressing and substantial to be pursued by discriminatory means would, I believe, leave scarcely any legitimate state objective seriously constrained by the constitutional fetter of equality.<sup>92</sup>

Arbour J. was rightly apprehensive about applying a test which forces courts to "engage in a s. 1 analysis that pays an undue amount of deference to the legislatures, both in the objectives they choose to pursue and in the means they adopt in pursuing them".<sup>93</sup> However, her approach unavoidably incorporated an inappropriate degree of balancing at the breach stage, and did not escape the problem of undue deference to the legislature. Rather, her approach simply imported much of the section 1 balancing of government objectives into the section 15 breach test. In the result, she ultimately accepted government arguments wholesale.

By refusing to find a section 15 violation and allowing government justifications to be determinative, Arbour J. endorsed the traditional conception of citizenship as one which inherently "distinguishes between citizens and non-citizens and treats them differently".<sup>94</sup> Given the Court's analysis in *Andrews*, and the contextual analy-

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<sup>91</sup> *Lavoie*, *supra* note 90 at paras. 84-87 [per Arbour J.].

<sup>92</sup> *Lavoie*, *supra* note 92 at para. 85.

<sup>93</sup> *Lavoie*, *supra* note 92 at para. 86.

<sup>94</sup> *Lavoie*, *supra* note 92 at para. 110.

sis set out in *Law*, it is surprising that a prima facie case of discrimination was difficult to establish in *Lavoie*. Yet, Arbour J.'s reasoning presumes to overturn *Andrews* in favour of a *Charter* interpretation that justifies virtually all government distinctions between citizens and non-citizens. The basis of this justification is Parliament's constitutional authority to define the "essence of the concept of citizenship". Because this justification occurs at the rights-definition stage, a claimant would have to overcome the burden of proving that the issue at bar does not in any way impinge on the government's definitional role, a virtually impossible task. That such a judgment was rendered in the immediate aftermath of September 11, 2001 can hardly be coincidental.

#### IV PROGNOSIS

##### 1. Not all bad news

Any discussion of equality since September 11, 2001 cannot ignore the few positive results achieved during this period. The most important equality-affirming judgment of the Supreme Court in the post-September 11, 2001 period is the *Martin* case,<sup>95</sup> which recognized chronic pain as a legitimate disability entitling injured workers in Nova Scotia to worker's compensation benefits. The Court ruled that the impugned legislation demeaned the essential human dignity of chronic pain sufferers by reinforcing negative assumptions about their disability:

... far from dispelling the negative assumptions about chronic pain sufferers, the scheme actually reinforces them by sending the message that this condition is not "real", in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment, as well as a chance to establish their eligibility for benefits on an equal footing with others.<sup>96</sup>

Importantly, the Court ruled that people with disabilities who suffered from chronic pain did not have to demonstrate historical disadvantage in relation to other injured workers, who were the comparator group for the purposes of the equality test. The absence of comparative disadvantage was viewed, in these circumstances, as a neutral factor, and the historical disadvantage of people with disabilities generally was sufficient to satisfy this contextual factor.<sup>97</sup> In the result, the Court determined that a blanket exclusion was unconstitutional; equality rights required that the government assess each individual worker based on the facts of his or her particular case.

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<sup>95</sup> *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 ["*Martin*"].

<sup>96</sup> *Martin*, *supra* note 95 at para. 105

<sup>97</sup> *Martin*, *supra* note 95 at paras. 88-90.

The only other successful piece of section 15 litigation decided by the Supreme Court since 2001 was the claim of sex discrimination by a father whose particulars had been arbitrarily excluded from his children's birth registration by the mother. As a result, the father was denied participation in choosing the children's surname.<sup>98</sup> The impugned provision allowed a mother to unilaterally "unacknowledge" the father of her child in the registration of vital statistics, drawing what the Court found to be an unconstitutional distinction on an enumerated ground. The violation of section 15 was unjustifiable on the basis that it did not impair the father's rights as minimally as possible because it failed to provide any recourse for a father who had been illegitimately unacknowledged. As in *Martin*, the Court emphasized that an absence of historical disadvantage did not necessarily preclude a finding of discrimination. The pronouncement that "neither the presence nor absence of any of the contextual factors is dispositive of a s. 15(1) claim"<sup>99</sup> confirmed Iacobucci J.'s statements in *Law* that the contextual factors are not necessarily relevant in every case, nor is the list of factors exhaustive.<sup>100</sup>

A further case in which the Supreme Court reached a positive finding on section 15 was not litigated by rights claimants but rather was a question referred by the Governor in Council to the Court for a legal opinion on the extension of marriage to include same-sex unions.<sup>101</sup> At the time the Court decided the reference, the desire of gay and lesbian couples to obtain marriage licences was the only issue to generate as much public consternation in Canada as the "War on Terror." Following a string of positive decisions by lower courts, ruling that the traditional definition of marriage is unconstitutional, the government set out to amend legislation to conform to the courts' findings.<sup>102</sup> The issue can be contrasted with the government's approach to dealing with terrorism, which, unlike same-sex marriage, was viewed with universal scepticism among equality groups and human rights advocates. Thus, while the Supreme Court's opinion on the same-sex marriage reference legitimated the claims of lesbian and gay equality seekers, it served the more important function of legitimating the political agenda pursued by the government. In this particular instance, therefore, deference to government objectives and rationales was of benefit to equality seekers.

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<sup>98</sup> *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835.

<sup>99</sup> *Trociuk*, *supra* note 98 at para. 20.

<sup>100</sup> *Law*, *supra* note 20 at para. 62.

<sup>101</sup> *Reference re Same-Sex Marriage*, 246 D.L.R. (4th) 193, 2004 SCC 79. The reference came on the heels of successful litigation before the highest appellate courts in Ontario, British Columbia and Québec.

<sup>102</sup> Courts in seven provinces and one territory have now ruled the traditional definition of marriage to be unconstitutional. See *Reference re Same-Sex Marriage*, *supra* note 101 at para. 66.

A similar result was reached in *Harper*,<sup>103</sup> a third-party election spending case. In this case, the government advanced equality arguments in support of its section 1 justifications to limiting the free speech of powerful lobbyists during election periods.<sup>104</sup> Recognizing the uneven playing field of political participation, the Court endorsed the government's argument that the breach of section 2(b) was justifiable to promote equality in the political discourse.<sup>105</sup> Thus, while the Court again deferred to government objectives, equality seekers were pleased with the entrenchment of equality and fairness considerations in the Court's conception of democracy, and as potential limits on individual freedoms. Similarly, in *Sharpe*, L'Heureux-Dubé wrote a persuasive judgment, albeit in dissent, on behalf of three justices applying section 15 considerations to the section 1 analysis of the constitutionality of the criminalization of possessing child pornography. As a result of these decisions, equality as a *Charter* value, not only as an independent actionable right, has been affirmed as a strong instrument in shaping the Court's interpretation of other *Charter* rights.

## 2. The state of equality

Positive features can also be identified in judgments where claimants were unsuccessful. It is useful to recall that positive advances in equality are rarely spontaneous; seminal equality-affirming judgments can often be directly traced to dissenting judgments in earlier cases. Thus, it is important to draw attention to the powerful dissents in cases such as *Gosselin* (per Arbour J.) and *Children, Youth and the Law* (per Binnie J.). While the Supreme Court was spared the challenge of incorporating poverty issues substantively into the equality analysis when Ontario decided to abandon its appeal of *Falkiner*,<sup>106</sup> it is simply a matter of time before these issues will have to be litigated and clarified by the high court. To this end, we can also expect to see an increasing convergence of equality grounds intersecting with poverty, especially race, sex, age, disability and ethnic and national origin. Although the incorporation of intersectionality analysis in the Supreme Court's equality analysis has been stifled over the past few years,<sup>107</sup> equality seekers can only hope that renegade voices on the bench will prevail, and assist the Court to deliver on the promise of meaningful substantive equality.

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<sup>103</sup> *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764.

<sup>104</sup> In a joint intervention, Democracy Watch and the National Anti-Poverty Organization urged the Court to apply section 15 both as requiring the government to adopt legislative provisions which protect and promote equality, and as a countervailing consideration in interpreting the scope of freedom of expression.

<sup>105</sup> *Harper*, *supra* note 103 at para. 101.

<sup>106</sup> *Supra* note 78.

<sup>107</sup> See note 77.

In the vein of future projections, it is worth drawing attention to a compelling concurring judgment in *Demers*,<sup>108</sup> in which LeBel J. added an additional “unwritten constitutional principle” to the four listed in the seminal *Secession Reference*.<sup>109</sup> In addition to federalism, democracy, constitutionalism and the rule of law, and respect for minorities,<sup>110</sup> LeBel J. introduced *respect for human rights and freedoms* as a fundamental principle underlying the Canadian constitution.<sup>111</sup> Given that courts hold unwritten principles to be independently actionable constitutional rights,<sup>112</sup> it will only be a matter of time before creative counsel begin to construct or bolster equality and other *Charter* claims on the basis of this newly-articulated foundational right.

## V CONCLUSION

The struggle to preserve civil liberties in the post-September 11, 2001 world must necessarily include the battle to overcome stereotyping and prejudices. Since the attacks on the U.S., Canadians have understandably felt concerned about their personal security. The government now balances competing interests as it attempts to protect all Canadians without targeting some on discriminatory grounds. Unfortunately, as this paper asserts, the government has miscalculated this admittedly difficult balancing act. Meanwhile, the Supreme Court has responded with sympathy for the government, reflected in increasing deference to legislative choices. Times such as these require extra vigilance from the courts to ensure that the constitutional fabric of Canadian democracy is not unwound. Just as it is often said that “hard cases make bad law”, it can also be said that hard times make bad policy. For this reason, the Supreme Court’s role as the “final arbiter” is more important than ever. Yet, as demonstrated in this brief survey of post-September 11, 2001 equality cases, the Court has largely abandoned this role and afforded government a wide degree of latitude to determine priorities, set the agenda, and implement policies with little to no oversight. The result of this is not only the adoption of an *Anti-terrorism Act* that undermines the human dignity of Muslims and Arabs (especially non-citizens), but also the creation of an environment of eroding equality protections for other disadvantaged groups, including women, children, people with disabilities, non-citizens, the poor, and those who identify with multiple disadvantaged groups.

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<sup>108</sup> *Demers*, *supra* note 46, in which the majority found that the section 15 issue was unnecessary to answer.

<sup>109</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

<sup>110</sup> *Secession Reference*, *supra* note 108 at para. 32.

<sup>111</sup> *Demers*, *supra* note 46 at para. 85.

<sup>112</sup> *Lalonde v. Ontario (Commission de restructuration des services de santé)* 56 O.R. (3d) 505 at para. 116.

Members of these groups and Arabs and Muslims alike are all victims of the post-September 11, 2001 attack on civil liberties. There is a pressing need to salvage equality from the wreckage of September 11, 2001, lest the guarantee of section 15 be sacrificed in the pursuit of the elusive goal of national security.