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Immigration, Xenophobia and Equality Rights

In two leading decisions, the Supreme Court of Canada has held that immigration laws that impose negative treatment on non-citizens but not on citizens are not, for that reason alone, discriminatory. Barring exceptional circumstances, or additional independent factors, such laws are considered to be insulated from constitutional challenge under section 15 of the Canadian Charter of Rights and Freedoms*. This article identifies and unpacks deficiencies in these judicial decisions, and argues that they do not sit comfortably with the Court's more general jurisprudence on section 15. In addition, by failing to acknowledge xenophobia as a form of discrimination that has long been prevalent in our society and is analogous to the grounds listed in section 15, the Court exposes non-citizens to unwarranted risks of oppressive treatment motivated by animus against them.*

Dans deux décisions phares, la Cour suprême du Canada a statué que les lois sur l'immigration qui imposent un traitement négatif aux non-citoyens mais non aux citoyens ne sont pas, pour cette seule raison, discriminatoires. Sauf circonstances exceptionnelles ou autres facteurs indépendants, ces lois sont considérées comme étant à l'abri d'une contestation constitutionnelle en vertu de l'article 15 de la Charte canadienne des droits et libertés*. Le présent article relève et comble les lacunes de ces décisions judiciaires et soutient qu'elles ne cadrent pas avec la jurisprudence plus générale de la Cour sur l'article 15. De plus, en ne reconnaissant pas la xénophobie comme une forme de discrimination qui prévaut depuis longtemps dans notre société et qui est analogue aux motifs énumérés à l'article 15, la Cour expose les non-citoyens à des risques injustifiés de traitement oppressif motivés par l'animosité à leur égard.*

* Professor Emeritus, University of Victoria. This paper benefited immensely from comments from two anonymous reviewers and perceptive observations and suggestions from Colin Grey and Sarah Marsden. In addition, Hester Lessard drew my attention to some constitutional cases and ideas that I would otherwise have overlooked. I appreciate all the assistance.

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Introduction

One can readily identify a number of factors that, over the last ten years or so, have combined to reduce and destabilize the legal status and social standing of non-citizens who are seeking to enter or remain in Canada. Particularly conspicuous are the amendments to our refugee and citizenship laws that were introduced by the government that held power from the 2006 election until 2015, especially those harsh measures that were introduced after the government obtained a majority in the legislature in 2011.[1] The changes in question were extensive and far-reaching. A shortlist of well-known examples indicates the scope. Prompted by concerns about fraud, families have been kept apart by provisions that, for example, redefined who could sponsor. [2] Prompted by economic reasons, older children were removed from the list of dependants who could be sponsored, even in circumstances where they were clearly dependent on their parent.[3] Various

1. The major legislative changes were introduced by *Protecting Canada's Immigration System Act,* SC 2012, c 17; a useful summary and critique of which is found in Amnesty International, Unbalanced Reforms: Recommendations with respect to Bill C-31 (Brief to the House of Commons Standing Committee on Citizenship and Immigration) (17 April 2012), online: <www.amnesty.ca/sites/amnesty/files/ai_brief_bill_c_31_to_parliamentary_committee_0.pdf>. In addition, the *Strengthening Canadian Citizenship Act,* SC 2014, c 22 rendered Canadian citizenship more inaccessible by imposing both substantive and procedural impediments.

2. See *Immigration and Refugee Protection Regulations,* SOR/2002-227, s 130(3) [*IRPA Regs*], originally introduced in 2012, which requires a person who has been sponsored as a spouse to be a permanent resident or citizen for five years before they can themselves sponsor a person as their spouse.

3. The government lowered the cut-off age from 22 to 19 in 2014 (SOR/2014-140, s 2(F)). This age was selected for the reason that children who came to Canada at an early age were likely to become wealthier than those who came later. While this age has since been increased once again to a cut-off of 22 (*Regulations Amending the Immigration and Refugee Protection Regulations (Age of Dependent Children)*, SOR/2017-60, s 1); the regulation nevertheless continues to deny the dependence of older children during post-secondary education.

individuals seeking to remain in Canada have been barred from access to an independent tribunal in a number of contexts: for instance, those seeking to avoid deportation who have committed minor offences[4] and asylum seekers who on various grounds cannot appeal denials of their refugee claims.[5] Detention has become a more frequent response to irregular entry, and in some cases is a mandatory response applying even to children.[6] Health care benefits have been denied to many individuals with precarious status.[7] The list goes on much further. As has been widely noted, citizenship, permanent residence, temporary residence and refugee status have all become more difficult to obtain and easier to lose.[8]

The changes in question were not only far-reaching in substance, they also took a number of forms, including legislative amendments,[9] regulatory changes,[10] and a slew of ministerial instructions,[11] reviewed by neither cabinet nor legislature. They were also accompanied by explanatory backgrounders,[12] and government statements that presented the measures as a response to what was characterized as serious threats to the integrity of our immigration and refugee regime from queue jumpers, bogus refugees, fraudsters, as well as from immigrants who brought "non-Canadian values" with them.[13] Innuendo and insinuation also magnified

4. See *Immigration and Refugee Protection Act,* SC 2001, c 27, s 64(2) [*IRPA*], appeals to Immigration Appeal Division unavailable to individuals sentenced to 6 months imprisonment.
5. *Ibid*, s 110(2). Some rights of appeals have been restored through litigation: see, *YZ v Canada (Citizenship and Immigration),* 2015 FC 892 [*YZ*].
6. *Ibid,* s 55(3.1), mandatory detention for children aged 16 and over who are designated as "irregular arrivals" under *IRPA* s 20.1.
7. Although also restored as a result of litigation. See, *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 [*Canadian Doctors*].
8. See, for example, Brief of the Canadian Association of Refugee Lawyers (Brief to the Citizenship and Immigration Committee of the House of Commons) (5 May 2014), online: <carl-acaadr.ca/sites/default/files/CARL%20C-24%20Brief%20to%20CIMM.pdf>.
9. *Supra* note 1.
10. The various regulations are noted in the relevant Annual Reports to Parliament, online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals.html>.
11. A list of ministerial instructions is available online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions.html>.
12. Backgrounders are archived online: <www.canada.ca/en/immigration-refugees-citizenship/news/archives.html>.
13. Such statements were widely reported. For example, Sarah Boesveld, "Efforts to keep bogus Roma refugees out have failed: Jason Kenney," *National Post* (22 April 2012), online: <nationalpost.com/news/canada/efforts-to-keep-bogus-roma-refugees-out-have-failed-jason-kenney>. See generally, the *Zero Tolerance for Barbaric Cultural Practices* Act, SC 2015, c 29 and accompanying widely reported government comments**.** In addition, in her caustic judgment in *Canadian Doctors*, *supra* note 7, MacTavish J makes several references to remarks from the Minister's office prejudging refugee claims as "bogus."

links between immigrants and organized crime and terrorism.[14] In addition, front-line officials, unreviewed by superiors within their organization, were given a strong mandate to protect national security, and have adopted more aggressive, less facilitative approaches to those attempting to negotiate their way through the system.[15]

Simultaneously, we have witnessed an increase in public expressions of anti-immigrant sentiment.[16] Mainstream political debate has become infected and influenced in alarming ways by xenophobic invective as newcomers and temporary workers are misidentified as a primary source of various past and present social ills and as a likely source of potential future harms. Individual non-citizens are attacked because of characteristics they are deemed falsely to have, or because of characteristics they do have but that are deemed wrongly to be pernicious. Antagonism to newcomers may also focus variably and not necessarily consistently on race, religion, cultural practices, place of origin, language skills and other factors.

It is not unreasonable to talk about the rise of xenophobia and to suspect that the government's package of immigration and citizenship reforms has helped stoke the irrational fears of those who feel threatened by newcomers and has increased the confidence and strength of anti-immigrant groups and organizations. Moreover, it is not unreasonable to suspect that xenophobes' irrational fears may have reciprocally influenced the government's decision to develop and implement the relevant measures. It would not be outlandish to conclude that, although each measure of harsh treatment is directed at a discrete and narrowly defined category of non-citizen, each measure operates like a single pixel that, only in combination with many others, presents the viewer with a comprehensible image. In this case, the cumulative message from the government could be interpreted as the message that in our immigration processes the interests of the existing citizenry always come first and extreme measures may

14. See, for example, Canadian Press, "Kenney blasted for linking Toronto gun violence to 'foreign gangsters,'" *Vancouver Sun* (20 July 2012), online: <www.vancouversun.com/Kenney+blasted+linking+Toronto+violence+foreign+gangsters/6966596/story.html>.

15. See Tony Keller, "Canada Has Its Own Ways of Keeping Out Unwanted Immigrants," *The Atlantic* (12 July 2018), online: <www.theatlantic.com/international/archive/2018/07/canada-immigration-success/564944/>. See also Geoffrey York & Michelle Zilio, "Access Denied: Canada's Refusal Rate for Visitor Visas Soars," *Globe & Mail* (8 July 2018), online: <www.theglobeandmail.com/world/article-access-denied-canadas-refusal-rate-for-visitor-visas-soars/>; and Nicholas Keung, "Audit of immigration detention review system reveals culture that favours incarceration," *Toronto Star* (20 July 2018), online: <www.thestar.com/news/gta/2018/07/21/audit-of-immigration-detention-review-system-reveals-culture-that-favours-incarceration.html>.

16. See, for example, Craig S Smith & Dan Levin, "As Canada Transforms, an Anti-Immigrant Fringe Stirs," *New York Times* (21 January 2017), online: <www.nytimes.com/2017/01/31/world/americas/canada-quebec-nationalists.html>.

be imposed where these interests might be in jeopardy. Each prominent example of oppressive treatment may be interpreted as aiming to assuage the general fears of anxious insiders and to respond to their demands.[17] A quick glance at the history of Canadian immigration law[18] reveals that this recent experience is hardly novel. Through the years, nativism, jingoism and xenophobia have emerged and re-emerged in the public sphere leading to harsher immigration laws.

In general terms, the recent package of reforms has raised four major concerns. First, are they gratuitously harsh? Is their serious impact on various groups necessary to achieve the purposes for which they were said to be introduced? Do they show adequate concern for the interests of those directly affected? Second, are they over-inclusive? Are they tailored sufficiently to target only those individuals whose behaviour is considered problematic, or do they have a negative impact on others who are caught innocently within the same net? Third, do they impose serious hardship on some individuals who have merely exercised their rights or who have failed to meet demanding conditions, solely to deter large numbers of others from engaging in similar conduct? In other words, are they imposing unreasonably high burdens on some individuals for reasons of the public good? Fourth, are they prompted by antagonism towards outsiders, or to pander to groups within the polity who bear such resentment? There is also an ancillary concern: whether there is adequate legal redress if a positive answer can be given to any of these questions.

In response to the package of reforms and the concerns they have raised, immigration lawyers have not been inactive. They have devised and maintained important, well-conceived challenges against various legal provisions. In doing so, they have relied on a familiar set of legal sources in their attempts to challenge the validity of the measures in question or to minimize their impact. They have placed significant reliance both on established administrative law doctrines and on section 7 of the *Canadian*

17. It should be acknowledged that since 2015, a significant number of the reforms have been annulled, both by the courts and by a new government that is more temperate in its rhetoric. However, while inflammatory language from officials may have subsided, many of the above-noted changes have been maintained.

18. The classic source is Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic*, 2nd ed (Toronto: University of Toronto Press, 2010): "…narrow (nativist) conceptions of community…and ideological hostility to collectivism in the organization of the economy seem largely to explain the exclusion of Asian and black immigrants, …the refusal to admit Jewish refugees before and during the Second World War, the internment of Japanese Canadians during the second World War, the screening out of alleged Communist sympathizers on national security grounds during the 1950's and 1960s…" at 464.

Charter of Rights and Freedoms,[19] which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[20]

However, lawyers have only rarely relied on other sections of the *Charter* when challenging the legal validity of government measures. Specifically, they have tended to shy away from relying on section 15, which provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Thus, *Charter* challenges have not been based on the claim that our laws or their application have been tainted by xenophobic impulses. The reluctance of lawyers to rely on this section is not at all mysterious. Authoritative decisions from the Supreme Court of Canada have, in no uncertain terms, asserted that laws governing the admission and removal of non-citizens are virtually immune from section 15 challenge,[21] except in the special case where they single out sub-groups of non-citizens for negative treatment on pernicious grounds, such as national origin.[22]

In the following pages, I argue that we should now reconsider these judicial decisions and promote the view that section 15 should play a more prominent role in litigation that challenges punitive or excessively repressive provisions in our regime of immigration laws. Only if we develop an egalitarian legal doctrine that is rooted in section 15, will we address all four of the general concerns noted above. Rather than disallow equality-based challenges to our immigration laws, we should welcome litigation that seeks to prove the suspicions that our immigration laws may have been shaped by the influence of xenophobic ideologies which may, in turn, have been fertilized autopoetically by government laws and policies. Even where oppressive immigration laws are applicable to all non-citizens and differentiate them as a class from citizens, we should welcome a forum for review in which we scrutinize their full impact

19. *Canadian Charter of Rights and Freedoms,* s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

20. It is interesting to note that on occasion, lawyers also continue to rely on the *Canadian Bill of Rights,* SC 1960, c 44. See, *Hassouna v Canada (Minister of Citizenship and Immigration),* 2017 FC 473.

21. The leading cases, discussed below, are *Charkaoui v Canada (Immigration and Citizenship),* 2007 SCC 9 *[Charkaoui]* and *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 1 RCS 711 [*Chiarelli*]. See the text accompanying notes 28 and 29, below.

22. See, for example, *Canadian Doctors*, *supra* note 7; discussed *infra* note 75; *YZ*, *supra* note 5, discussed *infra* note 79; and *Tabingo v Canada (Citizenship and Immigration),* 2013 FC 377, (FCTD) [*Tabingo*]; discussed *infra* at note 72, aff'd 2014 FCA 191 [*Tabingo* Appeal] discussed *infra* at note 74.

on non-citizens so that we can appraise accurately the actual harms and benefits and consider government reasons for imposing such rules under section 1 of the *Charter*.[23]

I do not argue that any specific legal provisions violate section 15. Such an argument would require more detailed attention to the wider social, historical and political milieu than space permits. Instead, I operate at a more general level, arguing that the reasons and premises underlying the decisions to immunize immigration law from equality challenges are deeply problematic. Not only are those reasons and premises insufficient to ground a comprehensive immunity, they are also inconsistent both with general doctrines of equality that were accepted at the time the decisions were made and those that have gained currency today. More specifically, they conflict with approaches to equality that demand a consideration of contextual factors, including an appraisal of historical experience, rather than mere formalistic categorization; they conflict with decisions that demand that we examine the actual impact that laws have rather than their purpose; they conflict with approaches that look beyond differential treatment to emphasize that a principle of equal concern and respect should be regarded as the fundamental principle of analysis; and they conflict with approaches that adopt the concept of substantive equality as the basic fulcrum for analysis.

In addition, recognition of the corrosive effects of xenophobia has developed and become more widespread since many of these decisions were made.[24] Our experience of anti-immigrant and anti-immigration polemic within mainstream political discourse and the wide-ranging ways in which xenophobia reveals itself should alert us to the dangers of immunization of particular areas of law from egalitarian challenge.[25] When nativist views gain currency, it is likelier that xenophobic laws will be enacted, particularly in the contentious field of immigration. It should also be noted that section 7 of the *Charter* has, in many ways, proved to be an ineffective and unreliable tool to challenge the constitutionality of

23. *Charter*, *supra* note 19, s 1; Where there is a heavy onus is on the government to show that any infringement of a right is demonstrably justifiable in a free and democratic society.

24. See, for example, recently signed *Global Compact for Safe, Orderly and Regular Migration,* 13 July 2018, online: <www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf.>; which makes multiple references to xenophobia and reveals high levels of concern about its rise.

25. As reported by Statistics Canada, "After steady but relatively small increases since 2014, police-reported hate crime in Canada rose sharply in 2017, up 47% over the previous year, and largely the result of an increase in hate-related property crimes, such as graffiti and vandalism. For the year, police reported 2,073 hate crimes, 664 more than in 2016. Higher numbers were seen across most types of hate crime, with incidents targeting the Muslim, Jewish, and Black populations accounting for most of the national increase." See, Statistics Canada, "Police-reported hate crime, 2017," *The Daily* (28 November 2018), online: <www150.statcan.gc.ca/n1/daily-quotidien/181129/dq181129a-eng.htm>.

immigration laws.[26] It is therefore appropriate to look for other devices that may offer additional legal protection.

In order to develop these points, I proceed as follows: First, I outline and analyse critically the decisive passages in the two leading Supreme Court cases that considered the interplay between section 15 and immigration law, and effectively closed off avenues for section 15 advocacy within the field. A major problem with these cases is that they make no helpful reference to leading equality decisions beyond the sphere of immigration. They also promote a concept of discrimination that is less nuanced than that found in these leading cases. While it is sometimes difficult to fathom how their terse analysis actually aligns with the decisions in which broader principles are articulated, it seems clear that the immigration cases are based on the weak premise that differential treatment between citizens and non-citizens in the realm of immigration law should not be characterized as discriminatory on a ground analogous to those enumerated in section 15 and should, as a result, be immune from section 15 challenge. I attempt to expose the weaknesses of this claim. I then examine other equality decisions from the same era. These decisions introduced some important doctrinal claims about the values that should underpin our concept of discrimination. I argue that these principles are still relevant and I use these cases to expose further the disingenuous artifice on which the immigration cases are based. Subsequently, I examine more recent decisions on equality in which the Supreme Court of Canada has raised doubts about the mandatory use of comparator groups when determining whether a person has been treated unequally and has promoted the pursuit of substantive equality. I suggest that these ideas clash with the approach taken in the decisions that immunize immigration law from section 15 challenges. I also examine some early decisions in which the Supreme Court suggests that a broad range of laws are insulated from *Charter* review and suggest that these cases have a narrow ambit that should not be extended to embrace immigration laws. Finally, I turn to some recent immigration cases in which current equality principles have been adopted —cases in which the question is whether differentiation between groups of non-citizens is discriminatory—to show how they too have failed to take seriously some key ideas that must be confronted if xenophobia is to be addressed adequately.

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26. See Catherine Dauvergne, "How The Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Jurisprudence" (2013) 58:3 McGill LJ 663; arguing that the principles of fundamental justice, having been analysed through a lens that places more importance on national security rather than on basic rights, have been unduly diluted.

I. *Immunizing immigration decisions from section 15: Interpreting* Charkaoui

A helpful point of entry is the Supreme Court's decision in *Charkaoui*,[27] a decision that followed closely on the 2006 election and one that dashed hopes that section 15 of the *Charter* would provide a set of tools to protect the interests of non-citizens as they negotiate the immigration process. In unequivocal terms, the Court denied that the distinction between non-citizen and citizen as found in our immigration and citizenship laws can ground a section 15 challenge, barring very exceptional circumstances. The relevant passages should be parsed carefully.

McLachlin C.J. introduces the issue thus:

> The appellant Mr. Charkaoui argues that the *IRPA* certificate scheme [which can lead to deportation on security grounds] discriminates against noncitizens, contrary to s. 15(1) of the *Charter*. However, s. 6 of the *Charter* specifically allows for differential treatment of citizens and noncitizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to noncitizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter* : *Chiarelli*.[28]

On first sight, this is an accurate statement of the law. Section 6 does indeed allow for differential treatment[29] and indeed, it ensures it by guaranteeing a package of rights to citizens that is not granted to others. The fact that non-citizens are denied these rights by virtue of their status

27. *Charkaoui, supra* note 21.

28. *Ibid* at para. 129. As explained below, the reference to *Chiarelli* is significant. See below, the text accompanying note 31.

29. Section 6 of the *Charter, supra* note 19, reads as follows:

> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> a) to move to and take up residence in any province; and
>
> b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

is, thus, not a matter that can be challenged constitutionally.[30] However, McLachlin C.J.'s words do seem to provide non-citizens with the possibility of a successful challenge in some circumstances. The inclusion of the phrase "for that reason alone" should give us pause. We should note its various possible meanings and from these, select one that fits best.

On the one hand, the phrase suggests that if non-citizens can identify an offensive aspect of the deportation scheme that has a profound impact on their interests then they might be able to successfully mount a challenge that the differential treatment that they are accorded, compared to that accorded to citizens, can amount to a violation of section 15. Under this reading, the Court would not be seeking to immunize the field from challenge. Instead, it would merely be adding a further demand to litigants: show us that there is something going on here that is more than the mere creation of a set of rules defining who has access to the country. In other words, a claimant who, for example, showed that rules about entry and residence imposed oppressive or unfair conditions, or who revealed that the rules were created by a political party that regularly engaged in the vilification of non-citizens might succeed. Within a specific context, the oppressiveness of a condition attached to a law that does not apply to citizens might provide the required additional reason that would permit a court to find that the scheme in question violated section 15.

However, a closer reading of the whole text reveals that this is not what is intended here. Ultimately, it becomes clear that, with one very small exception, non-citizens are always to be denied the opportunity to challenge immigration schemes if their claim pivots on differential treatment between non-citizens and citizens. The court is stating that, in such cases, there is sufficient reason to bar an equality challenge. For a non-citizen to successfully challenge a deportation scheme as discriminatory, that scheme would also have to differentiate on other grounds. For example, it would need to differentiate among non-citizens on grounds such as ethnic origin or religion or other analogous or enumerated grounds.

The reference to *Chiarelli* is the first indicator that this latter interpretation is the correct one. The relevant passage in Sopinka J.'s judgment reads as follows:

30. I do not consider here the argument that the Constitution, by guaranteeing rights to citizens, is not guaranteeing them exclusively to citizens. According to this argument, in special circumstances, various non-citizens may have a constitutional right to enter or remain in the country. Such an argument has not fared well in the courts. See *Solis v Canada (Citizenship and Immigration*), [2000] FCJ No 407, 186 DLR (4th) 512. Nevertheless, I believe that its full merit has been underappreciated.

> While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). *There is therefore no discrimination* contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.[31] [emphasis added]

Sopinka J.'s categorical conclusion that there is no discrimination is based on the understanding that a differentiation will be discriminatory only if it is made on one of the grounds listed in section 15 or an analogous ground. He is not here cataloguing all the factors that are required to show that a distinction *is* discriminatory. Instead, he is identifying a preliminary finding that must be made before the inquiry can continue. He is asserting that one can decide that differentiation is *not* discriminatory merely by finding that the distinction is neither enumerated nor analogous. Because he is attempting to show that a deportation scheme is *not* discriminatory, Sopinka J. does not pursue an inquiry into any additional factors, presumably because he thinks that it is unnecessary to do so. Because the distinction between citizen and non-citizen is authorized in a specific context, the differentiation is not based on a proscribed ground. Citizenship status, if it relates to the immigration process, is neither enumerated nor analogous. This terminates the section 15 inquiry at an early point.

Not only does McLachlin C.J. adopt Sopinka J.'s explanation of discrimination, she also adds flesh to the skeleton by adding extra caveats:

> ….there are two ways in which the *IRPA* could, in some circumstances, result in discrimination. First, detention may become indefinite as deportation is put off or becomes impossible, for example because there is no country to which the person can be deported. Second, the government could conceivably use the *IRPA* not for the purpose of deportation, but to detain the person on security grounds. In both situations, the source of the problem is that the detention is no longer related, in effect or purpose, to the goal of deportation.
>
> In *Re A*, the legislation considered by the House of Lords expressly provided for indefinite detention; this was an important factor leading to the majority's holding that the legislation went beyond the concerns of immigration legislation and thus wrongfully discriminated between nationals and non-nationals…Even though the detention of some of the appellants has been long—indeed, Mr. Almrei's continues—*the record on which we must rely does not establish that the detentions at issue have become unhinged from the state's purpose of deportation*…. [emphasis added][32]

31. *Chiarelli*, *supra* note 21 at para 32.
32. *Charkaoui, supra* note 21 at paras 130, 131. The Reference to *Re A* is a reference to *A v Secretary of State for the Home Department*, [2005] 3 All ER 169, [2004] UKHL 56.

The two points found in this excerpt should be considered in reverse order. In both cases, McLachlin C.J. is claiming that when we have left the realm of immigration, the possibility for a finding of discrimination re-emerges. In the second point, she is claiming that that where a court rules that a measure has not been introduced to achieve a purpose related to immigration but to achieve a quite different goal, it may then consider whether it is discriminatory. Where a person has been detained solely for national security reasons, we will not have entered the realm of deportation. Generally speaking, only where the government is pursuing a purpose that is related to immigration, will a disadvantage that is imposed only on a non-citizen be found not to be discriminatory. On the other hand, where treatment accorded to an individual is *unrelated* to the purposes of deportation, the immunization provided by the subject matter of the legislation will no longer apply and it may be found to be discriminatory.[33]

We should pause to note the full meaning of this analysis. Where the legislative purpose underlying a measure is that of regulating immigration, this will be sufficient to short circuit any further inquiry. In particular, it will circumvent the need to make inquiries into the actual effects that the measure has had or is likely to have on specific immigrants. This is problematic, because, as is noted below,[34] equality jurisprudence has placed increasing levels of emphasis on the need to conduct such effects-based inquiries. The general thrust of that jurisprudence is that we should look beyond formal distinctions to discover what the substantive impact of law is.

Now, turning to the first point made in the paragraph quoted above, it should be conceded that there is an attempt here to include an effects-based analysis of discrimination as part of the inquiry but it is, at most, half-hearted and does not provide a solid foundation for the conception of discrimination that is being promoted. When it becomes *impossible* for the government to achieve its stated immigration purpose through the measures in question, that purpose ceases to provide the required immunization from section 15 challenge. The measures in question, whatever their stated

33. The idea that the discriminatory nature of a law should depend on whether its purpose relates to the field of immigration raises a host of problems. Determining a law's purpose is of course notoriously difficult. But more important, deciding that a matter "relates to immigration" will be contentious. Does the imposition of a work permit relate to immigration or employment? Does denial of access to a profession to permanent residents relate to immigration. Even if the field of immigration is defined to embrace only the rights to enter into, remain in and depart from Canada, the imposition of restriction on work, housing, health, education may be seen as one that is defining the ambit to the right to remain. These are thorny problems that are noted but not discussed further.

34. *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 57 [*Law*].

purpose, cease to create the immunization because a court is justified in finding that they do not relate to deportation because of the absence of any effective way for it to contribute to that end.

The important point to note is that McLachlin C.J. is claiming that when an underlying immigration purpose may still be achieved, the seriousness of its impact on the individual is totally irrelevant to the determination that it is not discriminatory. Thus, while the impact of lengthy detention on Mr. Almrei was recognized to be severe, achieving the government's purpose of deportation was still characterized as within the realm of the possible. Since deportation has not become impossible, the detention could be characterized as part and parcel of the process of removal and therefore could not be considered to be discriminatory, no matter how repressive.

Although she does not cite it, it is likely that the Chief Justice had in mind the general approach to discrimination cases that had been developed by Iacobucci J. speaking for the Court in the case of *Law v. Canada* (*Minister of Employment & Immigration*)[35] a few years previously. Iacobucci J. summarized the approach as follows:

> Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[36]

The decision in *Charkaoui* is reached by addressing the second of these points. The deportation scheme in question imposes substantively differential treatment between the claimant and others, but the treatment

35. *Law, ibid.*
36. *Ibid* at para 88.

is not "based on one or more enumerated and analogous grounds." One's status as a non-citizen cannot count as an analogous ground when the differentiation in question relates to the immigration or removal process. The fact that the *Charter* itself permits such differentiation provides foundational support for this conclusion. In essence, the underlying argument seems to be that, if we were to recognize lack of citizenship status as a ground of discrimination, we would be unable to produce a body of immigration law. Indeed, we would be unable to develop a regime that treated citizens and non-citizens differently.[37]

II. *The Tension between* Charkaoui *and* Andrews[38]

On their face, the views expressed by McLachlin C.J. and Sopinka J. are perplexing. One should remember that in *Andrews v. Law Society of British Columbia*, the leading precedent at the time *Chiarelli* was decided, the Supreme Court had held that non-citizens fall into a category analogous to those specifically enumerated in s. 15. To distinguish between citizens and non-citizens is to differentiate on a prohibited ground. Wilson J. memorably offers the following explanation:

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, *Democracy and Distrust* (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote….I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. *I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.*[39] [emphasis added]

The emphasized passage suggests that you cannot pick and choose contexts in which to make the determination that non-citizens are particularly vulnerable, lack political power and are therefore at risk of

37. In *Lavoie v Canada*, [2002] 1 SCR 769 [*Lavoie*], it was argued unsuccessfully that recognizing immigration status as a ground analogous to those listed in section 15 *in any field* would "negate or abolish the concept of citizenship." The majority noted at para 39, "As [the respondents] put it, "[b]y universal definition and by constitutional fiat, …citizens and non-citizens are *unequal* in status." This case is discussed *infra* in the text accompanying note 46.

38. *Andrews v Law Society of British Columbia,* [1989]1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

39. *Ibid* at para 5.

suffering abuse. It is this general vulnerability in every social context (including the realm of immigration and deportation) that leads to the conclusion that non-citizen status is analogous to the grounds enumerated in section 15. The determination that non-citizens fall into an analogous category is not context dependent. If it is non-citizens' vulnerability that exposes them to the risk of abusive treatment and that therefore justifies a close scrutiny of their treatment comparative to how citizens are treated, then the field of immigration law should not be considered exceptional.

In response to this powerful explanation, the reasoning of McLachlin C.J. and Sopinka J. appears to be syllogistic in nature:

(1) Deportation schemes that differentiate only between citizens and non-citizens[40] are authorized by the Constitution.

(2) This is a deportation scheme that differentiates only between citizens and non-citizens.

(3) This scheme is authorized by the Constitution.

The fallacy in this logic can be exposed by noting that the guarantees found in section 6 of the *Charter* do not provide any logical answer to the question whether the distinction between citizens and non-citizens in this context is discriminatory. If, when considering the constitutional provision, one keeps in mind the three-part schema adopted in *Law*, one can readily identify that different interpretations of section 6 are possible. One option is, indeed, the one that is selected by McLachlin C.J.: it is not unconstitutional to provide different packages or rights to citizens and non-citizens in the immigration context because in that context it is not discriminatory to make such a differentiation.

However, a second option is to hold that, while sets of rules defining entry and removal that distinguish between citizen and non-citizen are not for that reason alone invidious, it is open to a litigant to show that the particular instance in question does discriminate. This option would bring into play the factors identified in the third part of the schema outlined in *Law*: since the burden placed upon non-citizens by deportation schemes, considered in the abstract, does not *per se* have the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition they are not presumptively discriminatory. However, it would be open to a non-citizen to show that any particular deportation scheme would have that effect. Such proof could rebut any presumption. A non-citizen could claim with justification that while they do not have a right not to be deported, they do have a right that the deportation process be conducted according to high standards of treatment and in a respectful

40. As opposed to schemes that distinguish among different categories of non-citizen.

manner. Under this interpretation, an abusive or needlessly oppressive immigration law that fails to give adequate weight to the interests of the non-citizen could be identified as discriminatory. While the distinction between citizen and non-citizen in a law that is part of an immigration scheme may not be suspect on its face, further inquiry may show that it is indeed so. The non-citizen litigant would note that the law in question is not merely a harsh law that applies to everyone. It is a harsh law that does not apply to citizens. It is the combination of the harshness and the recognized historical prejudice suffered by non-citizens that would permit us to label it discriminatory.[41]

Thus, if one reduces the reasoning to a syllogism the conclusion should not be the one attributed above to McLachlin C.J. and Sopinka J. Instead, it should be:

(4) This scheme is authorized *unless it is shown to be discriminatory.*

Syllogism alone cannot ground the immunization of an immigration scheme from a section 15 challenge.

One can tie these points directly to the excerpts from *Charkaoui* cited above. McLachlin C.J. connects the immunization within the sphere of immigration to the government's purpose. She omits to consider a case where there are multiple aims, one to establish an immigration regime as well as others that are more nefarious. For example, where there are two underlying purposes, the first of which is to define a deportation scheme and the second of which could be to ensure that the scheme will satisfy xenophobic zealots by showing high levels of disdain for non-citizens, an equality challenge will presumably not succeed. In McLachlin C.J.'s estimation because such a regime would not be "unhinged from the state's purpose of deportation," such ulterior purposes would not negate the immunization but they could reveal an unjustifiably negative attitude to non-citizens and have an undue impact on them.

Furthermore, where there is an immigration purpose behind a government regime but there are serious collateral and unintended impacts on the individual, McLachlin C.J.'s analysis posits that this should have

41. This point is made *in Quebec (Attorney General) v A,* 2013 SCC 5, [2013] 1 SCR 61 [*AG v A*] at para 347, where it is stated, "where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered": This analysis is explored in detail in *Canadian Doctors, supra* note 7 at paras 721-728.

no bearing on the conclusion that the regime is not discriminatory.[42] Assuming that the government can achieve its purpose, it is that purpose rather than its impacts that determines that we are in the zone of immunity. Thus, as will be shown in further detail below, the approach is antithetical to approaches that advocate that inquiries into discrimination should be effects-based rather than merely purpose-based.[43]

In the remaining pages of this paper, I present three major reasons for rejecting the *Charkaoui/Chiarelli* approach.

First, the approach does not easily co-exist either with the general jurisprudence on equality that was current at the time *Charkaoui* was decided, or with the judicial doctrine that has developed since then. Second, it fails to recognize and address the full impact of xenophobia as a significant social problem. And third, it has had a negative impact on judicial reasoning in those few immigration cases where judges have concluded that the section 15 rights of various groups of noncitizens have been infringed.

I address each of these in turn.

III. *The tension between* Charkaoui *and early equality jurisprudence*

The oddness of the decisions in *Charkaoui* and *Chiarelli* becomes noticeable when one looks first at analyses of discrimination found in other cases of the same vintage. I can make my point by adverting to two such cases—*Law* and *Lavoie.*

In *Law*, the Court had insisted vigorously that equality analysis "is to be undertaken in a purposive and contextualized manner." Moreover, it revealed and traced out the basic purpose underlying section 15 as follows:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as

42. As Colin Grey pointed out to me, it is fruitful to distinguish McLachlin CJ's views on section 15 with those that she expresses on section 7. Here, she is making the claim that an immigration law is immunized from section 15 challenge no matter how serious the harm incurred. In relation to section 7, she notes, "*Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not in itself engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so." *Charkaoui*, *supra* note 21 at para 17.

43. In *Withler v Canada (Attorney General),* 2011 SCC 12 at para 39 [*Withler*]. This point is made clearly: "The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group."Also in *AG v A*, *supra* note 41 at para 319, Abella J. quotes McIntyre J. in *Andrews*: "[T]he main consideration must be the impact of the law on the individual or the group concerned."

> human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[44]

The *Charkaoui/Chiarelli* approach, by maintaining that any rational connection between the treatment and immigration goals is sufficient to halt a s. 15 challenge in its tracks before considering whether essential human dignity has been violated adopts a return to formalistic tendencies that are inconsistent with the general contextualizing approach advocated in *Law* and further emphasized in later cases. No matter how oppressive our immigration laws, no matter how much disdain they reveal for those seeking to enter and remain in Canada, they are immune from being considered discriminatory, on the ground that the distinction between citizen and non-citizen is a pre-requisite for any immigration process to get off the ground. These contextual factors are seemingly irrelevant when determining whether an immigration measure is discriminatory. While it may be accepted for the purpose of argument that drawing a distinction between citizen and non-citizen may not in itself interfere with the promotion of "a society in which all persons enjoy equal recognition at law as human beings" any specific iteration of that distinction even in the realm of immigration law may do so. A clear example would be where immigrants are mandatorily separated from their children at the border and deported without them (as they have recently been in the United States).

Also, in *Law,* the Court discusses how comparator groups should be selected;

> To locate the appropriate comparator, we must consider a variety of factors, including the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive sense more generally….[45]

The decision to proscribe using citizens as a comparator group when immigration laws are at issue *without looking at the effects of a particular*

44. *Law, supra* note 34 at para 51.
45. *Ibid* at para 57.

law is incompatible with this analysis which emphasizes examining the effect of legislation when determining the relevant group.

In *Lavoie,* Bastarache J., for the majority, adverts to a tension between *Chiarelli* and *Andrews*:

> This case has much in common with both *Andrews* and *Chiarelli*. Like *Andrews*, it involves differential treatment in employment that is not explicitly authorized by the *Charter*; like *Chiarelli*, it involves a federal law that is part of a recognized package of privileges conferred on Canadian citizens. This combination of factors makes it difficult to decide whether, at the end of the day, the law conflicts with the purpose of s. 15(1) of the *Charter*. Based on this Court's recent s. 15(1) jurisprudence, I conclude that it does.[46]

Bastarache J. begins his analysis by noting that the case looks as if it is straightforward and calls for an uncontroversial application of *Andrews*:

> the impugned law draws a clear distinction between citizens and non-citizens, and the latter constitutes an analogous ground of discrimination under s. 15(1): see *Andrews*…[47]

However, an argument from the respondents gives him pause:

> Nevertheless, the respondents argue that the whole point of federal citizenship legislation is to treat citizens and non-citizens differently, and therefore that the two groups cannot validly be compared for s. 15(1) purposes. As they put it, "[b]y universal definition and by constitutional fiat, …citizens and non-citizens are *unequal* in status. To treat them equally would be to negate or abolish the concept of citizenship"….In their view, however, such a comparison is not appropriate in the case of "a citizenship defining law that draws a constitutionally permitted distinction between citizens and non-citizens." In such a case, the s. 15(1) analysis would undermine the fundamental difference between citizens and non-citizens…[48]

To address this concern, Bastarache J. focuses first on the use of citizenship as a comparator group and on the proper stage in the analysis that this should occur:

> Whether citizens are an appropriate comparator in this case is, in my view, better *dealt with as a contextual factor under the third branch of the* Law *analysis* than as a bar to recognizing a legislative distinction. Although Iacobucci J. stressed the importance of identifying an appropriate comparator group, there is nothing in *Law* to indicate that the

46. *Lavoie, supra* note 37 at para 37.
47. *Ibid* at para 39.
48. *Ibid.*

> first inquiry is anything but a threshold test. On the contrary, the precise inquiry at the first stage is whether the law draws a formal distinction "between the claimant and *others*."[49] [emphasis added]

He then proceeds to cast doubt on the ideas underpinning the respondents' claim:

> As citizenship was recognized as an analogous ground in *Andrews*, I can find no authority for qualifying this finding according to the context of a given case. The point of the analogous grounds, according to *Law* and subsequent cases, is that they are "suspect markers" of discrimination: the groups occupying them are vulnerable to having their interests overlooked no matter what the legislative context.[50]

In this paragraph, Bastarache J. shows clearly his unwillingness to recognize areas of immunity where the grounds of discrimination do not apply. While he does not explicitly overrule the decision in *Chiarelli*, he nevertheless casts grave doubts on the continuing authority of the reasoning on which it is based. McLachlin C.J.'s. somewhat casual reference to *Chiarelli* and her development of the approach found therein ignores this. She does not even cite the *Lavoie* decision in her judgment.

It should be added that in *Charkaoui,* McLachlin C.J. also ignores her own words in her dissenting opinion in *Lavoie* where she states:

> Parliament need not choose between legislating with respect to citizenship and discrimination. Rather, it is Parliament's task to draft laws in relation to citizenship that comply with s. 15(1). This leaves ample scope for the exercise of the citizenship power, so long as Parliament does not make distinctions that unjustifiably violate human dignity: *Law*, *supra*. We cannot agree that defining Canadian citizenship requires that Parliament be allowed to discriminate against non-citizens.[51]

Here, McLachlin C.J. offers no reasons why we should distinguish between laws that define how citizenship may be obtained and laws that define the rights that attach to citizenship. Her demand that Parliament draft citizenship laws that comply with section 15 should be regarded as categorical.

III. *The Tension between* Charkaoui *and later equality jurisprudence*

It should also be emphasized that the *Charkaoui/Chiarelli* approach does not fit smoothly with equality doctrine found in more recent cases. Post-*Charkaoui* decisions place weight on the factors that I have noted in

49. *Ibid* at para 40.
50. *Ibid* at para 41.
51. *Ibid* at para 3.

my analysis of *Law* and *Lavoie.* While the court has dispensed with the tripartite schema developed in *Law* and has condensed it into a two-part test, this change does nothing to reduce the friction.[52] Emphasis on the centrality of a conception of substantive, as opposed to formal, equality has increased the difficulty of continuing to maintain a preliminary filter that permits laws dealing with immigration to be immune from section 15 challenge.

For example, in *Withler*[53] the court attempts to simplify the jurisprudence by stating:

> At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"[54]

The court offers an analysis of substantive equality that suggests that it would be quite appropriate to inquire whether xenophobic antipathy is reflected in our laws, including our immigration laws, and their impacts:

> The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances.[55]

In *Quebec (Attorney General) v. A*,[56] the Court goes on to unpack the concept of substantive equality as follows:

> substantive equality is not denied solely because a disadvantage is imposed. Rather, it is denied by the imposition of a disadvantage that is unfair or objectionable, which is most often the case if the disadvantage perpetuates prejudice or stereotypes.[57]

The Court then quotes Sophia Moreau:

> We think of discrimination not just as any sort of differential treatment but as a particular kind of differential treatment: to be discriminated against is not just to be denied something that others have but to be *denied it in a way that is objectionable or unfair.*[58] [emphasis added]

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52. The jurisprudence establishes a two-part test for assessing a s 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? See *R v Kapp*, 2008 SCC 41 at para 17.
53. *Withler, supra* note 43.
54. *Ibid* at para 2.
55. *Ibid* at para 65.
56. *AG v A*, *supra* note 41.
57. *Ibid* at para 180.
58. *Ibid.*

Transposing these remarks into a deportation context would allow us to say that removal itself may not be discriminatory but particular forms of removal may be objectionable or unfair. The inquiry into substantive equality cannot be pursued if inquiries into unfairness or objectionableness are proscribed in particular fields of law, which is the outcome of adopting the *Charkaoui* analysis. Moreover, where a disadvantage is placed on non-citizens in an "objectionable or unfair way" such as by penalizing all refugees on the basis of a stereotyping and generalized assumption that their claims are fraudulent, the laws in question can fairly be regarded as discriminatory under this account.

Moreover, in *Withler*, the Court also offers a strong explanation why the filtering process in the first part of the test should not be too rigid. It says:

The role of comparison at the first step is to establish a "distinction." Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination.…[59] [emphasis added]

The Court then picks up on the idea suggested in *Lavoie* that comparison between groups should occur at the second stage of the inquiry (which had been the third stage, under the *Law* framework) and should be highly context-dependent:

> The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. *At this step*, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.[60] [emphasis added]

59. *Withler, supra* note 43 at paras 62-63.
60. *Ibid* at para 65.

In the immigration context, this might involve considering the differences between citizens and non-citizens when deciding that a particular part of the regime is substantively unjust.

IV. *Jurisprudence that supports* Charkaoui

Despite the friction between *Charkaoui* and *Chiarelli* on the one hand, and leading jurisprudence on the other, it must be noted and conceded that there is a strain of jurisprudence with which they are more compatible. The jurisprudence includes a case in which McLachlin J. (as she then was) dissents vigorously. The cases in question deal with the provincial funding of separate schools and decide that a particular sphere of legislation is insulated from *Charter* review. It should be noted at the outset that in these cases, unlike *Chiarelli* and *Charkaoui*, it is not held that the laws withstand Charter challenge because they are not discriminatory. The reasons for the decision are more basic. Nevertheless, these cases should remind us that *Charkaoui* and *Chiarelli* are not unique or extraordinary in their attempts to immunize laws from *Charter* review.

The first case is *Reference Re Bill C-30*[61] in which Wilson J. introduced the idea that a wide range of legislative measures may be insulated from *Charter* challenge. The case concerned legislation in Ontario that was to extend provincial funding to Roman Catholic Separate Schools. The Ontario Government argued that the Bill was a justifiable exercise of power under s. 93 of the *Constitution Act*.[62]

Amongst the arguments mounted against the legislation was the argument that, by providing Roman Catholic schools with financial benefits not made equally available to other taxpayers and other religious schools, Bill 30 violated the equality guarantee in s. 15(1) of the *Charter*. In response, the Ontario Government argued that such law was insulated from *Charter* challenge by section 29 of the *Charter*.[63]

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61. [1987] 1 SCR 1148, 40 DLR (4th) 18 [*Bill C-30*].

62. Section 93 reads: "In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union….
> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen□s Subjects in relation to Education…" *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

63. Section 29 provides, "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." *Charter, supra*, note 19, s 29.

In her majority opinion, Wilson J. gave an extended account of how a law may be immune from *Charter* challenge. It includes the extraordinary claim that a provincial law that is created under a plenary Constitutional power is immune from *Charter* challenge because it is an exercise of a power granted to the province as a result of a constitutional comprise.[64] One could justifiably extrapolate from this analysis to the position that any immigration law enacted by the Federal legislature would also be immune on the ground that it too is a legitimate exercise of a constitutionally granted power gained by constitutional compromise.

Wilson J.'s analysis was quoted *verbatim* in *Adler v. Ontario*[65] where a declaration was sought that the non-funding of Jewish schools in Ontario was unconstitutional. One argument that was made was that by funding Roman Catholic separate schools while denying funding to independent religious schools, the province discriminated against the latter on the basis of religion contrary to s. 15(1). Iacobucci J. for the majority in *Adler* noted that Wilson J. had found that the proposed legislation

> was nonetheless "immune" from Charter review because it was "legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise." See *Reference Re Bill 30*, at p. 1198. This was true regardless of the fact that this unequal funding might, as I mentioned above, "sit uncomfortably with the concept of equality embodied in the Charter."[66]

Iacobucci J. concluded:

> Following the same line of reasoning used by Wilson J. in the *Reference Re Bill 30*, I find that public funding for the province's separate schools cannot form the basis for the appellants' *Charter* claim.[67]

McLachlin J. (as she then was) in her partial dissent rejected this analysis:

> Before considering the *Charter* issues, it is necessary to determine whether s. 93 of the *Constitution Act, 1867* constitutes a code which ousts the operation of the *Charter*. I agree with Sopinka J. that it does not. Section 93 requires Ontario to fund schools for the Roman Catholic minority in Ontario and requires Quebec to fund schools for the Protestant minority in Quebec. Neither its language nor its purpose suggests that it was intended to do more than guarantee school support for the Roman Catholic or Protestant minorities in the two provinces respectively.

64. *Bill C-30, supra,* note 61 at paras 63-64.
65. *Adler v Ontario*, [1996] 3 SCR 609 [*Adler*].
66. *Ibid* at para 38.
67. *Ibid* at para 39.

> Provinces exercising their plenary powers to provide education services must, subject to this restriction, comply with the *Charter*.[68]

There is good reason to believe that Wilson J.'s analysis is no longer good law although it has never been formally repudiated. First, in *Lavoie,* Bastarache J. explicitly rejected an argument that jurisdictional considerations are relevant when determining whether the *Charter* applies.[69] Moreover, in *EGALE Canada v. Canada*,[70] the British Columbia Court of Appeal refused to apply Wilson J.'s analysis in a context other than the funding of separate schools, and emphasized the unique position that that issue held in constitutional history.[71]

The school funding cases are helpful because they indicate that there may be laws that are insulated from *Charter* review because they are merely recognizing rights, as the Constitution demands. A challenge that demanded that citizens should not enjoy rights—like the right to enter or stay in Canada—that non-citizens do not enjoy would likewise fail. But in *Adler,* McLachlin J. makes a strong case that this does not entail that we should establish excessively broad areas of immunity where the *Charter* would not apply. Nevertheless, this seems to be the upshot of the decision in *Charkaoui.* In *Adler,* McLachlin J. proposes that claimants be permitted to make arguments in accord with the criteria set out in the equality jurisprudence. Their permitted challenge would nevertheless fail both where it is found that the law does not discriminate against them but also where the government shows that the discrimination is demonstrably justifiable in a free and democratic society. In *Adler,* McLachlin J. found that Ontario had done just that.

V. *Xenophobia and immigration law*

My critique of the *Charkaoui/Chiarelli* analysis goes beyond the mere existence of friction created when one tries to fit it within the more general doctrines of equality established elsewhere. By denying a section 15 challenge to non-citizens where the law imposes an unfair disadvantage on them that is not imposed on citizens, the *Charkaoui/Chiarelli* doctrine

68. *Ibid* at para 194.
69. *Lavoie, supra* note 37 at para 40.
70. 2003 BCCA 251.
71. *Ibid*. The Court stated, at para 109: "What is apparent from these passages, and from the judgment of Wilson J. as a whole, is that the reason s. 93 was immune from Charter review was because of a pre-confederation compromise ("bargain") designed to protect the Roman Catholic minority in Ontario and the Protestant minority in Quebec. This compromise, which carried with it certain built-in rights (and inequalities), was entrenched in the Constitution Act, 1867. Section 29 of the Charter did not grant the right to immunity from Charter review under s. 15 or otherwise; it simply recognized and preserved the rights conferred by s. 93 in their historical context."

leaves few other options to the claimants. One option is to attempt to subsume the claim under another section of the *Charter*. However, there will be many cases of comparative disadvantage that will not meet the tight requirements of other sections. For example, the strict criteria that define cruel and unusual treatment will exclude many forms of abusive behaviour that reveal that the individual is not considered as an equal. In addition, as noted above, non-citizens have had only limited success in getting courts to recognize that the immigration process engages the right to life liberty and security of the person and even where they have been successful in this regard the challenge of showing that the principles of fundamental justice have been infringed has been a difficult one. Moreover, the harm recognized by section 15—that it is an assault on one's personality or identity to suffer the ignominy of treatment that indicates that one is less worthy as a human being as others who are under the law's authority—is quite different from those recognized in the other sections.

A second option is to argue one's case as an equality case but to compare one's treatment with that accorded to other groups of non-citizen. This option is premised on the idea that the law lives up to our equality principles within the realm of immigration by allowing a successful claim only when different rules are applied to different groups who must also negotiate their way through them. It is only where one can show that one is treated as a less valuable human being than other non-citizens that one's equality rights will have been infringed. This idea should be met head on. By accepting it, one is implicitly denying that xenophobia is and throughout our history has been a social problem that surfaces regularly and that demands legal recognition. My primary critique of *Charkaoui* hinges on the idea is that it fails to acknowledge the existence of xenophobia and its possible influence on our laws and misrepresents the nature of the harm suffered. The proposition that our laws have treated some non-citizens unequally because it has failed to accord them the same benefits accorded to other non-citizens is quite different from the proposition that the law has treated some non-citizens unequally because it has treated them as less worthy of respect than the citizenry.

The important point to note is that xenophobic measures need not uniformly oppress all non-citizens in the same way. Although some groups of non-citizen may be able to escape the application of a particular rule, this does not show that the rule is not an instantiation of a xenophobic body of law. As is emphasized in judicial statements about substantive equality, the discovery of formal differences in treatment amongst subgroups need not lead to the conclusion that the measure should not be identified as an instantiation of a more general assault on the whole group. It is for this

reason that is both misleading and unsatisfactory to require non-citizens within the immigration regime to show that differential treatment is being imposed on different groups of non-citizen in specific situations. Their complaint is not that some other non-citizens have escaped the unfair disadvantagement. Excessively harsh rules and over-inclusive rules may be created and implemented *haphazardly* with little concern about the effect. Laws that impose hardship on only one subgroup of non-citizens may be passed by a populist government anxious to curry favour with xenophobic groups. By ill-treating non-citizens in such a fragmented and possibly arbitrary way the government may be able to show its disdain for non-citizens as a whole. Where a legal regime variably imposes burdens on non-citizens from different countries, it does not engage in multiple acts of discrimination against different subgroups. It engages in a more profound act of discrimination against the whole.

Once we have entered a realm in which the distinction between citizen and non-citizen has been made, and once we acknowledge that non-citizens are subject to intermittent, sporadic forms of ill treatment, our inquiry should cease to focus on finding comparator groups. The primary issue is *whether the individual has been treated more harshly than he or she should have been.* We can use the criteria of substantive equality and the criteria from section 1 when making this inquiry. We should not impose any further comparative element. We distort the nature of the claim when we require litigants to show that they are worse off than other non-citizens.

The case of *Tabingo*[72] may cast light on the idea that requiring non-citizens to show that they are treated differently from other non-citizens ignores an important egalitarian concern. This case focused on discrimination *among* immigrants. It concerned a statutory measure which provided that applications for permanent residence as a member of the federal skilled worker class made before 27 February 2008 were to be terminated unless an officer had made a selection decision before 29 March 2012. The applicants had applied for permanent resident visas before 27 February 2008. They had been waiting many years for their applications to be processed but they were in fact cancelled, and noted that the processing was slower in some visa offices. They argued that the measure in question violated their s.15 rights. A large part of the decision focused on the issue whether *Charter* rights vest in non-citizens outside Canada, but this should not concern us here (although it should concern us).

In the Federal Court, the applicants framed their challenge in terms that alleged that the measure discriminated against them on grounds of either

72. *Tabingo, supra* note 22.

country of residence or national origin. Thus, the court was not asked to consider whether the measure in question is a manifestation of a general xenophobic antipathy that surfaces from time to time. While Rennie J. is happy to concede that national origin is an analogous ground for the claim, he finds that country of residence is not. He sums up his reasons thus:

> When determining whether grounds of discrimination are analogous to those listed in section 15, courts should consider whether the characteristics at issue have historically served as "illegitimate and demeaning proxies for merit-based decision making" and whether the distinction being drawn affects a "discrete and insular minority or a group that has been historically discriminated against"….
>
> It is doubtful that country of residence could be an analogous ground. Country of residence is not an immutable characteristic, nor is it vital to identity, given the applicants' willingness to immigrate. Nor are the applicants a discrete and insular minority, and certainly not such a group within Canadian society. Country of residence, in contrast to race and religion, does not have the same historical antecedence of being a basis for discrimination, nor is there sufficient evidence that would establish that residence is an illegitimate or demeaning proxy for merit-based decision making. Accordingly, I find that country of residence is not an analogous ground of discrimination under section 15 of the *Charter* and turn to the applicants' argument based on national origin.[73]

The passages reveal the difficulty that non-citizens face if we remove the opportunity to rely on their mere status of non-citizens. Any ground that they may select as analogous will likely be based on a distinction found in the law or created by the application of the law, in this case, country of residence. But such a distinction may lack the historical pedigree to convince the judge that it can give rise to a discrimination claim. When we have no historical experience with this type of distinction we do not even reach the stage of determining the substance of the claim.

Ultimately Rennie J. found that the measure in question did not discriminate on the basis of national origin. This decision was upheld in the Federal Court of Appeal[74] which dealt with the equality issue quite cursorily noting that that there was a rational explanation for slow processing in some visa offices that had nothing to do with discrimination. At neither level of court was the obvious question addressed: *Given that waiting times are different in different parts of the world (for valid reasons), does it show equal concern and respect to all applicants when one uniformly uses the same cut-off date for cancellation?*

73. *Ibid* at paras 112-114.
74. *Ibid.*

It is also useful to examine a second recent case, *Canadian Doctors*,[75] where MacTavish J offers a perceptive account of recent section 15 jurisprudence. The case concerned the constitutional validity of two Orders in Council that denied basic health care coverage to refugee claimants from designated countries. MacTavish J.'s careful analysis leads her to conclude that the orders discriminated on the grounds of national origin. However, she baulks at finding that the laws are discriminatory on more general grounds. She considers the argument that the laws discriminate on the basis of "immigration status" and concludes that she is bound by an earlier Federal Court of Appeal decision that immigration status is not analogous to the grounds identified in section 15.[76] In *Toussaint v Canada*[77] Stratas J.A. had stated:

> In my view, the appellant has failed to demonstrate that the Order in Council makes a distinction based on any enumerated or analogous ground that is relevant to her situation. …The primary distinction is said to be between foreign nationals possessing certain immigration status who are covered under the Order in Council, and other foreign nationals who possess another immigration status who are not covered….Further, I do not accept that "immigration status" qualifies as an analogous ground under section 15 of the Charter, for many of the reasons set out in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203 at paragraph 13, recently approved by the Supreme Court in *Withler*, *supra* at paragraph 33. "Immigration status" is not a "[characteristic] that we cannot change." It is not "immutable or changeable only at unacceptable cost to personal identity." Finally "immigration status"—in this case, presence in Canada illegally—is a characteristic that the government has a "legitimate interest in expecting [the person] to change." Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada.[78]

While it is beyond the scope of this paper to consider the merits of the conclusion that differentiations among foreign nationals cannot be discriminatory, the more general conclusion that "immigration status" is not an analogous ground because it is not immutable must be questioned. It should first be noted that neither *Corbière* nor *Withler* addresses the question of immigration status. They merely re-iterate the need to show that the relevant characteristic is "immutable or changeable only at unacceptable cost to personal identity." Stratas J.A.'s account of

75. *Canadian Doctors*, *supra* note 7.
76. *Ibid* at para 870.
77. *Toussaint v Canada (Attorney General)*, 2011 FCA 213.
78. *Ibid* at para 99.

immigration status as mutable runs counter to common experience—it is notoriously difficult for the bulk of the world's population to change its immigration status. It also runs counter to the more lax analysis of immutability found in *Andrews*, where status as a non-citizen is identified as an analogous ground. It is unfortunate that MacTavish J.'s location in the judicial hierarchy precluded her from addressing this point or from extrapolating further from her analysis of the more general jurisprudence.

Yet another recent decision reveals some negative effects of requiring non-citizens to use more specific grounds of discrimination than their non-citizen status. In *YZ*,[79] the applicants alleged that denying an appeal to the Refugee Appeal Division of the IRB to refugee claimants from designated countries of origin (DCOs) violated section 15. Refugee claimants from other countries had access to the appeal process.

Referring to the first part of the *Withler* two-part test, Boswell J. decided that a differentiation had been made on the ground of national origin. Turning to the second part of the test, he argued:

> The distinction drawn between the procedural advantage now accorded to non-DCO refugee claimants and the disadvantage suffered by DCO refugee claimants under paragraph 110(2)(d.1) of the *IRPA* is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and "non-refugee producing." *Moreover, it perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or "bogus" claimants who only come here to take advantage of Canada's refugee system and its generosity*…
>
> The introduction of paragraph 110(2)(d.1) of the *IRPA* has deprived refugee claimants from DCO countries of substantive equality vis-à-vis those from non-DCO countries. Expressly imposing a disadvantage on the basis of national origin alone constitutes discrimination (*Andrews* at 174; *Withler* at paragraph 29), and this distinction perpetuates the historical disadvantage of undesirable refugee claimants and the stereotype that their fears of persecution or discrimination are less worthy of attention.[80] [emphasis added]

In order to find that there has been discrimination in this case, Boswell J, is forced to maintain that claimants from a DCO alone are subject to the stereotype of being queue jumpers. But in actuality, this stereotype was being launched more generally at all arrivals who were not waiting overseas to be resettled. When the measures designating countries of origin were introduced, other over-inclusive measures to discourage

79. *YZ, supra* note 5.
80. *Ibid* at para 124.

fraudulent refugees were also introduced. These measures had an impact on *all* refugee claimants, reducing the times to prepare for hearing and access to humanitarian and compassionate process and the Pre-Removal Risk Assessment. The justification offered by Boswell J. while laudable in effect, offers a partial account of the contextual evidence and wrongly implies that refugee claimants from non-designated countries were not being slighted nor subject to the same abusive stereotypes.

This artificial analysis could have been avoided had Boswell J. conceded that the imposition of restrictive conditions on refugees from DCOs was but one assault amongst many that were targeting refugee claimants in general. We should not look for distinctions amongst the victims who have been violated by different attacks. We should instead recognize that it because they were part of the larger group of non-citizens that they were treated with disdain and disrespect.[81]

Conclusion

Cases such as *Tabingo* and *YZ* should not be read in isolation. Their direct precursors are *Charkaoui* and *Chiarelli*—cases that refuse to acknowledge that a vein of poison may have penetrated our immigration laws and may continue to do so in the future. This failure ensures that harsh and oppressive forms of treatment will likely be viewed as unique or isolated and directed towards discrete groups of non-citizens rather than as indicative of a more general and entrenched antagonism towards non-citizens as a whole. The requirement that non-citizens first show that they are treated unfavourably in comparison with other non-citizens, and then show that the ground of differentiation is analogous to those listed in section 15, and *then* show that the difference reveals that they are being presented as less valuable persons than those others is a requirement that is not only difficult to meet but also one that fails to address the underlying problem—that we live in a culture in which currently there is large-scale distrust of newcomers, and anxiety about the changes that non-members will bring. As a consequence, demands are made that the government treat these anxieties seriously. In various ways and at various times, governments have revealed their willingness to comply to such demands and in doing so, have shown insufficient concern about the collateral impacts of our immigration laws on the individuals whose lives they shape. Since *Andrews,* we have recognized this may surface as a problem outside the field of immigration

81. It should be noted that, on 17 May 2019, the Government removed all countries from the list of those designated as safe. See Government of Canada, "Canada Ends the Designated Country of Origin Practice," (News Release, 17 May 2019), online: <https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/canada-ends-the-designated-country-of-origin-practice.html>.

and have addressed the issue. It is but a small step to recognize it within that field as well.