THE DEMISE OF POSITIVE LIBERTY? *NATIVE WOMEN'S ASSOCIATION OF CANADA V. CANADA*

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INTRODUCTION

Canadian courts ordinarily conceive of liberty negatively. Applied to the *Charter*, they protect liberty by prohibiting the state from interfering with the fundamental rights and freedoms of the individual, notably, those under section 2. However, courts could also conceive of liberty positively. They could adopt a strong conception of positive liberty by requiring the state to perform some positive act towards an individual or group. For example, they could oblige the state to guarantee to everyone a minimum level of education, conditions of employment, or income. They could also adopt a weaker conception by requiring the state to perform a positive act towards a party only if the state has already chosen to act. For example, should the state decide to provide minimal levels of education, employment, or income, courts could insist that it do so in a particular manner.

Positive liberty is sometimes protected under section 15 of the *Charter*. In *Haig v. Canada*[1] in particular, the Supreme Court left open the possibility that a weak conception of positive liberty might apply under section 2 as well.

The case of *Native Women's Association of Canada v. R.*[2] is important, not because it imposes a positive obligation upon the state to fund the Native Women's Association of Canada — indeed, the Supreme Court does exactly the opposite. It is significant because it undermines positive conceptions of liberty in general, but notably under section 2 of the *Charter*, notwithstanding *Haig*.[3] The case might also be taken as a departure from previous decisions of the Supreme Court of Canada on the interpretation of the *Charter*.

This case study has three aims: first, to evaluate positive conceptions of liberty as conceived by Canadian courts prior to the *NWAC* case, notably in *Haig*; second, to analyze the impact of the *NWAC* case upon the judicial interpretation of sections 2 and 15 of the *Charter*; and third, to conclude in light of the first two aims.

HAIG V. *CANADA*

Haig dealt with two referenda on the Charlottetown Accord held on October 26, 1992: one held in Quebec, and the other in the rest of Canada. Due to the different enumeration requirements of the two referenda, Haig was unable, after moving from Ontario to Quebec in August 1992, to vote in either referendum. He appealed to the Federal Court on grounds that, being disentitled to vote in either referendum, the state had violated his rights under sections 2(b), 3[4] and 15(1).[5] He applied for a declaration that he, and anyone else in his position, be considered resident in their respective province of origin, and be entitled to vote in the federal referendum. Speaking for the majority, L'Heureux-Dubé J. held that the *Referendum Act* did not require that the federal referendum be conducted in all provinces and territories. She observed, explicitly, that:[6]

> ... the appellants were unable to cast their ballots simply because, on the enumeration date, they were not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellant's right of expression as guaranteed in the Charter.

More importantly from the perspective of this case study, L'Heureux-Dubé J. recognized circumstances in which individuals have positive liberties which the state has a positive obligation to preserve. This is most apparent in her statement:[7]

> [W]hile section 2(b) of the Charter does not include the right to any particular means of expression, where a government chooses to provide one ... it may not do so in a discriminatory fashion, and particularly not on ground [sic] prohibited under section 15 of the Charter.

Several inferences follow from this statement. First, the individual does not have unlimited options in expressing her opinion in a referendum. Second, the state is entitled to choose among competing options. Third, the state may not do so in a discriminatory fashion.

This third requirement is important in two respects. First, it is consistent with the principle, enunciated in *Andrews* v. *Law Society of British Columbia*,[8] that everyone has the right to equal benefit of the law.[9] It also is important as it seems to establish a link between the positive obligations assumed by the state under section 2 and section 15 of the *Charter*, respectively.

L'Heureux-Dubé J. used an illustration to depict everyone's right to equal benefit of the law. She stated: "in colloquial terms, ... the freedom of expression contained in section 2(b) prohibits gags, but does not compel the distribution of megaphones."[10] At the same time, L'Heureux-Dubé J. insisted that the state, in being free to distribute megaphones, still cannot do so in a "discriminatory fashion."[11] The inference arising from her illustration is that, in preserving the right of all Canadians to vote, the federal government is obliged to ensure that it does not accord the right to vote to some only by discriminating against others. This does not imply that the state is obliged to devise multifaceted ways of voting in order to satisfy the whim or convenience of each and every Canadian. But, it *does* imply that the state contemplate the possible unequal effect of a referendum upon discrete segments of society. Using an extreme example, it would be unconstitutional for a government to require voters to satisfy a complex literacy or property-ownership test that prevents significant segments of the population from voting. In contrast, the government would *not* violate section 3 of the *Charter* were it to set up polling stations for a referendum only in generally accessible areas of the Yukon, despite the inconvenience caused to citizens living in remote parts who could vote only by trekking to one or another of them.

Regarding the link between the state's positive obligations under sections 2 and 15 of the *Charter*, L'Heureux-Dubé J. is unclear as to whether the state assumes a positive obligation to provide equal benefit under section 15 *only*, or also under section 2(b) dealing with freedom of expression. She is also unclear, in light of *Andrews*,[12] whether she intends to limit discriminatory treatment to enumerated and analogous grounds to section 15, or whether she envisages new grounds as well. If L'Heureux-Dubé J.'s reasoning requires the state "to take positive steps to ensure the equality of people or groups ... within the scope of section 15" *only*,[13] it is apparent that the state has *no* further obligation to promote freedom of expression under section 2(b). If she reasons that issues of expression are "strongly linked" to equality, as she appears to do,[14] it is likely that the state has at least *some* positive obligations under section 2 as well.

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The facts of the *NWAC* are best drawn from the report of the case itself:[15]

> During the constitutional reform discussions which eventually led to the Charlottetown Accord, a parallel process of consultation took place with the Aboriginal community of Canada. The federal government provided $10 million to fund participation of four national Aboriginal organizations: the Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Metis National Council (MNC) and the Inuit Tapirisat of Canada (ITC). The Native Women's Association of Canada (NWAC) was specifically not included in the funding,

but a portion of the funds advanced was earmarked for women's issues. As a result, AFN and NCC each paid $130,000 to NWAC and a further $300,000 was later received directly from the federal government. NWAC was concerned that their exclusion from direct funding for constitutional matters and from direct participation in the discussions threatened the equality of Aboriginal women .... They alleged that by funding male-dominated groups and failing to provide equal funding to NWAC, the federal government violated their freedom of expression and right to equality. The application was dismissed by the Federal Court, Trial Division. The Federal Court of Appeal also refused to issue an order of prohibition. It made a declaration, however, that the federal government had restricted the freedom of expression of Aboriginal women in a manner that violated ss.2(b) and 28 of the *Charter*.

In writing the majority opinion in the *NWAC* case, Sopinka J. affirmed L'Heureux-Dubé J.'s contention in *Haig* that, "in certain circumstances," a government might be required to engage in positive action "in order to make the freedom of expression more meaningful."[16] He stated:

> *Haig* establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in *Haig* leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression more meaningful. Furthermore, in some circumstances where the government does provide such a platform, it must not do so in a discriminatory manner.

However, following this statement and using artful rhetoric, Sopinka J. emphasized the inefficiency and cost that would arise were government to assume positive obligations under section 2 of the *Charter*. This is apparent when he declares:[17]

> ... it cannot be said that every time the Government of Canada chooses to fund or consult a certain group, thereby providing a platform upon which to convey certain views, that the Government is also required to fund a group purporting to represent the opposite point of view ... if this was the intended scope of section 2(b) of the Charter, the ramifications on government spending would be far reaching indeed.

The result of Sopinka's rhetoric is less an evaluation of the merits of the assertions of the Native Women's Association of Canada than a blanket disapproval of court-imposed obligations upon government under section 2(b) of the *Charter*. Sopinka J.'s argument is familiar: requiring government to act positively is inefficient because it likely would give rise to a flood of inefficient impositions upon the state. Then, there is Sopinka J.'s further argument that governments ought to be free to decide when and how to act positively towards the populace. For example, he insisted that the state "must be free to consult or not whomever it pleases."[18] He added that, because government "chooses to fund or consult a certain group" does not mean that it also is required to "fund a group purporting to represent the opposite point of view."[19]

In advancing these arguments, Sopinka J. dismantles a straw man — the possibility left open by L'Heureux-Dubé J. in *Haig* that government might embrace a positive conception of liberty. Indeed, nothing in L'Heureux-Dubé J.'s *ratio* in *Haig* infers that courts should assume the mantle of government by default. Nor does Sopinka J. identify any judicial argument in *Haig*, or any other case for that matter, in which a positive right to freedom of expression is viewed as trammelling the democratic function of government.

Nevertheless, Sopinka J.'s majority decision in *NWAC* appears to negate the claim that the state might have any weak positive obligation to promote freedom of expression under section 2 of the *Charter*. By insisting that "it will be rare indeed that the provision of a platform or funding to one or several organizations will have the effect of suppressing another's freedom of speech,"[20] Sopinka J. retreats from the door partially opened by *Haig*.[21] While he makes it more difficult to advance a claim to positive liberty under section 2 of the *Charter*, he does not altogether exclude that possibility.

L'Heureux-Dubé J., in her minority decision in *NWAC*, understandably disagreed with this retreat

from *Haig*. She "cannot agree with [her] colleague [Sopinka J.] when he states that *Haig* 'establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group.'"[22] She added: "*Haig* ... stands for the proposition that the government *in that particular case* was under no constitutional obligation to provide for a right to a referendum under section 2(b)."[23] It follows from L'Heureux-Dubé J.'s reasoning that a positive liberty might be enforced *in some other case*. Sopinka J. clearly rejected this line of reasoning.

Sopinka J.'s final argument was to collapse the positive obligation of government under section 2(b) into a section 15 inquiry into equality. Again citing L'Heureux-Dubé J. in *Haig*, Sopinka J. noted that "the allegations that a platform of expression has been provided on a discriminatory basis are preferably dealt with under section 15."[24] Sopinka J. hereby resolved the ambiguity in *Haig* as to whether an independent positive speech right arises under section 2(b) that forbids the government from acting in a "discriminatory fashion." Treating positive speech rights, at most, as equality rights, he recognized a positive speech right only as a subset of section 15(1).[25]

Sopinka's apparent disapproval of courts imposing *any* positive obligations upon the state goes well beyond the scope of the case. In appearing to disapprove of courts requiring the state to protect both strong *and* weak conceptions of positive liberty, he appears to disassemble the analyses of prior courts. He also varies from Wilson J.'s contention, in *Edmonton Journal*,[26] that one value "at large" ought not to be balanced against a conflicting value "in context."[27] In rendering efficiency "at large" overriding, Sopinka J. seems *not* to evaluate the values of expression and equality "in context."

Sopinka J. varies from existing *Charter* jurisprudence in another respect as well. He associates positive liberty with section 15 of the *Charter*, but not section 2. This defies the unity of values that courts ordinarily impute to the guarantees provided for in the *Charter*. If courts are to preserve that unity, then, absent agreement to the contrary, they ought to ensure that freedom of expression under section 2 and equality under section 15 are mutually reinforcing.[28] The roots of this proposition, in the complex and interacting values of the *Charter*, is apparent in LaForest J.'s assertion in *Lyons*:[29]

> [T]he rights and freedoms protected by the Charter are not insular and discrete ... Rather, the Charter protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada ... and the particularization of rights and freedoms contained in the Charter thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the Charter as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.

Courts have a further reason to invoke section 2 to preserve a weak conception of positive liberty. Section 2 provides guarantees of freedom to "everyone." "Everyone" has a wide meaning. Encompassed within its meaning is the realization that, for the state to deny one person's section 2 freedom while granting that freedom to another is to violate section 2, not only section 15. To avoid this consequence and to preserve the unity of *Charter* values, a court ought to deny the state the right to discriminate under *both* sections, not under one section only.[30]

This contention introduces Sopinka J.'s likely response: a state that gives a megaphone to one group does not necessarily infringe the freedom of another group to express an opposite view. That other group remains free to voice its perspective. However, this response is insufficient because it ignores the unequal effect that state action might have upon different groups. By amplifying the right of expression of one group, but not another, the state not only treats them unequally: it potentially infracts upon the right of the ignored group to express itself. That infraction is most apparent in cases like *Big M*[31] where the guarantee of freedom includes the absence of coercion or constraint.[32] The guarantee of freedom, in turn, includes the protection from indirect forms of control that the state exerts in favour of some groups. That indirect control is most apparent — and most questionable — when the state assists some groups to

express their particular beliefs and practices, but not others.[33]

Given the limits in Sopinka J.'s analytical premises, it is to be hoped that at least a weak conception of positive liberty still might prevail under section 2 of the *Charter*. This weak conception might be premised upon three related considerations: the social conditions preceding the state's grant of a benefit to a disadvantaged group, the social effect of the grant upon *that* group, and its effect upon other groups, including other disadvantaged groups. Applied to Native women, the state is entitled to benefit native organizations claiming to represent native peoples in general. However, it is not entitled to do so when the effect is to exacerbate the disadvantage of native women *vis-à-vis* others, including native men. While the precise impact of state action upon disadvantaged status is a question of fact, that question arises under *both* sections 2 and 15(1). Freedom of expression under section 2(b) is every bit as fundamental as equality in a democratic society. If an individual or group cannot invoke an enumerated or analogous ground under section 15(1), section 2 is surely a justifiable alternative.

Despite these observations, legal counsel are advised to orient future *Charter* challenges based on positive liberty around section 15(1), not section 2. Whatever the deficiencies in Sopinka J.'s reasoning in the *NWAC* case, he clearly suggests that future *Charter* challenges based on positive liberty be brought within the enumerated or analogous grounds of section 15.

SECTION 15

Despite his insistence that positive liberty claims be grounded in section 15, Sopinka J. barely touched on that section. This is regretable for several reasons. First, by insisting that a positive speech right is likely to arise only as a subset of section 15(1), not section 2(b), Sopinka J. opens the door to speculation on the application of section 15(1), while avoiding entering it himself. Second and following therefrom, Sopinka J. passes up the opportunity to evaluate new analogous grounds recognised by superior courts in several provinces, notably, in Nova Scotia[34] and Saskatchewan.[35] In particular, he does not explore the possibility that discrete groups might invoke a new analogous ground under section 15.

Given that the interests of native women arguably are distinguishable from those of both native men and women in general, it is conceivable that their disadvantaged status gives rise to a new and analogous ground under section 15. This approach is reinforced by the realization that courts sometimes are willing to fill in the cracks between disadvantaged groups. This is especially apparent when they transform economic and social disadvantage into new and analogous grounds under section 15 on the basis of the harsh social effects of that disadvantage.[36]

SECTION 1

In rejecting the claim of the Native Women's Association, the Supreme Court in the *NWAC* case did not find it necessary to consider section 1 of the *Charter*. It has been suggested above that the proper stage at which to balance the values of efficiency, expression and equality is the section 1 stage of analysis. Sopinka J. found that the evidentiary foundation was insufficient to warrant proceeding to such a balancing. However, as section 1 is significant in determining when a positive liberty has been violated, it is appropriate to consider it here.

The prevailing analysis of section 1, following the *Oakes* test,[37] is phrased in the language of negative liberty. The intent is to evaluate whether the state has a compelling reason in a free and democratic to override the right of an individual. A section 1 inquiry based on a positive conception of liberty, in contrast, is likely to give rise to an inquiry into whether the state has a compelling reason not to promote that positive liberty. In effect, courts will be required to determine whether the state is justified in failing to act positively, rather than in acting negatively.

A section 1 inquiry into restrictions on positive liberty also is likely to lead to a second order of rights based on economic considerations. This varies from the traditional construction of section 1 in which courts disallow economically-based intrusions upon negative liberty: "Administrative flexibility in itself is generally regarded as insufficient reason to warrant overriding a [negative] Charter right."[38] Given that the state is most likely to decline to act positively on the grounds of social cost, administrative inefficiency is likely to be central to a section 1 inquiry into the denial of positive liberty. This is apparent in the Nova Scotia case of *Sparks*[39] where Hallett J.A. indicated that a "degree of administrative flexibility

is needed to effectively manage a public housing scheme ...."[40] While the remainder of the *Oakes* test would remain largely intact in relation to section 1,[41] the addition of a positive liberty that is economically constrained to a negative liberty that is not, is likely to lead to a modified perception of *Charter* rights.[42] However much one might distrust a hierarchy of constitutional rights, it is arguable that, with the protection accorded "life, liberty and security ..." under section 7, the apex of such a hierarchy already exists.

CONCLUSION

The *NWAC* case has seriously undermined the prospect of an independent claim to weak positive liberty under section 2(b) of the *Charter*. The fact that L'Heureux-Dubé J., who raised the possibility of such an action in *Haig*,[43] did not convince the majority to leave that possibility open in the *NWAC* case, reinforces the implication that a positive claim to liberty under section 2 is not likely to be successful.

At the same time, the majority in the *NWAC* case preserved the right to assert a positive claim based on discrimination under section 15(1) of the *Charter*. This is in keeping with *Andrews*[44] and *Schacter*.[45] It also complies with the principle that, if the state is to provide equal benefit under the law, it is expected to do so by both positive and negative means.

Although it is not explicitly dealt with in the *NWAC* case, it is conceivable that a section 15(1) claim of positive liberty may be sustained *only* if it is founded upon an enumerated or analogous ground. Recent decisions in Nova Scotia and Saskatchewan take a wider view of 15(1). In particular, they treat "composite grounds" as analogous.[46] Given that the *NWAC* case does not deal with this issue, it is hoped that this trend in Nova Scotia and Saskatchewan will prevail.

The *NWAC* case also did not deal explicitly with section 1. Had the Court determined that the state had violated a positive liberty under section 15, a section 1 inquiry would have become necessary. It is suggested that this is where Sopinka J.'s efficiency concerns should have been voiced. As indicated above, such an inquiry is likely to lead to a modified application of section 1, notably, by forcing consideration of the efficiency of state action.

In summary, the *NWAC* case is remarkable only in the fact that it draws a firm line: positive liberty henceforth has a very restrictive place under the *Charter*. In particular, positive liberty is permitted as an equalitarian claim under section 15(1), but not as a fundamental right under section 2, unless one of the arguments proposed here receives judicial support. The *NWAC* case might also mark a departure from liberal principles of interpretation accorded the *Charter* during its first decade of evolution.

The majority in the *NWAC* case is crystal clear: courts should not require the state to embark upon inefficient action. The assumption is that government is better able to decide when its actions are efficient, or for that matter, inefficient. This assumption is overstated. In evaluating selective state funding, judges would pronounce on the fairness of state action, not displace its conception of efficiency. Evaluating the fair allocation of public funds *is* within the judicial purview — and ought to be. Nor does the fair allocation of funding mean equal funding. It is quite conceivable that a court could fairly award an organization like the NWAC *some*, as distinct from *equal*, funding.

What is a fair allocation of state funding, ultimately, is a question of fact, not judicial jurisdiction. What is reasonable to consider is whether organizations like the NWAC represent a voice of difference that, absent state funding granted other organizations, is subject to discrimination. What is evenhanded is for judges to balance positive liberty against administrative efficiency in weighing the rights of the state against its responsibilities within a disparate society.

None of these criticisms of the majority in the *NWAC* case is intended to suggest that the Supreme Court *necessarily* should have held that the state infringed the positive liberty of the *NWAC* case. What is suggested, however, is that, just as the *Haig* Court restricted its *ratio* to the facts,[47] the Supreme Court could have done so here as well. Founding good law upon questionable reasoning, ultimately, fosters questionable law.❑

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Endnotes

1. [1993] 2 S.C.R. 995 [hereinafter *Haig*].

2. [1994] 3 S.C.R. 627, F.C.A. dec'n 95 D.L.R. (4th) 106 [hereinafter *NWAC*].

3. *Haig, supra* note 1.

4. No violation of section 3 was found as section 3 does not guarantee a right to vote in a referendum (at 1030-33).

5. No section 15(1) violation was found. Persons who move to Quebec less than six months before a referendum do not comprise an analogous ground. They do not suffer historical disadvantage or prejudice and therefore are not a discrete and insular minority.

6. *NWAC, supra* note 2 at 1042.

7. *Supra* note 1 at 1041 (emphasis added). L'Heureux-Dubé J. found no section 2(b) violation.

8. [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

9. In *Andrews, ibid*, McIntyre J., defines equality under section 15 as having four elements: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) he right to equal benefit of the law.

10. *NWAC, supra* note 2 at 1035.

11. *Ibid.* at 1041.

12. This lack of clarity is evident in Justice L'Heureux-Dubé's stipulation in *Haig* that the government not act "in a discriminatory fashion, and particularly not on ground prohibited by section 15." *Haig*, supra note 1 at 1041. On *Andrews*, see *supra* note 8.

13. Citing the Supreme Court of Canada decision in *Schacter*, L'Heureux-Dubé J. states:

> ... the Court said that section 15 of the Charter is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15. It may well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals ... I believe that, should such situations arise, it would be preferable to address them within the boundaries of section 15, without unduly blurring the distinctions between different Charter guarantees (*infra* note 42 at 1041-42).

14. *Haig, supra* note 1 at 1041.

15. *NWAC, supra* note 2 at 628-629.

16. *Ibid.* at 655.

17. *Ibid.* at 656.

18. *Ibid.* at 656-57. Sopinka J. reinforces this proposition by referring to American jurisprudence, notably, *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984). For example, he cited with approval, the statement there: "[W]hen government makes policy, it is under no greater constitutional obligation to listen to any specifically affected class than it is to the public at large ... [and that] a person's right to speak is not infringed when government simply ignores that person while listening to others."

19. *Ibid.* at 656.

20. *Ibid.* at 657.

21. See *Haig, supra* note 1.

22. *NWAC, supra* note 2 at 666-67.

23. *Ibid.* at 667 (emphasis in the original).

24. *Ibid.* at 664. Sopinka J. then goes on to dismiss the case on lack of evidence: "In either case, regardless of how the arguments are framed, it will be seen that the evidence does not support the conclusions urged by the respondents" (at 657).

25. McLachlin J. was not willing to go even this far. In a terse separate opinion, she states: "I would allow the appeal on the ground that the freedom of governments to choose and fund their advisors on matters of policy is not constrained by the Charter of Rights and Freedoms ... I would distinguish the policy consultations at issue in this case from a formal electoral vote of the type at issue in *Haig* ... I find it unnecessary to determine whether the evidence was capable of demonstrating a violation of the Native Women's Association of Canada's rights under section 2(b) of the Charter" (*ibid.* at 668).

26. *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

27. *Ibid.* at 1351ff.

28. See *Southam Inc.* v. *Hunter*, [1984] 2 S.C.R. 145 at 156, and *R.* v. *Oakes*, [1986] 2 S.C.R. 103 at 136.

29. *R.* v. *Lyons*, [1987] 2 S.C.R. 309 at 326.

30. For a comparable resort to section 2(a) in the absence of section 15 which was not yet in force, see *R. v. Edwards Books & Arts Ltd.*, [1986] 2 S.C.R. 713.

31. *R.* v. *Big M Drug Mart*, [1985] 2 S.C.R. 295.

32. *Ibid.* at 336.

33. *Ibid.* L'Heureux-Dubé J.'s used an illustration in response. If the state amplifies the expression of whites but not persons of colour, for example, does this not constitute an indirect form of control? Does it not interfere with the manifestation of beliefs and practices held by persons of colour?

34. In 1993 the Nova Scotia Court of Appeal in *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks* (1993), 101 D.L.R.(4th) 224 [hereinafter *Sparks*] found that public housing tenants were encompassed within an analogous ground. The appeal concerned a provision of the *Residential Tenancies Act* which denied public housing tenants any security of tenure (private housing tenants gain security of tenure after 5 years, and may only be removed under exceptional circumstances), and allowed any public housing tenant, regardless of the length of their tenancy, to be evicted on one month's notice.

    The Nova Scotia Court of Appeal found that public housing tenants form what might be described as a composite ground (this was the first composite finding in *Charter* history). Hallett J.A., speaking for a unanimous court, held that public housing tenants were disproportionately composed of the elderly and single mothers, a disproportionate number of whom were black, and all of whom were (as a criteria of eligibility for public housing) economically disadvantaged. The fact that the tenants were not a uniform group was not deemed to be a barrier to a section 15(1) claim. Thus, while tenancy is not, in and of itself, an immutable ground, the Court held that persons who are tenants possess sufficient immutable characteristics to merit *Charter* protection under section 15(1). As Hallett J.A. stated:

    > ... the phrase 'based on grounds relating to personal characteristics' as used in *Andrews* cannot be taken to mean that the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifestly directed at such characteristics. Such an interpretation would fly in the face of the effects-based approach to the *Charter* espoused by the Supreme Court of Canada (at 233).

    Sparks was followed in the recent N.S.S.C.T.D. case of *R.* v. *Rehberg* (1993) 127 N.S.R.(2d) 331. That court, found that the status of single mothers on social assistance constituted, in and of itself, an analogous ground. The case involved a provision of the N.S. *Family Benefits Act* which forbade single mother recipients from cohabiting with men. Kelly J. followed the Court of Appeal in *Sparks* by finding that "single mothers are a 'group' in society most likely to experience poverty in the extreme, and that poverty is likely of to be a personal characteristic of a single mother" (at 351). Further, he found that "in this instance, poverty is analogous to the grounds listed in section 15" (at 351).

35. In *Panko* v. *Vandesype* (1993), 101 D.L.R. (4th) 726 (Sask. Q.B.), illegitimacy was found to be an analogous ground. The *Children of Unmarried Persons Act* did not allow for a voluntary support order to be varied unless the father was delinquent. The *Act* also prohibited the mother from making an application to the Court. The judge addressed this by finding that the position of unmarried parents is also an analogous group under section 15.

36. As the Nova Scotia Court of Appeal found in *Sparks*, *supra* note 34, an effects-based approach does not require that "the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifested at such characteristics" (at 233). But see *contra*, *Egan* v. *Canada* (1993), 103 D.L.R. (4th) 336, aff'd [1995] S.C.J. No. 43, where the Court denied pension benefits to gay and lesbian partners of pension recipients. The majority accepted the government's concession that sexual orientation was a ground analogous to those listed in section 15(1). However, it thereafter chose to characterize the distinction in the legislation as being between spousal and non spousal relationships. This line of reasoning is reminiscent of the Supreme Court of Canada's resort to formal equality in *Attorney-General of Canada* v. *Bliss*, [1979] 1 S.C.R. 183. There, the court held that unequal treatment of pregnant women did not discriminate against women as the disadvantaged group was defined by pregnancy not sex.

37. *Supra* note 28.

38. *Sparks*, *supra* note 34 *per* Hallett J.A. at 235, citing *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

39. *Ibid.*

40. *Ibid.* at 235. Hallett J.A. added: "However, neither the authority nor the Attorney-General has proven that the means chosen to achieve the objective are ... properly tailored to meet the legitimate objectives" (at 235).

41. See *supra* note 28.

42. On the underinclusiveness of governmental action, see esp. *Schacter* v. *Canada*, [1992] 2 S.C.R. 679. In that case the Supreme Court evaluated whether the *Unemployment Insurance Act* violated section 15(1). In particular, it considered whether that *Act* created an unequal benefit by distinguishing between the benefits available to natural and adoptive parents.

43. *Supra* note 1.

44. *Supra* note 8.

45. *Supra* note 42.

46. See, for example, *supra* notes 34-35.

47. See L'Heureux-Dubé J. in *NWAC*, *supra* note 2 at 666-7. L'Heureux-Dubé J. contends that *Haig* does not stand for the proposition that the government is generally under no obligation to fund or provide a specific platform of expression to an individual or a group. It rests on the proposition that, *in that particular case* the government was under no constitutional obligation to provide for a referendum under section 2(b). It rests on the further proposition that, if and when the government decides to provide such a platform for expression, it ought to do so in a manner that is consistent with the *Charter*.