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THE IMPACT OF *LOVELACE v. ONTARIO* ON SECTION 15 OF THE CHARTER

By Lori Sterling*

I. INTRODUCTION

On June 20, 2000, the Supreme Court of Canada rendered its decision in *Lovelace v. Ontario* (the *Lovelace* case).[1] This was the first case to reach the Supreme Court of Canada that focused on section 15(2) of the Charter.[2] Section 15(2) states:

> Subsection [15](1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The facts of this case were that the government had reached an agreement with bands under the *Indian Act*[3] to provide a licence for a commercial casino, with the net profits being distributed amongst all bands in Ontario. After three years of negotiations between the Chiefs of Ontario, who represented the bands, and the government of Ontario, the casino was constructed on a reserve near Orillia and was called Casino Rama. Just before the opening of Casino Rama, however, several Métis and non-status Indian groups and communities brought a legal

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1 [2000] 1 S.C.R. 950.

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

3 R.S.C. 1985, c. I-5.

challenge alleging that their exclusion from the project violated their right to equal treatment under section 15(1) of the Charter.

The Supreme Court of Canada unanimously upheld the Casino Rama project on the basis that it did not violate section 15(1) of the Charter. In its decision, the Supreme Court of Canada had to grapple with complex questions such as the relationship between section 15(1) and (2), and the difference between an ameliorative program that targets a small group of disadvantaged beneficiaries ("targeted programs") and a program that is generally available ("universal programs"). The Court also had to resolve the vexing question of what role is left for section 1 of the Charter in the context of a challenge to a section 15(2) ameliorative program. Further, the Court had to analyze the differences between aboriginal groups and make findings on whether the Casino Rama project perpetuated the stereotyping of Métis and non-status Indians.

The purpose of this paper is to canvass the different approaches to section 15(2) of the Charter that were open to the Supreme Court of Canada to adopt in the *Lovelace* case and to analyze the particular approach the Court ultimately chose. In particular, it is suggested that while the Court refused to acknowledge that it was amending the section 15(1) test for targeted programs, it did, in fact, do so by modifying the "contextual factors" which are considered in the assessment of discrimination. The result is a test for affirmative action programs which purports to simply apply the pre-existing section 15(1) jurisprudence but, in reality, modifies it so that such programs are more likely to withstand a constitutional challenge.

II. Alternative Approaches to Section 15(2)

There were several different approaches open to the Court to adopt when deciding whether an ameliorative, targeted program violates the equality rights of an excluded group. Not all of these approaches, however, were put to the Supreme Court of Canada in the *Lovelace* case, and there exists a myriad of other options that are not discussed in this paper.[4]

One option not recommended to the Supreme Court of Canada by any of the parties but that was ultimately discussed by the Court is the so-called "rationality approach." This approach is found in the lower court jurisprudence and suggests that it is appropriate to modify the standard section 15(1) test by incorporating a review of the "rationality" of the affirmative action program. An early example of this rationality approach is found in *Apsit v. Manitoba Human Rights*

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[4] Other approaches not canvassed in this paper include: Subjective Intent Analysis: see *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387, at 393-94 (C.A.); Subjective Purpose and Ancillary Features Assessment: see Pierce, "A Progressive Interpretation of Subsection 15(2) of the Charter" (1993), 57 Sask. L. Rev. 263; Objective Purpose Analysis: see *Penner v. Danbrook*, [1992] 4 W.W.R. 385, at 389-90 (Sask. C.A.), leave to appeal refused, [1993] 1 S.C.R. viii.

Commission.[5] In this case, the Manitoba Queen's Bench struck down a program that gave native persons an advantage in growing wild rice. The Court struck down the program on the basis that native persons already had an advantage in this area and what they really needed was help with other skills. It is suggested that this decision sets too high a standard for affirmative action programs. Why not assist native persons in areas that are related to their tradition and culture and where they have prior experience?

The main advantage of the rationality approach is that it allows excluded groups the opportunity to bring a challenge and receive an explanation as to why the program was created. One criticism of this approach, however, is that it may render the section 1 test redundant. How could a program that has been found not to be rational then meet the section 1 test?

A variation on this approach is found in *R. v. Willocks*.[6] This case dealt with a program to assist aboriginal persons in the justice system by offering them a "diversion" program for certain offences. The program was challenged by a Jamaican accused who was not eligible for diversion. Watt J., *in obiter*, discussed the ambit of section 15(2) and adopted a test which permitted affirmative programs to pass constitutional muster unless there was "gross unfairness." "Gross unfairness" was intended to permit a higher degree of deference toward such programs than one of rationality. He stated:

> In any program which is designed to ameliorate the conditions of a disadvantaged group, others will be "disadvantaged" as a result of their non-eligibility for participation. Section 15(2) acknowledges as much. What must be avoided is gross unfairness to others. The Charter does not ask, in my respectful view, that an affirmative action program within s. 15(2), must address at once all individuals or groups who suffer similar disadvantage. There must be some room left to establish and give effect to priorities amongst disadvantaged groups, provided there is no gross unfairness.[7]

A second approach to section 15(2) was articulated by the appellants in the *Lovelace* case[8] and was supported by a native women's group, the Native Women's Association of Canada (NWAC), which had intervened in this case. The appellants had argued that section 15(2) was only intended to prevent challenges

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5 [1988] 1 W.W.R. 629 (Man. Q.B.). See for criticism of this approach, Vizkelety, "Affirmative Action, Equality and the Courts: Comparing *Action Travail des Femmes v. CN* and *Apsit and the Manitoba Rice Farmers Association v. The Manitoba Human Rights Commission*" (1990), 4 C.J.W.L. 287.

6 (1995), 22 O.R. (3d) 552 (Gen. Div.).

7 *Id.*, at 571.

8 See Pothier, "Charter Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993), Queen's L.J. 261, for further discussion of this approach.

from advantaged groups. It therefore operated as a complete bar to the bringing of a section15 challenge by an advantaged group to an affirmative action program. For excluded disadvantaged groups, however, section 15(2) had no relevance whatsoever. In other words, where an excluded disadvantaged group demonstrated a violation of section 15(1), the onus then shifted to the government to justify the programs under section 1 of the Charter.[9] Neither the Court of Appeal nor the Supreme Court of Canada accepted this approach.

The appellant's approach is problematic for several reasons. It is at odds with the plain language of section 15(2), which does not draw any distinction based on who the potential challenger is. As well, it ignores section 15(2) except in challenges from a limited class of potential applicants: advantaged persons.

A serious problem with this approach is that it could dissuade governments and community-based groups from jointly developing ameliorative programs, especially those that involve incremental or experimental phases. The existence of a minority legal aid clinic may be due to the fact that a particular community hall was rent-free and that student lawyers were willing to staff the clinic rather than because of a survey done of all minority groups to see which one was most needy or a review of the facilities that were available in different communities. Simply stated, the appellant's approach may not provide governments with sufficient encouragement to develop affirmative action programs as a means to achieve equality, because a program will readily be open to challenge. The Court of Appeal in *Lovelace* explained why it is important to grant governments some leeway for affirmative action programs, as follows:

> Governments have no constitutional obligation to remedy all conditions of disadvantage in our society. If government affirmative action programs can be too readily challenged because, for example, they do not go far enough in remedying disadvantage, governments will be discouraged from initiating such programs. Governments should be able to establish special programs under section 15(2) that distinguish between or even within groups protected under section 15(1).[10]

If a rigorous section 1 analysis were required for any of these programs to survive then the government and the beneficiaries might be less inclined to develop such programs.

Finally, this approach raises the spectre of further litigation over the meaning of an "advantaged" group. It fails to recognize that the concept of advantage is complex because it is both relative and contextual. Under this approach, a program which

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[9] This approach appears to be motivated by a concern that governments might play favourites with disadvantaged groups, and highlights a distrust of affirmative action programs, even among some equality-seeking groups.

[10] *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735, at 755 (C.A.).

provides a hospice for AIDS patients could be challenged by a group composed of Alzheimer's patients. How is a court to determine which group is more disadvantaged?

A third approach to section 15(2), which was adopted by the Ontario Court of Appeal in *Lovelace* but rejected by the Supreme Court of Canada, focused on the purposes of the program. Specifically, the Court of Appeal found that where a program, on objective grounds, has as its purpose the provision of a benefit or assistance to a disadvantaged group, there is no violation of section 15(1) as long as the excluded group does not fall within the purposes of the program. In contrast, where an excluded disadvantaged group does fall within the purposes of a program then it is open to that group to argue that the program violates section 15(1) of the Charter.

This approach was consistent with the decision of the Ontario Court of Appeal in *Ontario Human Rights Commission v. Ontario*[11] and the Supreme Court of Canada decision in *Battlefords and District Co-operative Ltd. v. Gibbs*.[12] In *Gibbs*, the Court examined an employer's disability plan and held that it was intended to cover both mental and physical disabilities. Under the plan, however, mental disabilities were subject to time-limited coverage whereas physical disabilities were not so limited. The Court held that the plan violated the Saskatchewan *Human Rights Act* on the basis that it inappropriately excluded a group on the prohibited ground of mental disability even though that group fell within the general purposes of the program. The Court distinguished this type of program from a more limited one intended to provide hand insurance for piano teachers on the basis that the purpose of this latter type of program was not a general employment disability program.

Perhaps the most elaborate application of this approach to section 15(2) is found in the Ontario Court of Appeal decision in *Lovelace*. The Court in that case reviewed the entire evidentiary record and concluded that the purpose of the Casino Rama was to provide Indian bands with the opportunity for economic development through a casino operation. The excluded group did not fall within the imperatives of this program, which required a reserve-base, experience with gaming and a high degree of financial and political accountability and identifiability. As well, this program responded to a well-articulated self-government aspiration and interest in a commercial casino operation by bands.

A fourth and final approach to section 15(2) discussed in this paper and ultimately adopted by the Supreme Court of Canada in *Lovelace* builds on the section 15(1) test as articulated in *Law v. Canada (Minister of Employment and*

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11 (1994), 19 O.R. (3d) 387 (C.A.).

12 [1996] 3 S.C.R. 566, at 591-92, 594.

Immigration):[13] The *Law* approach to section 15(1) was not discussed in the Court of Appeal decision in *Lovelace* since the *Law* decision had not yet been rendered. At the time the Court of Appeal rendered its decision, the Supreme Court was deeply divided on the analytic framework for section 15(1) of the Charter, and so it was not surprising that the Court of Appeal turned to the human rights jurisprudence.

In *Law*, the Supreme Court of Canada outlined the following approach for the determination of a violation of section 15(1):

> The approach adopted … focuses upon three central issues:
>
> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. [14]

The Supreme Court of Canada further held that determining whether a program is "discriminatory" involves an analysis of whether the program reflects stereotypes or presumed characteristics which have the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition. This definition of discrimination is intended to promote human dignity, equal concern, consideration and respect.

In order to assess discrimination, the Court suggested an analysis of four "contextual factors":

(1) whether the excluded group had a pre-existing disadvantage;
(2) whether the alleged ground of discrimination corresponds to the needs, capacity or circumstances of the Charter applicant;
(3) whether the purpose or effect of the program is to ameliorate the condition of more disadvantaged groups; and,
(4) whether the nature and scope of the interests affect the core of human dignity.[15]

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13 [1999] 1 S.C.R. 497.

14 *Id.*, at 548.

15 For more recent applications of the *Law* test see *M. v. H.*, [1999] 2 S.C.R. 3, at 45-47; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at 215-16; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at 675; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at 1022-25; and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, at 727-40.

Although the presence of a judicial consensus in the *Law* case on the appropriate approach to section 15(1) was applauded by the legal community and the public more generally, the test itself can be criticized on at least three fronts. First, it has been suggested that this test is unduly complex. One author has suggested that there are 16 steps before you are in a position to obtain a response.[16]

As well, the test may well be indeterminate in the result and at least easily manipulable. Because there is only a series of questions to ask or guidelines to follow in the assessment of discrimination, with no weighting system for each question, the answer to any constitutional challenge is difficult to predict. What if answers to some questions point to discrimination whereas answers to other questions do not? How do you decide which contextual factors prevail?

Finally, as discussed more fully below in the analysis of the *Lovelace* decision itself, it is certainly arguable that the Court in *Law* has melded section 15(1) with parts of the traditional section 1 Charter test. In particular, by including the second contextual factor of merit, capacity and circumstances (also called the correspondence factor) within section 15(1), the Court is asking questions similar to those asked under section 1 of the Charter.

In terms of the application of *Law* to targeted programs, a plain reading would suggest that many affirmative action programs could be challenged under section 15(1). This is because such programs usually do provide for differential treatment based on an enumerated and analogous ground. As well, the *Law* decision suggests that exclusion from a benefit itself can be demeaning and doesn't appreciate that affirmative action programs can exclude groups without necessarily diminishing the dignity of those groups. Furthermore, to the extent that such programs may target a disadvantaged group that is nevertheless more advantaged than another disadvantaged group, the application of the first and third contextual factors would suggest that such programs discriminate, in violation of section 15(1).

III. Analysis of the Supreme Court of Canada Decision in Lovelace

The Supreme Court of Canada unanimously upheld the Casino Rama project and further held that the *Law* test was directly applicable to targeted ameliorative programs described by the language of section 15(2). As a result, the attributes and frailties of *Law* are now part of the affirmative action context.

All the parties and intervenors in *Lovelace* took the position that the *Law* test had to be amended in some fashion to take into account section 15(2) and the

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[16] See Bredt & Nishisato, "The Supreme Court's New Equality: A Critique" (Osgoode Hall Law School, Charter Update, Continuing Legal Education Program, 1999 Constitutional Cases Conference, 7 April 2000).

affirmative action context. The Supreme Court of Canada, however, was not willing to openly admit that the test would have to be amended for the affirmative action context. Instead, it opined that the *Lovelace* case was "an opportunity for the Court to confirm that the s. 15(1) scrutiny applies just as powerfully to targeted ameliorative programs."[17] Further, it explicitly rejected the proposition that for section 15(2) type programs, the section 15(1) analysis should be easier to meet because of the ameliorative purposes of such programs.[18] Instead, it held that the existing test was already sufficiently well developed to deal with affirmative action programs without any modification. As will be discussed below, however, while the Court was not willing to openly admit that section 15(1) had to be modified in the affirmative action context, in fact, that is exactly what it did.

On the facts of this case, the Court found that the first step of the equality rights test was met since there was differential treatment between the Métis and non-status Indian communities and the Indian bands. With respect to the second step, it assumed, without deciding, that the differential treatment was based on an enumerated or analogous ground such as ethnic origin.

Turning to the third and final step of the section 15(1) test, assessing whether there was discrimination, the Court found that there was no discrimination. It began by analyzing the first contextual factor of "pre-existing disadvantage, stereotyping, prejudice or vulnerability" of the excluded group. Previously, this factor had been understood to require some sort of demonstration of relative disadvantage of the excluded group vis-à-vis the beneficiaries of the program. The Court held, however, that this was an error of interpretation. The Court opined that it was contrary to the spirit of equality to pit disadvantaged groups against each other in a determination of who is the worst off. To require proof of relative disadvantage would result in a "perverse competition over which [group] is more needy."[19]

The extent to which the Supreme Court of Canada sought to deny that it was amending this first contextual factor is evident from the following passage of the decision:

> Admittedly, in *Law*, there are a number of observations about what result might be expected in relation to various constellations of relative disadvantage. However, these were observations and nothing more; they were present in order to convey a full appreciation of the flexibility of the substantive equality analysis. The broad and fully

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17 *Lovelace, supra*, note 1, at 988.

18 *Id.*, at 1005.

19 *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735, at 760 (C.A.), and [2000] 1 S.C.R. 950, at 981.

> contextual s. 15(1) analysis transcends the superficiality of a simple balancing of relative disadvantage.[20]

While the amendment of the first contextual feature is appropriate for the affirmative action context, the Supreme Court of Canada fails to recognize that this is indeed an amendment and may well be only necessary in the context of a targeted section 15(2) program. In most other contexts, the first contextual factor, which had entailed evidence of relative disadvantage, would still be an appropriate consideration in determining discrimination.

If this first contextual factor is now to be interpreted as simply asking whether the excluded group is disadvantaged vis-à-vis society at large, it is unlikely to carry much weight in the ultimate determination of discrimination in the affirmative action context. This is because affirmative action programs typically target a few disadvantaged groups and will inevitably exclude the vast majority of disadvantaged (and advantaged) groups. In this respect, affirmative action programs are distinguishable from universal programs which single out and exclude very few disadvantaged groups.

The very limited weight to be attributed to this first factor in affirmative action contexts is demonstrated by turning to the facts of the *Lovelace* case itself. The Court concluded that the appellants were disadvantaged and stereotyped because of societal attitudes toward non-status and Métis aboriginal people. The Court did not find relative disadvantage although it did note that the excluded group could not receive some of the federal funding provided to Indians. This contextual factor, however, did not appear to have any impact on the result. Instead, the Supreme Court quickly moved on in the analysis to what is likely to become the only real issue in section 15(1) affirmative action cases, namely, whether the different merit, capacity or circumstance of the two groups reveals a valid rationale for the exclusion of the claimant.[21]

In the circumstances of the Casino Rama project, the Court carefully examined this second contextual factor: the correspondence of the needs, capacities and circumstances of the excluded group with the impugned programs. It concluded that there were valid different circumstances between the two groups that justified the exclusion of the appellants. Importantly, only the bands held the land necessary for the casino. Furthermore, because the project involved "partnering" in a commercial venture with the bands, it was tailored to their circumstances and needs. The Court also found that because of the different history of illegal gaming

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[20] *Lovelace*, *supra*, note 1, at 986.

[21] The Court dealt with the first contextual factor on the merits in one sentence when it stated: "leaving aside as I must arguments advanced relating to the potentially discriminatory or arbitrary nature of the exclusionary provisions of the *Indian Act*, the appellants have failed to establish that the First Nations Fund functioned by device of stereotype" (*Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at 993).

in the two groups as well as different self-government aspirations relating to gaming, it was appropriate for the government to start with a casino project for bands.

The appellants had argued that the Métis and non-status Indians had similar economic and social needs as status Indians and the Casino Rama project was simply a device to meet those needs.[22] The Court agreed that they had a similar need but rejected need as the fundamental basis for the finding of discrimination in this case. Instead, it held that the appropriate analysis was to focus on circumstances of the included and excluded groups.

The analysis undertaken by the Court under this contextual factor resembles the purpose-based approach discussed above and applied by the Court of Appeal. This is because, at the end of the day, this factor is designed to answer the question of whether the ameliorative purposes of the program have been met in the program design. While the Supreme Court of Canada did not agree that it was asking a question similar to that asked by the Court of Appeal, it did recognize that this contextual factor is similar to the rational connection approach discussed in the previous section and adopted in the human rights jurisprudence. The Supreme Court concluded that "the rational connection test … matches the approach to examining the "correspondence factor" embedded in the s. 15(1) analysis …."[23]

In light of this explicit recognition of the relationship between the second contextual factor and a rational connection test, it must be asked, what is left for section 1 of the Charter? The Court states that by using its approach "one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review."[24] The question that remains to be answered, however, is whether a meaningful section 1 review is truly available.

On the one hand, it is arguable that the section 1 test still has a role to play since government priorities such as deficit reduction may very well not be sufficient to prevent a finding of discrimination but may be sufficient to meet a section 1 justification.[25] Further, there may be a role for section 1 if courts require a very precise degree of correspondence between the merits, capacities and circumstances and the program. On the other hand, it is also arguable that there is a limited role left for section 1 of the Charter because there is little difference between a rationality analysis and a section 1 *Oakes* analysis. Indeed, it could be argued that section 1 had set a higher threshold for the government to meet than the current section 15 approach. This is because under the section 1 analysis, there is the

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22 *Lovelace*, *supra*, note 21, at 994.

23 *Id.*, at 1007.

24 *Id.*, at 1011.

25 See *Cameron v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 611 (N.S.C.A.), leave to appeal denied, [1999] S.C.C.A. No. 531, for an example of cost reduction as a section 1 justification.

requirement of not just rationality but minimal impairment of the right at issue. As well, under section 1 the onus lies on the government, whereas under section 15 it lies on the claimant. As the Supreme Court of Canada has not yet explicitly discussed the possibility of an overlapping relationship between section 15 and section 1 of the Charter, it remains to be seen whether it will simply acknowledge it or try to amend the test so as to minimize the overlap.

The third contextual feature in the *Law* case is the analysis of the ameliorative purpose. In *Law*, the Court had held that ameliorative legislation that was designed to benefit the population in general but which excludes a historically disadvantaged claimant would "rarely escape the charge of discrimination."[26] In *Lovelace*, however, the Court was required to backtrack and reject this analysis in part. Now, at least in the targeted program context, instead of finding that programs which exclude historically disadvantaged groups suggest discrim-ination, the Court will focus on the ameliorative effect on the included group. The result is that this factor in the affirmative action context will invariably suggest non-discrimination because such programs are inevitably ameliorative.

What the Court did with this third contextual feature is modify it for the affirmative action context by removing any comparative analysis of the disadvantages between the excluded and included groups.[27] Simply stated, the application of this contextual factor where the excluded group is disadvantaged in the non-affirmative action context is likely to lead to discrimination, whereas in the affirmative action context, it is not.

The fourth and final contextual feature discussed in *Lovelace* was the nature of the interest affected. While it had been argued that the exclusion from the Casino Rama project demonstrated a lack of recognition of these groups as self-governing communities, the Court found such an assertion "remote."[28] This part of the decision suggests that where money is the benefit provided by government, even where it is a very large sum of money as was the case with the Casino Rama project, the nature of the interests affected are not likely to suggest discrimination. Simply stated, loss of pecuniary benefits are less likely to point to a section 15(1) violation than the loss of fundamental privacy interest or an ability to participate in democratic processes.

IV. CONCLUSION

The *Lovelace* decision has many positive aspects. It confirms the importance of ameliorative, targeted programs in achieving substantive equality. It permits

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[26] *Lovelace*, *supra*, note 21, at 999, quoting *Law*, *supra*, note 13, at 518, quoting *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 174-75.

[27] *Lovelace*, *supra*, note 21, at 1000.

[28] *Id.*, at 1002.

disadvantaged groups and governments to work together to build programs to overcome stereotyping of these groups. It acknowledges that it is not necessary to target the most disadvantaged group when developing an ameliorative program. As well, the fact that the Court decision was unanimous suggests that it is committed to a single vision of equality. The Casino Rama project itself will provide the bands and their members much needed economic support.

Nevertheless, the question which must now be asked is whether the Court's vision of equality provides sufficient guidance and clarity. How practical is the *Law* test when trying to ascertain violations of section 15(1)? Has *Lovelace* modified the *Law* approach to equality rights, at least in the affirmative action context? What is the role of section 1 in light of the *Law* test? In this paper, it was suggested that the contextual factors have changed to deal with unique features of targeted ameliorative programs. The result is greater judicial deference toward such programs and a concomitant diminution in the ability of any group, including disadvantaged groups, to successfully challenge these programs.