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EQUITY LAW FOR CLINIC ADVOCATES:
A 1997 REVIEW

JUDITH KEENE*

RÉSUMÉ
Dans cet article, on examine les développements survenus en 1997 en ce qui a trait :

- au droit matériel en vertu de l’article 15 de la Charte canadienne des droits et libertés et des lois provinciales et fédérales sur les droits de la personne; et

- aux questions de compétence et de procédure reliées à l’évaluation des droits en equity des clients.

Dans l’ensemble, 1997 a été une meilleure année que la précédente dans le secteur du droit en equity qui touche (ou pourrait toucher) les clients pauvres. Après avoir refusé d’interjeter un appel dans plusieurs causes de grande importance pour les clients pauvres, la Cour suprême du Canada a donné à l’article 15 du droit en equity un solide coup de pouce lorsqu’elle a rendu sa décision dans la cause Eldridge c. Colombie-Britannique à la fin de l’année et même les motifs du jugement dans la cause Eaton et le Conseil de l’éducation du comté de Brant permet d’en tirer certains principes jurisprudentiels utiles. Cette année, nos décisions ont eu tendance à réduire la protection de l’article 15 de la même façon que cela est devenu une pratique routinière à la Cour fédérale et à la Cour d’appel fédérale. Il est possible que la cause Eldridge ait un effet correcteur dans le futur. D’un autre côté, la Division générale de la Cour de l’Ontario a permis pour la première fois que les réductions du gouvernement puissent contrevenir à l’article 15 et la Cour d’appel de la Nouvelle-Écosse a corrigé certains problèmes résultants de décisions prises précédemment.

Bien que la jurisprudence de fond concernant les lois sur les droits de la personne et l’article 15 de la Charte continue d’être utile, il est toujours difficile d’en faire profiter les clients pauvres. Tant le gouvernement provincial que le gouvernement fédéral continuent de faire la sourde oreille aux efforts de réforme du droit, ce qui entraîne des procédures en litige lorsque cela n’est pas nécessaire. De plus, il semble que la Commission ontarienne des droits de la personne continue de faire les frais d’une absence de révision judiciaire.

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INTRODUCTION

On the whole, it has been a better year than last in the area of equity law that affects (or could affect) poor clients. After denying leave to appeal in several cases of great importance to poor clients, the Supreme Court of Canada gave s. 15 equity rights a significant boost with its decision in Eldridge v British Columbia,1 at the end of the year, and even its reasons for judgement in Re Eaton and Brant County Board of Education2 yielded some helpful jurisprudence. Our Court of Appeal's decisions this year have tended to narrow s.15 protection in much the same way that has become routine at the Federal Court and the Federal Court of Appeal; perhaps Eldridge will have a corrective effect for the future. On the other hand, the Ontario Court General Division has for the first time allowed that government cut-backs can offend s.15, and the Court of Appeal in Nova Scotia has corrected some problems arising from earlier decisions.

While the substantive jurisprudence under both human rights legislation and s.15 of the Charter continues to be helpful, getting its benefit for poor clients continues to be difficult. Both the provincial and the federal government continue to turn a deaf ear to efforts at law reform, necessitating litigation where it should not be necessary. Further, it appears that the Ontario Human Rights Commission continues to respond to little short of judicial review.

This article is organized under the following headings:

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   A. Social Assistance
   B. Unemployment/Employment Insurance
   C. Canada Pension Plan
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   F. S. 15(2): the Latest on “amelioration of disadvantage” from the Ontario Court of Appeal
   G. Eldridge: Significant Help from the Supreme Court of Canada

II. How to Get There From Here
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I. RECENT EQUITY JURISPRUDENCE

As noted in last year's article,3 the Supreme Court has repeatedly pointed to human rights law as an aid in the analysis of s.15. For this reason, the review of cases below will be organized according to subject-matter, rather than whether the equity argument

was made under s.15 of the *Canadian Charter of Rights and Freedoms*,4 or under human rights legislation.

A. **Social Assistance**

N.S. Court of Appeal partially overrules *Rhyno*, upsetting negative precedent

In *Rhyno v. Minister of Community Services*,5 the Trial Division of the Nova Scotia Supreme Court upheld a regulation which imposed a six-month waiting period before a married person who had separated from his or her spouse was eligible for benefits as a sole support parent. No such waiting period applied to other applicants. Despite the fact that the Supreme Court of Canada rejected the “similarly situated” analysis in its very first s.15 decision, *Andrews v Law Society of British Columbia*,6 the judge in *Rhyno* held that the regulation did not discriminate within the meaning of s.15 of the Charter on grounds of marital or family status because all “married separated people with children” were treated the same.

The Nova Scotia Court of Appeal has partially overruled *Rhyno* in a subsequent case. The issue of the six-month waiting period arose again in a complaint to the Nova Scotia Human Rights Commission. A Human Rights Board of Inquiry held that it was bound by *Rhyno*. On appeal, the N.S. Court of Appeal reversed the tribunal and expressly disapproved the reasoning in *Rhyno: Re Carrigan and Nova Scotia Human Rights Commission*.7 The Court held that the regulation clearly created unequal treatment of married people and referred the matter back to the Board of Inquiry to determine whether the distinction was discriminatory.

*Carrigan* is a useful affirmation that “similarly situated” reasoning is not appropriate in equality analysis whether under the Charter or under provincial human rights legislation.

**Discriminatory Nova Scotia Shelter Rules Struck Down**

In *Way v. Covert et al.*,8 the Nova Scotia Court of Appeal overturned a lower court decision9 upholding a regulation which has caused much hardship to people with disabilities and their families in Nova Scotia. At issue was a regulation under the Nova Scotia *Family Benefits Act* which disallowed shelter allowances to recipients who lived with relatives if the relative’s income exceeded a prescribed amount. The appellant had argued that this regulation was *ultra vires* the Act and violated s.15 of the Charter of Rights. Both arguments had been dismissed by the Trial Division. The Court of Appeal found it unnecessary to consider the *Charter* issue: two members of

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the Court found the regulation to be *ultra vires* the Act without reference to discrimination. They held that notwithstanding the broad regulation-making power in the Act, that power did “not extend to denying benefits simply because a person, otherwise eligible, is living with a relative who has a certain level of income. Such a denial of benefits is a fundamental departure from, and inconsistent with, the basic standard of eligibility set out in the Statute”. In a concurring decision, Pugsley J. suggested that the regulation was *ultra vires* because, even apart from the Charter, the regulation-making power should not be interpreted as allowing discriminatory action.

*Way* is one of several decisions from other jurisdictions to strike down social assistance regulations deeming support where support is not actually provided. Ontario social assistance regulations are riddled with similar deeming provisions, both directly and indirectly, most of which have never been challenged.

**B. Unemployment/Employment Insurance**

Court of Appeal Diminishes Rights in Purpose-Finding Exercise

In *Schafer v Canada (Attorney General)*,\(^1\) two Ontario couples challenged the amended parental benefit provisions in the *Unemployment Insurance Act*,\(^2\) s.11(3), (4) and (7). The provisions authorized a total of 25 weeks' combined payment of maternal and parental benefits, but limited adoptive parents to 10 weeks extended parental benefits. Subsection 11(7) granted 5 weeks of additional benefits to an adopted child with a medically-certified “condition”, but only for children who were over the age of 6 months at the time of adoption. The Ontario Court, General Division, held that the provision of shorter leaves to adoptive parents were discriminatory and not saved by s. 1.

The *Schafer* decision was partly overturned by the Court of Appeal.\(^3\) The Court of Appeal (Brooke, Osbourne and Austin JJA), acknowledged that ss.11(7) the age limitation discriminatory, but reversed on the question of whether s.11(3) and (4) infringed s.15.

The focus of the Court of Appeal’s decision is the purpose of the “legislative scheme”. The provision at issue reads as follows:

11. (3) Subject to subsection (7), the maximum number of weeks for which benefit may be paid in a benefit period

   (a) for the reason of pregnancy is fifteen;

   (b) for the reason of caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is ten; and

   (c) for the reason of prescribed illness, injury or quarantine is fifteen.

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(4) Subject to subsection (7), the maximum number of weeks for which benefit may be paid
(a) in respect of a single pregnancy is fifteen; and
(b) in respect of caring for one or more new-born or adopted children as a result of a single pregnancy or placement is ten.

(5) In a claimant's benefit period, the claimant may combine weeks of benefit to which the claimant is entitled for any of the reasons referred to in subsection (3), but the maximum number of combined weeks is thirty.

It appears that the reason for the Court of Appeal's decision may lie in the peculiar structure of s.11. The section deals with unemployment benefits for sickness, for pregnancy and for child-care of new arrivals to a family by birth or adoption. It is possible that the inclusion of sickness benefits in the section gave rise to a fragmented approach to the enunciation of the rationale for the provision. The court below had found that the purpose of s.11(3) and(4) was “to facilitate the process of family formation”. The Court of Appeal took a much narrower view, holding that the purpose was “to protect women who work from the economic costs of pregnancy and childbirth”.

Although the Court of appeal specifically disagreed only as to the purpose of the “legislative scheme”, it is also clear that it disagreed as to the nature of the provision under constitutional scrutiny. It is difficult to imagine how else it could have confined its view on legislative purpose to the circumstances of giving birth. It is as though the Court disregarded the existence of subsection 11(3)(b) and (4)(b) in the “legislative scheme”. This made possible the finding that adoptive parents had been denied equal benefit of the law (para 48) but that there was no discrimination because the legislation was directed to a situation experienced only by women who give birth.

This purpose-finding exercise that focused on only one part of one section of s. 11 produced the type of results predicted by McLachlin J in her argument against the circularity of the Gonthier addition of a “relevancy” test to the s.15 analysis:

>“Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of nondiscrimination under s. 15(1).”

[emphasis added]

13. In Morin ...


>“Relevance can, by definition, only be evaluated as against the purpose of the impugned legislation. Consequently, it fails to take into account the possibility that a distinction that is relevant to the purpose of the legislation may nonetheless still have a discriminatory effect ... Using relevance to define the absence or presence of discrimination raises other difficulties. It is no good, for instance, for a distinction to be relevant to a legislative...
A narrow approach to interpreting the purpose of the impugned legislation was also rejected by the Supreme Court of Canada in Eldridge,\textsuperscript{15} discussed below.

An application to the Supreme Court of Canada for leave to appeal the decision in Schafer has been filed.

C. \textit{Canada Pension Plan}

1. \textit{Survivors' benefits: Law to be heard by Supreme Court of Canada}

As discussed in last year's article, the arbitrary age limit for survivors’ benefits was challenged unsuccessfully under s.15 in \textit{Law v The Minister of Employment and Immigration}.\textsuperscript{16} In its decision, the Pension Appeals Board (PAB) subjected age, an enumerated ground of discrimination, to the type of analysis that has been confined by the Supreme Court of Canada to unenumerated grounds,\textsuperscript{17} and quoted but otherwise appeared not to apply Supreme Court of Canada jurisprudence as to the test for the application of s.15. The PAB also purported to impose a more stringent test for age discrimination than for other enumerated grounds, thus departing from the approach of the Supreme Court of Canada.\textsuperscript{18} The PAB also found that the impugned restrictions were also justified under s.1, although its rationale bears little resemblance to that indicated by current Supreme Court jurisprudence. The Federal Court of Appeal found no reviewable error.

Leave to appeal the \textit{Law} decision has been granted by the Supreme Court, but at the date of this article, the matter has not been heard.

\textit{Contribution rules’ effect on disabled persons; leave denied by Supreme Court of Canada}

As noted in last year's article, the contribution rules that apply only in respect of CPP disability pensions were challenged under section 15 of the \textit{Charter} in \textit{Xinos v. Minister of National Health and Welfare}.\textsuperscript{19} An application to the Federal Court of Appeal for judicial review was unsuccessful. In brief oral reasons, the court concluded that the different contributory requirements for disability pensions did not violate the equality rights section of the Charter and, if they did, were saved by section 1.\textsuperscript{20}

On September 25, 1997, the Supreme Court of Canada refused leave to appeal.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Supra}, fn 1.
\item (1995), CEB & PGR #8574; application for judicial review dismissed: (1996), 196 NR 73 (FCA).
\item See for example \textit{McKinney v University of Guelph} (1990), 76 DLR (4th) 545 (SCC) at 647 and 682.
\item (January 22, 1996), CEB & PGR #8609 CT F.C.A. File No. A-212-96.
\end{enumerate}
\end{footnotesize}
PAB Denies Charter Challenge to CPP Definition of “Spouse”

In *Minister of Human Resources Development v Fisk* 21 the PAB held, by a three-two split, that the definition of “spouse” in section 2 of the CPP, which requires that spouses be of opposite sex, does not violate the Charter.

In *Fisk* an application for survivor’s benefits had been denied because both the applicant and the deceased contributor were male. A Review Tribunal had found, on appeal, that s. 2 violated the Charter, that the words “of the opposite sex” should be read out of the definition, and that the applicant was therefore eligible as a surviving “spouse”. The Minister appealed to the PAB on the sole issue of whether s. 2 was saved by s. 1 of the Charter, conceding that it was discriminatory under s. 15 of the Charter.

The appeal was heard by a panel of five judges. Foisy JA, with Dureault and McMahon JJ concurring, held that the purpose of the survivor’s benefit was to protect individuals likely to have been financially dependent on their spouses against the loss of a breadwinner’s earnings, and that the exclusion of same-sex spouses was rationally connected to this purpose on the basis that same-sex relationships were less likely to result in financial interdependence. Foisy JA found that the exclusion of same-sex spouses was a reasonable limit under s. 1, observing, on the issues of minimal impairment and proportionality, that the courts should be reluctant to interfere with social benefit schemes as complex and intricate as the CPP. In dissent, Chilcott J, with MacIntosh J concurring, found that the goal of the legislation, to alleviate the poverty of surviving spouses, had not been shown to be directed at protecting or supporting “traditional” family units, and that the exclusion of same-sex spouses could not be said to have a rational connection to legislative purpose.

The majority in *Fisk* appeared to have forgotten that the objective that is relevant to the section 1 analysis is the objective of the infringing measure. McLachlin J sounded a warning against over-broad interpretation of objective in *RJR MacDonald Inc. v. Canada*: 22

> Care must be taken not to over-state the objective. The objective relevant to the section one analysis *the objective of the infringing measure*, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. [emphasis added]

The majority also appears to have given undue weight to the discredited notion that complex social benefit schemes should attract an extraordinary degree of judicial deference. 23 In *RJR McDonald*, McLachlin J, in the course of discussing contextual approach, noted that

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21. (September 25, 1997), Appeal CP 4471 [unreported].
23. Judicial deference in section 1 most typically becomes an issue in relation to the second test of the three part proportionality test, particularly when this test is being applied to remedial “social” legislation in which the legislature is making choices about the allocation of scarce resources between different disadvantaged groups. The Supreme Court of Canada, (in *Eldridge*, supra, at N.R. 230-232, paras 85, 86) has accepted that deference to government’s discretion to determine what and how to
... it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge.24

D. Employment Law

Record award for racial harassment on the job

In *Naraine v Ford Motor Co. No.3*,25 a board of inquiry under the Ontario *Human Rights Code* found that there had been significant racial harassment of the complainant, who had been employed at the Ford Motor plant in Windsor. The complainant was ultimately26 awarded reinstatement in employment with full wages, benefits and seniority as of the date of receipt of the decision, damages for lost income and benefits for a period of unemployment just short of two years, retraining and employee assistance counselling to the complainant, $20,000 compensation for infringement of rights, $10,000 for mental anguish, and prejudgment interest.

Pay Equity: First Ontario Victory in Fighting Discrimination-by-Cutbacks

*SEIU Local 204 v Ontario*27 was an application under Rule 14 for a declaration that Schedule J of the *Savings and Restructuring Act, 1996*, which amended the *Pay Equity Act* to discontinue the use of the proxy method of comparison and to cap employers’ financial obligations already accrued under pay equity, infringed ss.15(1) and 28 of the *Charter*. The declaration of unconstitutionality was granted.

Without any particularly clear or detailed analysis, O’Leary J found that:

- the *Pay Equity Act* is remedial “human rights” legislation (p.22)

spend on social programs cannot be absolute:

... members of this Court have suggested that deference should not be accorded to the legislature merely because an issue is a social one or because a need for governmental incrementalism is shown; see *Egan, supra*, at para 97 (per L’Heureux-Dubé J.) and at paras 215-216 (per Iacobucci J.). In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach ... the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. Thus, I stated the following for the Court in *Titreault-Gadoury, supra*, at p.44:

It should go without saying, however, that the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual’s Charter rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down.

the plight of the affected subgroup of women is better than it was before the passage of the Act, but that a disadvantage was effected by the amendment.
(p.27)

"Section 15(2) does not protect affirmative action legislation from attacks from members of the disadvantaged group it was designed to benefit" (p.29-30)

there is no positive obligation on government to relieve inequality, and it could have repealed the whole Pay Equity Act (30-31) but

the government must justify under s.1 the creation of disadvantage to part of the group meant to be benefitted by the Act (33).

The court appeared to find it relevant to the s.1 analysis that "the proxy method was removed ... in the absence of any study on the efficacy of the proxy method in operation and in the absence of any demonstrated problem or any literature concluding proxy is inappropriate".28

The decision contains no comment on the s.28 argument.

The provincial government has announced that it will not appeal the decision.

E. **Education: Useful Jurisprudence from Eaton decision**
The appeal in *Re Eaton and Brant County Board of Education*29 was granted unanimously by the Supreme Court in 1996. The reasons for the decision were released in 1997.

The Court found that the decision of a school board’s Identification, Placement and Review Committee (the IPRC) to place a disabled child in a segregated class rather than let her remain in the general primary school population did not breach s.15 because is lacked a presumption that disabled students would attend regular classrooms, unless those proposing a segregated classroom could establish that a segregated placement would provide a better educational experience than an integrated classroom.

While the result on the specific issue is disappointing, the Eaton decision provides helpful resolution of a problem that was beginning to beset advocates arguing s.15 cases. The decision provides an answer to government’s attempts to confine constructive ("adverse-effects") discrimination to “facially neutral” rules based on stereotypes, or to argue that proof that an impugned government action, legislation or regulations was based on a stereotype, or the perpetrates a stereotype, is a necessary precondition to establish a breach of s.15.

It is no coincidence that stereotyping has been cited as a major evil in s.15 cases addressed by the Supreme Court. This is because the overwhelming majority of these cases have addressed deliberate differentiation because of citizenship, age, sex, etc. In such cases, the respondent government agency knew that it was distinguishing on a ground that might be included under s.15. It rationalized its choice to do so by making

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29. *Supra fn2.*
assumptions concerning the relevant facts, and many of the assumptions were revealed as stereotypes.

By contrast, the doctrine of constructive/adverse effect discrimination and the corresponding duty to accommodate that has been developed first under human rights law and later under s.15 of the Charter of Rights has been developed to address, not the fictitious differences that are the basis of stereotype, but real differences related to personal characteristics addressed by human rights legislation and the Charter. In a constructive/adverse-effects discrimination claim, the claimant group proves the existence of a rule, restriction or requirement, and demonstrates how that rule, restriction or requirement operates as a barrier when applied to the real facts associated with a prohibited ground of discrimination. The classic example, a 6-foot height and 180-pound weight requirement for employment, acts as a barrier to women’s employment because most women are in fact under that height and weight, not because they are stereotypically perceived to be so.

In Eaton, Justice Sopinka for the entire Supreme Court acknowledged that the issue was not only stereotypes but the actual facts concerning the abilities and disabilities of the child in question.

In discussing the application of s.15, Justice Sopinka quoted McIntyre J. (in Andrews) to the effect that “accommodation of differences is the true essence of equality”, and went on

This emphasizes that the purpose of s.15 of the Charter is not only to prevent discrimination by the application of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society ...

The principle object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. [emphasis added]

Justice Sopinka went on to apply his more general remarks to disability:

In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society’s benefits and to accommodate them. ... The discrimination inquiry which uses “the attribution of stereotypical characteristics” reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual


31. Supra, fn 2, at NR 203-204 para 62-63, emphasis added.
characteristics, and reasonable accommodation of these characteristics which is the central purpose of s.15(1) in relation to disability.\textsuperscript{32}

Justice Sopinka’s application of the relevant general principles to disability provides an example which can easily be extended to other grounds of discrimination.

F. S. 15(2): the Latest on “amelioration of disadvantage” from the Ontario Court of Appeal

Section 15(2) of the \textit{Charter} provides:

(2) Subsection (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.

Given the wide range of disadvantages that beset clinic clients, and the wide range of criteria for qualifying for programs that might make their lives better, it is not surprising that advocates will find themselves challenging such programs on occasion.

A recent Ontario Court of Appeal decision has been added to the very few cases in which s.15(2) has been considered.

In \textit{Lovelace v Ontario}\textsuperscript{33} Aboriginal groups not registered as Bands under the \textit{Indian Act} claimed that their exclusion from a profit-sharing arrangement limited to Bands (and certain others) offended s.15. Government successfully appealed a decision in their favour made pursuant to an Application under Rule 14.

The Court of Appeal made some general statements about s.15(2).

We view s.15(2) ... as furthering the guarantee of equality in s.15(1), not as providing an exception to it.\textsuperscript{34}

... government action under s.15(2) should be generously and liberally assessed, consistent with the court's approach to the interpretation of the rights and freedoms in the rest of the Charter.\textsuperscript{35}

Expanding on these remarks, the CA made some initially rather troubling statements about the degree of judicial scrutiny proper to a s.15(2) program:

We also think that judicial review of s.15(2) programs should be limited ... if the court is satisfied that the target of the government's program is a disadvantaged group and the object or purpose of the program is to ameliorate the conditions of that group, the program fits within s.15(2). Nothing in s.15(2) calls on the court ... to assess the effectiveness of the program or the means used to achieve the government's ameliorative object or whether a reasonable relationship exists be-

\textsuperscript{32} \textit{Ibid}, at NR 203-204 para 63.

\textsuperscript{33} (1997) 33 OR (3d) 735, (OCA).

\textsuperscript{34} \textit{Supra} at 752.

\textsuperscript{35} \textit{Ibid} at 754.
tween the cause of the disadvantage and the form of the ameliorative action. If some aspect of the program infringes the equality guarantee, the government’s rationale or justification for the infringement should be considered under s.1 of the Charter.

... 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 s.15(2) that distinguish between or even within groups protected under s.15(1).

Having said the above, the Court of Appeal also noted:

Nonetheless, s.15(2) does not immunize special programs from constitutional review. Even where the substance of the program is authorized by s.15(2), some feature of it may be discriminatory and thus infringe s.15(1). However, it clearly signalled that reactionary challenges by privileged groups would not be uncritically received.

The language and history of s.15(2) seem to militate against ... challenges to s.15(2) programs by members of socially advantaged or privileged groups. [Quoting from *R v Edwards Books and Art Ltd* ... the courts must be cautious to ensure that [the Charter] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.”

Obviously equity-seeking groups might be concerned about the court’s comments relating to “limited” judicial scrutiny. Concerns about some of the above-noted generalizations may be somewhat reduced after close scrutiny of the exercise actually undertaken by the CA in respect of the program at issue. Although the Court’s review started with the statement that “characterizing the object or purpose of a s.15(2) program is the key to its constitutionality” (p.20, para 69), it is arguable that the government succeeded because it was able not only to identify non-discriminatory reasons for the “marker” it used to restrict the program, but to establish that the restriction contributed to the amelioration of disadvantage experienced by Aboriginal people.

While the *Lovelace* decision is somewhat rambling, it is clear that the court found that the objectives of a s.15(2) program had to be constitutionally valid as a part of the furtherance of equality under s.15(1). The court listed the reasons why it found the project “authorized by s.15(2)”:

1. the historical record
2. the project’s reserve base

39. To use the term used by Justice McLachlin in *Miron*. 
3. matters of identification and political and financial accountability, and
4. the Bands' interest and experience in Casino gaming

In respect of the program at issue, the court found that “benefiting only the Bands is the true purpose of the project, and that defining the purpose in this way is entirely consistent with the goals of s.15(2)”\(^{40}\) Items 1, 2 and 4 on the above-noted list establish the government’s constitutionally valid reasons for establishing the project, but they do no more than that. They do not establish constitutionally valid reasons for restricting it. Only item 3 does that. The government clearly convinced the court that restricting profit sharing to Bands was a reliable way to ensure that the money benefitted Aboriginal people and no one else.

The court noted that the membership criteria of the non-registered Aboriginal groups varied, with differing definitions of the terms “Metis” and “non-status Indian”, and differing rules about the membership of people who did not define themselves as Aboriginal. It also pointed out that there was little evidence before the it as to the governing mechanisms of the groups. The court identified “matters of identification and accountability” as differences relevant to the purpose of the project.

Arguably, it would not have been sufficient for the government to rely only on items 1, 2 and 4 in the list above. It was necessary to demonstrate why the restriction at issue contributed to the amelioration of disadvantage experienced by Aboriginal people, and the court noted the existence of that nexus, in a discussion of identification and accountability. Clearly, the court had been satisfied that the restriction was a logical way to ensure that the money flowed to the target group and to no one else.

Arguably, if there had been no evidence adduced by the government that linked the restriction to the furtherance of equality under s.15(1), the court would have dealt with the restriction as a restriction that limited the amelioration of disadvantage experienced by aboriginal people, and that restriction would have had to be dealt with under s.1. As noted above, the court maintained that s.15(2) does not immunize special programs from constitutional review.

The apparent “bottom line”:

1. As ever, objectives which are thoughtfully crafted with an eye to constitutional validity and operational logic can enable the government to operate restricted special programs with impunity. Any challenge will be answered either at the Lovelace stage, a review of the constitutionality of the objectives and the fit of the applicant to those objectives, or at the s.1 stage.

2. A s.15(2) program may be successfully challenged by a member of a disadvantaged group who fits within the Constitutionally valid objectives of the program.

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\(^{40}\) Ibid at 760.
• where the substance of a program is authorized by s.15(1), if "some feature of it (is) discriminatory (it will) infringe s.15(1)." The court appears to hint at the acceptability of an argument that members of privileged groups would not get past the s.15(2) analysis: "The language and history of s.15(2) seem to militate against such challenges ... by members of socially advantaged or privileged groups" (para 65). However, it is clear that if a member of a disadvantaged group proves a feature of the program discriminatory, the government would be required to justify it under s.1.

• the restriction of a program to certain subsets of a disadvantaged group would have to have a constitutionally valid purpose to satisfy the Lovelace analysis.\(^{41}\)

G. Eldridge: Significant Help from the Supreme Court of Canada

The Supreme Court's decision in *Eldridge v British Columbia*\(^ {42}\) is highly relevant and extremely useful to the work of poverty law advocates in an era in which governments seem determined to get out of the business of public service:

• The Supreme Court concluded that, although a legislature may give authority to a body that is not subject to the Charter, the Charter applies to all the activities of government whether or not they may be otherwise characterized as "private" and it may apply to non-governmental entities in respect of certain inherently governmental actions. The Court found that governments should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. This conclusion by the Court is extremely timely, given the growing trend of government to "privatize" core government functions such as social assistance.

• In the context of government refusing to supply a needed service, the Court also provided a detailed review of important issues in constructive discrimination, and some guidance about the burden of proof under s.1.

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41. For example, it appears likely that:

• the program at issue in *Ontario Human Rights Commission v Ontario* (1994) 19 OR (3d) 387 (CA) (discussed in "Poverty Law in Ontario: The Year in Review", Ellsworth, Morrison, Keene, Rapsey, Pearce; (1994) 10 *Journal of Law and Social Policy* 1) would have satisfied the Lovelace analysis if it had been a program to assist blind persons to find remunerative employment, and the restriction in question had been to persons of working age.

• a program such as Wheeltrans, with its broad objectives relating to mobility, would not satisfy the test if it attempted, for example, to restrict itself to "seriously" handicapped" people. The court in *Lovelace* did "not have to determine the question of relative disadvantage to decide this appeal" *ibid* at 760.

42. *Supra*, fn 1.
The three plaintiffs in *Eldridge* were born Deaf. They are fluent users of American Sign Language, but have limited skills in written English and none in spoken English. The problem at issue in *Eldridge* was the failure of the British Columbia health insurance scheme to pay for sign language interpretation for deaf beneficiaries. The plaintiffs, who included a diabetic whose diabetes was not easily controlled and a woman who had experienced the premature birth of twins without being able to communicate with the medical personnel involved, provided compelling evidence as to the need for clear communication between health workers and patients. However, two out of three members of the B.C. Court of Appeal concluded that there had been no breach of section 15.

The majority of the B.C. Court of Appeal chose the narrowest possible definition of the purpose of the health insurance legislation at issue, contrary to the usual principles of statutory interpretation. The purpose of the legislation, according to the Court, was not to make the included health services available, it was to "remove the responsibility to make payment". By using this device, the court was able to locate the plaintiff’s burden outside the ambit of the legislation.43

*Eldridge* was overturned on appeal to the SCC, in a unanimous decision by the full panel, written by Laforest, J.

The Court decided that the legislation itself did not infringe the *Charter*, but that the decision not to fund the service did. Because the decision-makers were hospitals and the BC Medical Services Commission, a considerable part of the decision it devoted to the issue of whether the entities in question were subject to the *Charter* (s.32). The Court found that they were.

In regard to s.15, the Court found that the failure by the government to provide what was needed to ensure that the applicants benefitted equally from a service offered to everyone constituted a denial of equal benefit of the law. In doing so, the Court dealt conclusively with some of the more specious arguments that have been tendered by government in s.15 cases. The Court:

* rejected the argument that failure to provide a service is government "inaction", and cannot be challenged under the Charter:

  [66] Unlike in *Simpsons-Sears* and *Rodriguez*, in the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone ...

  [72] ... the respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that

43. The Ontario Court of Appeal used a similar narrow interpretation of a statute's purpose to defeat a *Charter* claim in Schafer *supra* fn 12.
governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits ... 

[73] In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence. It has been suggested that s. 15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see Thibaudeau, supra, at para. 37 (per L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner ...

[77]... Section 15(1) expressly states, after all, 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 ...” (emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.44

- in defining the purpose of the legislative scheme at issue, took a broad and remedial approach:

[50] ... The inter-locking federal-provincial medicare system ... entitles all Canadians to essential medical services without charge.

[59] ... the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual's physical disability.

[71] ... the system is intended to make ability to pay irrelevant.45

- maintained a generous and purposive interpretation of the Charter:

[53] ... I emphasize at the outset that s. 15(1), like other Charter rights, is to be generously and purposively interpreted. ... As Lord Wilberforce proclaimed in Minister of Home Affairs v. Fisher, [1980] A.C. 319, at p. 328 (P.C., Bermuda), a constitution incorporating a bill of rights calls for “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism,’ suitable to give individuals the full measure of the fundamental rights and freedoms referred to” ... 46

- reiterated that constructive discrimination is prohibited by s.15:

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44. Supra fn 1, at NR 217-224.
45. Ibid, at 204, 211, 220.
46. Ibid at 206.
[60] The only question in this case, then, is whether the appellants have been afforded “equal benefit of the law without discrimination” within the meaning of s. 15(1) of the Charter. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit “distinction” based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of “adverse effects” discrimination.

[61] This court has consistently held that s. 15(1) of the Charter protects against this type of discrimination. In Andrews, supra, McIntyre J. found that facially neutral laws may be discriminatory. It must be recognized at once”, he commented, at p. 164, “... that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality”; see also Big M Drug Mart Ltd., supra, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality.

[62] As a corollary to this principle, this court has also concluded that a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation. ... A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law. As McIntyre J. stated in Andrews, supra, at p. 165, “[t]o approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned”.47 [emphasis added]

- denied the relevance of government’s attempt to argue that particular individuals were not as badly affected as they could have been:

[83] ... it is not in strictness necessary to decide whether, according to this standard, the appellants’ s. 15(1) rights were breached. This Court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights.48

Finally, the Court dealt with s.1:

[84] ... Assuming without deciding that the decision not to fund medical interpretation services for the deaf constitutes a limit “prescribed by law”, that the objective of this decision – controlling health care expenditures – is “pressing and substantial”, and that the decision is rationally connected to the objective, I find that it does not constitute a minimum impairment of s. 15(1).49

47. Ibid, at 211-212, emphasis added.
48. Ibid at 228, emphasis added.
49. Ibid at 230.
In so deciding, the Court once again dealt with some arguments commonly raised by government in s.15 cases. The Court:

- while not ruling on whether it should take a deferential approach in the context of social programs, reiterated that government is obliged to show that it has infringed Charter rights no more than reasonably necessary:

  [85] ... It is also clear that while financial considerations alone may not justify Charter infringements (Schachter, supra, at p. 709), governments must be afforded wide latitude to determine the proper distribution of resources in society; see McKinney, supra, at p. 288, and Egan, supra, at para. 104 (per Sopinka J.). This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups; see Egan, supra, at paras. 105-110 (per Sopinka J.). On the other hand, members of this Court have suggested that deference should not be accorded to the legislature merely because an issue is a “social” one or because a need for governmental “incrementalism” is shown; see Egan, supra, at para. 97 (per L’Heureux-Dubé J.) and at paras. 215-216 (per Iacobucci J.). In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the Oakes test under a deferential approach. It is, therefore, unnecessary to decide whether in this “social benefits” context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted.

  [86] At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals.50

- dismissed a “floodgates” argument as purely speculative:

  [92] ... To deny the appellants’ claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled’s goal of a barrier-free society distressingly remote.51

II. HOW TO GET THERE FROM HERE

A. New Legislation; New Needs for Litigation on Behalf of Poor Clients

There have been years when advances in equity jurisprudence could be used to persuade government to amend or repeal discriminatory provisions in legislation and regulations, or to alter practices. However, in the past few years, government has afforded no opportunities for dialogue, despite continued efforts on the part of communities.

To the continuing refusal of the provincial government to listen to affected communities has been added an unprecedented wave of new legislation affecting all core areas of Clinic practice. The nature of the new legislation is also unprecedented. Overwhelmingly, it is harsh and punitive, with wholesale roll-backs of rights pre-

50. Ibid at 231-232.
51. Ibid at 236.
Equity Law for Clinic Advocates: A 1997 Review

Previously considered fundamental, and severe cuts to the number of important issues which can be reviewed effectively by an administrative tribunal. The provincial government appears increasingly willing to ignore Charter and human rights issues in legislation and social policy, and to simply wait for challenges. Clinics will find themselves forced into the courts more than ever before, as there is no other effective way to address serious breaches of the fundamental rights of poor people.

B. Getting Action from the Ontario Human Rights Commission

Advocates with an interest in human rights have for some years been seriously concerned about dysfunction within the Ontario and, to a lesser extent, the federal Human Rights Commissions. In respect of Ontario in particular, there is significant evidence of lack of application of substantive human rights jurisprudence, lack of concern for human rights in general, and an unhelpful and dismissive attitude toward complainants in particular.

It is probably no coincidence that breaches of the Human Rights Code are being litigated in the courts or in other tribunals, whenever the client has a cause of action independent of the human rights complaint. However, in the vast majority of cases, where getting

52. For an analysis of this trend in social assistance legislation, see I. Morrison, "What Does Bill 142 Mean for Clinic Practice?" Clinic Resource Office, October 1997.


54. It is now established that both courts and administrative tribunals have a duty to apply human rights legislation where it is relevant to cases properly before them. Examples have arisen:


in an application for a declaration in regard to an insurance contract: Re London Life Insurance Co. and Ontario Human Rights Commission et al (1985), 50 OR (2d) 748

in an application under s. 60 of the Trustee Act RSO 1980, c. 512: Canada Trust Co. v Ontario Human Rights Commission (1990), 74 OR (2d) 481 (Ont. CA)

at SARB: SARB M-02-21-31 (Nov. 7, 1994; Cardinal) [CRO # SA/D-1925]


Information and Privacy Commissioner: Order P-540 (Sept.24, 1993)

On the obligation of tribunals to apply human rights legislation, see Douglas College v. Douglas/Kwantlen Faculty Association et al (1990), 77 DLR (4th) 94 (SCC), review of jurisprudence (at 116-119) by Madame Justice Wilson; Re ONA and Etobicoke General Hospital 14
the complaint before a court or other tribunal is unfeasible, attempting to get the Commission to deal with the matter appropriately remains the only route to redress.

The Commission's deficiencies are such that an unrepresented complainant has almost no chance of a favourable result. Further, taking on a complaint file is unnecessarily labour-intensive, as it is imperative for the complainant's counsel to take on the following responsibilities:

- ensure that the complaint is properly drafted and served on all parties (the Commission's record on this is spotty);
- undertake to collect and preserve any evidence, names, addresses and statements of witnesses, etc (the Commission does not investigate promptly, and may take years to do so);
- ensure that the Commission has a written direction from the client in regard to who the Commission should communicate with directly (it is advisable for counsel to take on this role);
- regularly correspond with the Commission to ask that the matter be dealt with promptly, get updates on the investigation, and reiterate interest in the complaint;
- get an up-to-date understanding of the relevant caselaw (the Commission cannot be relied upon);
- reduce any communication to or from the Commission to writing, and copy both the file and the Commission (miscommunication and non-communication is rife); and
- take an active part in protecting the client's interests in settlement negotiations.

Finally, it is unfortunate but true that judicial review may be necessary to get appropriate attention to a complaint from the Ontario Human Rights Commission. The only bright note is that the caselaw is at least reasonably favourable. To date, there has been considerable success in judicially reviewing inappropriate dismissals of complaints by the Commission. Recently, a clinic whose client's complaint of sexual harassment had been dismissed by the Commission, because of the Commission's opinion that the matter would have been more appropriately dealt with in a grievance arbitration, filed an application for judicial review, upon which the Commission reconsidered its decision. The complaint is now being investigated.

OR (3d) 40 (Div. Ct); Corner Brook Council v CUPE (19 Feb 1996) (Nfld CA) Yorkton Union Hospital v Sask. Union of Nurses [1993] 7 WWR 129 (Sask. CA).

55. The Commission must allow complainants to fill in their own complaint forms where they wish to do so. The Divisional Court has indicated that while the Commission may bring insufficiencies to the attention of complainants, it may not dictate what goes into the complaint form: Bridges v Ont. Human Rights Commission (1991) unreported decision, Ont. Ct. Gen. Div. File No. 157/91.


57. Clinic counsel who are considering judicial review of the Commission may wish to contact the CRO and ask to be put in touch with clinic counsel on record in CRO file # 97012359.