1997

Equity Law for Clinic Advocates: The 1996 Year in Review

Judith Keene
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THE 1996 YEAR IN REVIEW

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INTRODUCTION
This article reviews developments in 1996 with respect to two areas of equity jurisprudence. It will examine the substantive law under section 15 of the Canadian Charter of Rights and Freedoms and federal/provincial human rights legislation, in addition to the jurisdictional and procedural issues involved in asserting clients' equity rights. The article also includes a brief discussion of the context in which public interest litigation takes place, as an adjunct to strong community organization and law reform efforts.

This article is organized under the following three headings:

I. Recent equity jurisprudence

II. How to get there from here: procedural issues relevant to achieving legal remedies

III. Litigation is not enough: the importance of maintaining a variety of strategies for promoting equality rights

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I. RECENT EQUITY JURISPRUDENCE

As noted in a last year's review article,¹ the Supreme Court of Canada repeatedly pointed to human rights law as an aid in the analysis of section 15 of the Canadian Charter of Rights and Freedoms.² In Andrews v. Law Society of British Columbia,³ Justice McIntyre addressed the definition of discrimination under section 15 with reference to the law as developed under federal and provincial human rights legislation. He stated that discrimination under section 15 would "be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts".⁴ The principles which had been applied under that legislation were "equally applicable in considering questions of discrimination under s.15(1)".⁵ For this reason, the review below will be organized by subject, rather than whether the equity argument was made under section 15 of the Charter, or under human rights legislation.

A. Social Assistance

1. Aged-based welfare restrictions

The constitutionality of three major age restrictions in Ontario welfare regulations was litigated in 1996.

(a) Ineligibility of applicants under 16 year of age

In February 1996, the Ontario Divisional Court released its long awaited decision in Mohamed v. Metropolitan Toronto.⁶ The appellant was a 15-year-old Somali refugee without family in Canada who had applied for General Welfare Assistance and was determined categorically ineligible because of her age. The Court accepted that the denial itself constituted a prima facie violation of subsection 15(1), being discriminatory on the grounds of age, but found the law justified under section 1. In particular, the Court found that the reasonableness of the law had to be assessed in the context of all legislation dealing with the care of children, including the Child and Family Services Act.⁷ The Court

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4. Ibid. 19.
5. Ibid. 18.
seemed particularly influenced by the fact that the Children's Aid Society was prepared to take the appellant into care at all times, even though the appellant did not want to be taken into care and there was no evidence that this was desirable or necessary for her. The Court of Appeal has granted leave to appeal this decision.8

(b) Conditional eligibility of those 16–18 years of age
Subsection 7(4) of the General Welfare Assistance Act9 prohibits a person over 16 but under 18 from receiving assistance as a single adult unless “special circumstances” exist. In SARB L-09–21–43B,10 the Ontario Social Assistance Review Board11 found no special circumstances but held that subsection 7(4) violated section 15 of the Charter. The Ministry of Community and Social Services has appealed the decision.12

(c) Ineligibility of those 18–21 years of age living at home
In at least three cases SARB has found that ineligibility for welfare of persons between 18 and 21 living at home violates section 15 of the Charter. SARB has ruled that paragraph (b) of the definition of “single person” in the General Welfare Assistance Regulations13 violates the Charter in at least some situations. The appellant in SARB K-10–13–2214 was a 20-year-old employable person living with her parents. She was not dependent on them, a fact confirmed in a previous SARB decision. SARB held that denial of benefits in these circumstances violated section 15 of the Charter. Even though Ministry counsel conceded the violation and that it could not be saved by section 1, SARB held that it could decide Charter issues on a case-by-case basis only as it has no jurisdiction to find regulatory provision to be of no force or effect in all circumstances. The decision therefore leaves open the question of whether the section is constitutional in some circumstances with respect to “dependent adults” of this age.

The second SARB decision holding that the definition of “single person” under the regulations violates the Charter, SARB # L-08–20–15,15 involved an appeal——

10. (27 May 1996; Soloman, Fyles, Shilling) [unreported].
11. Hereinafter “SARB”.
14. (21 April, 1993; Bradbury, Novac) [unreported].
15. (28 October 1993; McCormick, Martin) [unreported].
The appellant whose parents received Family Benefits disability assistance and were not entitled to an allowance for a dependent adult. As in the previous SARB decision on this point, the Ministry conceded the violation.

In the third SARB decision on this point, the appellant was an employable 18-year-old who had left home but returned when she became pregnant. SARB again held that the definition of “spouse” in subsection 1(1) of the regulations violated section 15, but found it was saved by section 1 because the appellant had been accepted back into her family home after a short period away. SARB held that the objective of assessing the appellant's need for assistance in the context of the family unit as a whole, while attempting to ensure that limited resources are directed to those most in need, is of sufficient societal importance to override a constitutionally protected right, as is the objective of ensuring that the needs of young persons are met in a manner appropriate to their age and circumstances. This decision is presently before the Ontario Divisional Court.

2. Welfare cuts

On July 21, 1995, the Ontario government announced that social assistance benefits would be decreased by 21.6% effective October 1, 1995. By Ontario Regulations 384/95 and 385/95, the basic needs allowance and the maximum shelter allowances under both the Family Benefits Act and the General Welfare Assistance Act were reduced by 21.6%.

In the last week of September 1995, twelve social assistance recipients applied to the Ontario Divisional Court for judicial review of the rate cuts.

At the time the application was heard, two applicants were single unemployed persons, one of whom was temporarily disabled and was acknowledged by the Welfare Administrator as unable to seek work. Seven applicants were sole-support mothers with young children. One applicant was a married disabled person with a spouse and two children. Two applicants were unemployed persons with spouses, one of whom had three children (two with disabilities). The other unemployed person with spouse had two children, one so severely disabled that she was effectively the cause of her parents' unemployment. That child would have to be cared for in a hospital critical care unit at a cost of approximately $1,000.00 per day if, as foreseen, the cuts made it impossible for her parents to meet the expenses of caring for her at home.

The uncontradicted evidence showed that all of the applicants had modest accommodation at rents at or below the local average. The effect of the cuts was such that, after rent was paid, the single disabled person had $3.00 per month, the other single unemployed person had $20.00 per month, and the parents (each household with an average of two children) had an average of $285 per month. In each case, the left-over amount had to cover all other expenses: food, clothing, fuel, utilities, telephone, health necessaries and transportation.

The applicants argued that the rate cuts were *ultra vires* the legislation, that they contravened Ontario's undertaking under the *Canada Assistance Plan*, and that the they violated sections 7 and 15 of the *Charter*. The section 7 argument focused on the obvious threat to the applicants' security of the person. The section 15 argument focused on the fact that the affected social assistance recipients — a group in which temporarily disabled people, children, the aged, and sole-support parents are grossly overrepresented — were being forced to bear a disproportionate burden of government austerity measures compared to other residents of Ontario.

The applicants applied for an interim order, on an emergency basis, to prohibit the regulations from coming into effect on October 1. That part of the application was unsuccessful. However, in her endorsement Justice Boland indicated that she was "satisfied that there are serious issues to be tried involving constitutional and administrative principles". She arranged for a special court to sit in early November 1995 so that the full application for judicial review could be heard by three judges of the Divisional Court.

Of the three-judge panel of the court, Justices O'Driscoll and O'Brien found in favour of the government in respect of every argument. There was a partial dissent by Justice Corbett. Each member of the panel wrote a lengthy and difficult-to-follow judgement, and there was considerable disagreement as to the reasons for even the concurring decisions.

Despite the fact that the cuts were done by regulation, Justice O'Driscoll found that there was no government action that could attract constitutional scrutiny under section 32 of the *Charter*. He also relied heavily on American jurisprudence to the effect that the state has no positive duties to its citizens.

Justice O'Brien said that it was unnecessary to deal with the "no government action" argument. He seemed to suggest that section 7 could protect some economic interests, but relied on other lower court decisions denying the right to subsistence. He appeared to believe that poverty, rather than receipt of social assistance, had been argued as a ground of discrimination. He seemed to find that poverty could not be a ground "on this factual basis" because it is not immutable.
Justice Corbett agreed without reasons that there was no violation of section 7. She did not comment on the main section 15 argument, but instead focused on the fact that disabled and elderly people were treated differently under General Welfare than they are on Family Benefits. She found this treatment discriminatory. She also noted that the government’s apparent rationale for sparing disabled and elderly people from the cuts was that they cannot work. She noted that sole-support parents with children of “pre-school age” (which she did not define) also could not work, and concluded that failing to include this group among those spared was discriminatory. Justice Corbett would have restored the pre-cut level of entitlement to all members of these groups.

No member of the panel commented on the parens patriae argument that had been raised on behalf of affected children.

The main areas of agreement were a general disinclination to “interfere” with the role of the legislature, and the adoption of a circular definition of the purpose of the General Welfare Assistance Act and the Family Benefits Act: to provide whatever amount Cabinet sets for whomever Cabinet says should get it.

Leave to appeal this decision was denied on April 30, 1996, with Justices Finlayson, Carthy and McKinley of the Court of Appeal providing no reasons for refusing leave. A subsequent application for leave to appeal to the Supreme Court of Canada was dismissed by Chief Justice Lamer and Justices Gonthier and Iacobucci, without reasons, on December 5, 1996.19

3. “Spouse in the house”

The “spouse in the house” rule has traditionally been one of the most contentious and litigated issues in social assistance law. In 1987, the Ontario government promulgated a new regulatory definition of “spouse” under the General Welfare Assistance Act and Family Benefits Act. These regulations reflected the settlement of a Charter challenge that had been brought against the old “spouse in the house” rule in the mid-1980s by the Women’s Legal Education and Action Fund. A definition of “spouse” which was virtually identical to the pre-1987 Ontario definition was struck down by the Nova Scotia Supreme Court in R. v. Rehberg.20

The 1987 regulations provided a definition of “spouse” for social assistance purposes that was in line with the Family Law Act21 which provides that a couple not otherwise deemed spouses because of marriage or parentage may cohabit

for three years before the imposition of financial obligations. The 1987 regulations also provided that sexual factors were not to be considered when determining whether persons are spouses. When developing the 1987 rule, the Social Assistance Review Committee — and ultimately the government — specifically rejected a rule which would deem relationships to be spousal where there was economic contribution from one person to another prior to three years of cohabitation.

The 1987 definition was in effect in Ontario until October 1, 1995. As of that date, clause (d) of the definition of “spouse” under section 1(1) of both the General Welfare Assistance Regulations and the Family Benefits Regulations was changed to read:

(d) a person of the opposite sex to the applicant or recipient who is residing in the same dwelling place as the applicant or recipient if,

(i) the person is providing financial support to the applicant or recipient,

(ii) the applicant or recipient is providing support to the person, or

(iii) the person and the applicant or recipient have a mutual agreement regarding their financial affairs, and

the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation.22

The regulations were also amended in October 1995 to impose a presumption that two persons of the opposite sex are spouses whenever they live in the same dwelling place, providing that

... unless the applicant or recipient provides evidence to satisfy the Director to the contrary, it is presumed that if a person of the opposite sex to the applicant or recipient is residing in the same dwelling place as the applicant or recipient, the person is the spouse of the applicant or recipient.23

Effective October 1, 1995, the government also amended the regulations under the General Welfare Assistance Act and the Family Benefits Act to provide that no sole support parent could be eligible for social assistance unless he or she


was living apart from his or her "spouse" "by reason of separation with no reasonable prospect of reconciliation." 24

Early in 1996, four sole-support mothers who were cut off Family Benefits pursuant to the amendments filed an application for judicial review.

At the time each was disqualified, the women had been living in the same residence with a man for less than one year. None of the men is the father of any of the applicants' children, and none has any legal obligation to support the woman or the children with whom they live. At the time each woman made the decision to live with a co-resident, a vital consideration was whether she could continue to receive subsistence income until she could become self-supporting or until a new family was established. Each woman discussed the matter with her welfare caseworker, making her decision based on the knowledge that she could co-habit without losing her eligibility. The caseworker reduced each woman's allowance, deeming the man to be contributing to household expenses, but did not eliminate the allowance because the former rule allowed a three-year period before "spousal" status was established.

The applicants in *Falkiner et al. v. Attorney General (Ontario)* 25 argued that the amended regulations create a definition of spouse that can be satisfied with evidence of "social and familial aspects of the relationship...(that) amount to cohabitation". The new definition can be satisfied without the evidence of economic support that had been held by the Court of Appeal 26 to be an essential element of "cohabitation", because that aspect has been removed from consideration by the specific wording of section 1(d)(iii). It would appear therefore that no more than evidence of affection, service and the acceptance of mutual duties (exclusive of economic support) is necessary for a situation to "amount to cohabitation".

This argument was buttressed by evidence concerning the application of the regulations, including affidavits from disabled recipients who had been disqualified because of living with a care-giver, or with a landlord of the opposite sex, and from an elderly recipient who had been disqualified because he had given shelter to his sister-in-law and her son when they were evicted from their previous accommodation.

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The applicants also argued that the regulations breached the Ontario Government's obligation under the *Family Benefits Act* and the *General Welfare Assistance Act* to provide assistance to persons in need. The applicants also argued that the new rules violated sections 7 and 15 of the *Charter*.

The applicants argued that the new rules infringe section 7 for the following reasons:

- the increased likelihood that social assistance recipients will be charged with fraud under the Criminal Code on vague and ill-defined grounds;
- the attendant privacy deprivation infringes their liberty and security of the person;
- the amendments restrict the liberty and freedom of social assistant recipients to form conjugal and non-conjugal relationships even though these relationships may be in the best interests of the recipients and their children; and
- the recipients are deprived of the basic means of subsistence and therefore of their right to security of the person when attempting to form relationships with people of the opposite sex, even though they receive no support from these people and their basic needs remain unchanged.

The applicants also argued that the government violated their rights under section 7 by making the new rules apply even to those people who entered into living arrangements relying on the old rule — which permitted them to live with a person of the opposite sex for three years without affecting their benefits.

In respect of section 15, the applicants argued that the impugned amendments discriminate against social assistance recipients, women (specifically poor single mothers), and the children of social assistance recipients for the following reasons:

- the new rules allocate social assistance benefits to needy persons on the basis of a definition of “spouse” which does not apply to any other group in society, a definition which is far broader than the definitions of spouse used for the purposes of the Ontario *Family Law Act* and virtually all other purposes, including tax laws;
- expert evidence showed that ninety-five percent of single parents on social assistance are women, and that the new rules will force single mothers, who already face the highest poverty rates of any group in Canada, into greater economic dependence on men — while taking away choice in their personal relationships; and
expert evidence also indicated that the financial consequences of the new rules will be disastrous on children since they depend upon the social assistance provided to their mothers; because of the chilling affect of the new rules, many children will be deprived of the possibility of developing a new family relationship with an adult man.

A split decision was released October 30, 1996, with the majority (Justices Borins and Saunders) dismissing the application on the basis that the applicants lacked standing and that the application was premature. They did not express an opinion on the merits of the Charter argument.

In dissent, Justice Rosenberg held that the case was properly before the Court and, further, that the new definition violates section 15 of the Charter. He also found that these violations were not "demonstrably justifiable in a free and democratic society" and therefore could not be saved under section 1. Justice Rosenberg criticized the government's arguments as to the meaning of the regulation, and emphasized the basic fact that a "man in the house" under the new regulations had no legal obligation to provide support and could not be forced to provide support or to apply for welfare as part of a "family" unit.

Although the only justice who considered the merits of the case ruled the new definition of "spouse" unconstitutional, because of the position of the majority concerning procedure, thousands of households affected by the impugned regulations must each bring appeals to SARB. To compound the problem, the Court of Appeal has previously stated that SARB is entitled to no deference from an appellate court even with respect to the interpretation of its own legislation and regulations,27 much less in regard to its opinions on constitutional questions.28 People struggling to maintain subsistence will therefore be affected by a seemingly unconstitutional regulation for years to come.29 Falkiner has been appealed.

4. Constructive discrimination against disabled recipients

In 1996, the Nova Scotia Supreme Court rejected a Charter challenge to Family Benefits regulation changes affecting disabled recipients. In Way v. Covert,30 the disabled applicant had been receiving a shelter allowance while living with her brother and sister-in-law. The regulations were amended to provide that a

29. See discussion in Part II below.
person living with a relative (as defined by the regulations) was not eligible for a shelter allowance unless the relative’s income fell below a prescribed level. The applicant’s brother was disabled, but the family exceeded the income cut-off when his wife’s income was included. Without the shelter allowance, the brother and sister-in-law were unable to support the applicant and testified that she would have to be institutionalized — at a far greater cost to the taxpayers. The applicant argued that the effect of the regulation discriminated against her on grounds of disability. Justice Gruchy rejected this argument, stating that the disadvantage suffered “is not the result of her personal characteristics, but rather by reason of her ‘family income’”. He went on to hold — despite there being no evidence to support the reasonableness of the regulation — that he could not second-guess the government’s decisions. He also rejected an argument that the regulations were ultra vires Nova Scotia’s Family Benefits Act.

In making this decision, the court illustrated a failure to understand the concept of constructive discrimination. Evidence adduced in this case — but not referred to by the Court — showed that 80% of people affected by this regulatory amendment were disabled. This was the basis for the adverse impact claim based on disability. Way is under appeal.

5. 90-day residency requirement for social assistance
The British Columbia government has engaged in a very public dispute with the federal government over a 90-day residency requirement before new entrants to the province are eligible for social assistance. In the first round of legal challenges to this decision, the British Columbia Supreme Court struck down the regulation imposing the requirement as ultra vires the B.C. Guaranteed Income For Need Act. Justice Spencer held that even given a broad reading of the purposes of the enabling legislation, it could not be read as permitting the executive branch to discriminate against any class of “persons in need” it chose, no matter the reason. Because of this finding, Justice Spencer did not rule on a Charter argument advanced in the same case.

The British Columbia government has reintroduced this measure and it appears that a further court challenge will proceed. The administrative law argument relied on by Justice Spencer has been used in several cases in Ontario without success, but it has never been unequivocally rejected. This decision raises the possibility of further arguments of this nature.

31. Also referred to as “adverse effects” discrimination. See discussion in J. Keene, supra, note 1.
32. Federated Anti-Poverty Groups et al. v. British Columbia (3 October 1996), (B.C.S.C.) [unreported].
B. (Un)Employment Insurance

1. Parental benefits

In *Schafer v Canada (Attorney General)*, two Ontario couples challenged the amended parental benefit provisions in the *Unemployment Insurance Act*. The provisions authorized a total of twenty-five weeks combined maternal and parental benefits, but limited adoptive parents to 10 weeks of benefits. Subsection 11(7) granted 5 weeks of additional benefits to an adopted child with a medically-certified "condition", but only for children over the age of 6 months at the time of adoption. Justice Cameron of the Ontario Court (General Division) held that the provision of shorter leave to adoptive parents was discriminatory and not saved by section 1.

The court held that the provisions denied equal benefit of the law to adoptive parents and, indirectly, to adopted children. The court held that status as an adoptive parent or adoptive child were analogous grounds (although finding the status as an adoptive family was not), and that there was discrimination under subsection 15(1) on grounds of age and status as an adoptive parent or child.

The discrimination was not saved by either subsection 15(2) or section 1. The court rejected a section 15(2) argument, finding that even if maternity benefits have as their object the amelioration of disadvantage to pregnant women and women who have given birth, there was insufficient rational relationship between the legislation and the cause of the disadvantage. The court likewise rejected the argument that a government program could be saved from section 1 scrutiny upon mere proof that it was directed toward ameliorating disadvantage.

The court ruled that the evidence established that maternity benefits were used predominately for the care of children and family formation. Although the court did not enlarge upon this point, it appears that, given the actual use of the benefit, the government was expected to rationally justify a differentiation between adoptive child care and family formation and care and family formation after the birth of a child — and that it failed to do so.

The court ordered that subsection 11(7), the age limitation, be ‘read out’. As for the other provisions, the court ordered the ‘reading in’ of a phrase reflecting adoption as well as pregnancy and birth. The court ordered that the ‘reading in’

34. R.S.C. 1985, c.U-1, as amended, ss. 11(3), 11(4) and 11(7).
35. *Supra*, note 33 at 532.
36. *Ibid* at 533.
be suspended for ten months to provide Parliament with a reasonable opportunity to fashion its solution to the discrimination, noting the “complex legislative scheme” of the Unemployment Insurance Act.

2. Sexual harassment as “just cause”
(UN)Employmen
t Insurance Umpires and judges of the Federal Court of Appeal have not been noted for their understanding of equity law.37 An exception to this general rule can be seen in the decision of the Federal Court of Appeal in Bell v. Attorney General (Canada),38 where the court reviewed a case in which a woman had left employment because of sexual harassment by her employer’s boyfriend. The Court noted that the Board of Referees, by requiring that there be “urgency or necessity” for the employee to leave — and finding that the work situation was not “so critical that she had no real option but to quit” — had applied too stringent a test. In addition, the Board had never made a finding as to whether sexual harassment had occurred. The matter was referred back to the Board for rehearing.

C. Canada Pension Plan
As with (UN)Employment Insurance, the appeal system under the Canada Pension Plan39 is not noted for decisions that display any understanding of equity law. There have been no notable exceptions this year.

1. Survivors’ benefits
To qualify for a survivor’s benefit, a spouse must be over the age of 35, have dependant children, or be disabled. This arbitrary age limit was challenged unsuccessfully under section 15 in Law v The Minister of Employment and Immigration.40 In its decision, the Pension Appeals Board41 subjected age, an enumerated ground of discrimination, to the type of analysis that had been confined by the Supreme Court of Canada to unenumerated grounds,42 and

37. See, for example, the decision of the Federal Court of Appeal in Canada (Attorney General) v. Faltermeier (1995), 128 D.L.R. (4th) 481, in which the Court failed to appreciate the constructively discriminatory effect of s.14 on women who are unavailable for work because of an obligation to care for sick children.
39. Hereinafter the “CPP”.
41. Hereinafter the “PAB”.
quoted but otherwise appeared not to apply Supreme Court of Canada jurisprudence regarding the test for the application of section 15.

The PAB also imposed a more stringent test for age discrimination than for other enumerated grounds, thus departing from the approach of the Supreme Court of Canada. The PAB also found that the impugned restrictions were justified under section 1, although its rationale bears little resemblance to that indicated by current Supreme Court jurisprudence. The Federal Court of Appeal found no reviewable error.

2. The effect of contribution rules on disabled persons

The disability pension scheme with the CPP is subject to contribution rules that apply only in respect of disability pensions. It is arguable that these provisions are discriminatory, contrary to section 15 of the Charter, as they impose a disadvantage on disabled contributors not imposed on other contributors to the CPP. Only disabled contributors are subject to a 'recency' test in that their contributions must have been made within a certain time frame. Only disabled contributors have their contributory period determined on the basis of a "deemed" event (eg. the "deemed disability date") rather than an actual event (eg. retirement, death, etc.).

The most recent decision case involving a section 15 challenge to CPP disability provisions is Xinos v. Minister of National Health and Welfare. In that case, the appellant had made CPP contributions from 1966 to 1978, but had not been in Canada between 1979 and 1988. Shortly after returning to work in Canada in 1989, he was injured. He was denied benefits on the basis that he did not meet minimum contributory requirements. The Charter challenge here focused on the 'recency' test.

The PAB rejected the challenge, holding that while retirement benefits were available to all contributors who met basic requirements (whether disabled or not), disability benefits were additional benefits available only to the disabled and therefore the view that the disabled were disadvantaged by the benefit scheme could not be supported. In the alternative, the PAB held that any violation of section 15 would be saved by section 1 as the different policy objectives for retirement and disability pensions justified different contributory requirements. It is instructive to compare the reasoning of the PAB in this decision with that of the Supreme Court of Canada in Battlefords and District

43. See, for example, McKinney v. University of Guelph (1990), 76 D.L.R. (4th) 545 at 647 and 682 (S.C.C.).

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Co-operative Ltd. v Gibbs et al.,\(^{45}\) below. An application to the Federal Court of Appeal for judicial review of Xinos has been filed.\(^{46}\)

D. Workers’ Compensation

In British Columbia, an appellant filed a section 15 challenge to a provision of that province’s Workers Compensation Act that denied the continuation of a “widow’s benefit” to widows who remarried or became involved in a “common-law relationship” prior to April 17, 1985. Spouses of both sexes who remarried or lived with a partner after that date were not subject to disqualification. The decision in Griggs v. British Columbia\(^{47}\) is notable for the court’s struggle with a matter which alleged more than one ground of discrimination. The grounds cited were sex, marital status and age, and the Griggs decision focused in excruciating detail on the question of the correct ground of discrimination.

In relation to the claim of sex discrimination, the court found that the class of affected individuals included “invalid men”, and that “invalid men’s” pensions were not terminated upon their remarriage.\(^{48}\) Astonishingly, the court declined to consider this situation discriminatory, applying the “similarly situated” test rejected by the Supreme Court in Andrews.

The court ruled that the discontinuation did not constitute age discrimination, despite finding that the affected class was disproportionately older than those receiving benefits today. The court appeared to have trouble, as did the court in Law,\(^{49}\) accepting the Supreme Court’s approach that age is an enumerated ground, and that the application of section 15 is relatively straightforward in such situations.

Ultimately, having rejected the claims of age and sex discrimination, the court found discrimination on the basis of marital status.

The disentitling event predated the effective date of section 15 of the Charter; however the court decided that this did not bar relief as the disqualification created a continuing disadvantage that resulted in a “current violation”.\(^{50}\)

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48. Ibid at 17.
49. Supra, note 40.
50. Supra, note 48.
E. Access to rental accommodation and services

1. Last month's rent as constructive discrimination

A board of inquiry under the Ontario Human Rights Code has ruled that a landlord breached the Code when he refused to rent to a complainant because she was 16 years old, on welfare, and welfare refused to prepay last month's rent.

In Garbett v Fisher, the complainant had been living on the street since she was 13 because of the regulatory bar to persons under 16 obtaining welfare. She planned to rent a place to live and return to school as soon as she turned 16. After qualifying for General Welfare she and a friend, who was also on welfare, viewed an apartment owned by Gustav Fisher. They completed an application form and paid a deposit. Ms. Garbett then reported to her welfare worker, who phoned Mr. Fisher to obtain details of the rental agreement. The worker testified that Fisher asked if Welfare would pay the last month's rent. He was told that Metro Toronto no longer provided last month's rent to welfare recipients. Fisher said he had decided not to rent to Garbett because she was too young.

Ms. Garbett went to Fisher to try to persuade him to change his mind, or to get back the deposit. Fisher called Garbett and her friend "bums", "thieves", and "liars" and refused to return the deposit. Garbett eventually recovered the deposit by suing in Small Claims Court.

The landlord gave evidence that he had rented to under-eighteen tenants and to people on welfare in the past. The landlord gave three reasons for his refusal to rent to Garbett: first, a claim (rejected by the board on a finding of fact) that the complainant had stolen the deposit receipt without leaving a deposit; second, that he had been advised that he should not rent to "under age" tenants without obtaining the name of a guarantor; and third, that he had a policy of requiring last month's rent in advance to prevent financial loss.

In a decision that reflects an unusual understanding of the realities of life for welfare recipients, the board found that age was one of the reasons for the decision not to rent. In addition, the board pointed out that a policy of requiring last month's rent, while not prima facie discriminatory, amounted to constructive discrimination in these circumstances because it had a disproportionately adverse effect on welfare recipients. Ms. Garbett was awarded special damages for loss arising out of the infringement and $2,500.00 for loss of dignity, emotional suffering, and loss of the right to be free from discrimination.

In contrast to the *Griggs*, the *Garbett* decision illustrates the familiarity of human rights tribunals in dealing with multiple grounds of discrimination without insistence on finding the reason for the respondent's actions.

Note that the Ontario government is attempting to legislatively restrict the impact of human rights legislation on accommodation rights for poor people. In its new and misleadingly-named *Tenant Protection Act*, it has proposed an amendment to the *Code* that would allow landlords to use

in the manner prescribed under this Act income information, credit checks, credit references, rental history, guarantees or other similar business practices which are prescribed in the regulations made under this Act in selecting prospective tenants.  

It remains to be seen how this clause will appear in its final version and how it will be interpreted.

2. **Insurance benefits: sexual orientation and disability discrimination**

Two 1996 human rights decisions, both involving employees' insurance benefits packages, are worthy of mention. In *Ontario Human Rights Commission and Dwyer v. Metropolitan Toronto,* an Ontario human rights board of inquiry ruled that the limitation of employee spousal benefits to spouses of the opposite sex contravened both the *Code* and the *Charter.* The board found that the definitions of "spouse" and "marital status" in the *Code* must be read down so that they would not be confined to opposite-sex spouses.

*Battlefords and District Co-operative Ltd. v. Gibbs et al.* dealt with an employment health insurance policy which provided income replacement for mental disability which terminated after two years unless the recipient was hospitalized. No such restriction was placed on persons unable to work because of physical disability. A board of inquiry under Saskatchewan's human rights legislation found the policy discriminatory. That decision was unanimously upheld by the Supreme Court of Canada.

A major issue in *Gibbs* was how comparisons should be made in these circumstances. The employer made the following arguments:

- The plan treated all employees equally prior to the materialization of risk of disability, in that they were all given similar protection from future contingencies; therefore there was no discrimination.

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53. At s.200.

54. (September 27, 1996) (Ont.Bd.Inq.) [unreported].

55. *Supra,* note 45.
The purpose of human rights legislation was to protect disabled persons from less favourable treatment than the able-bodied. Thus the board of inquiry made the wrong comparison. Instead of comparing the situation of employees unable to work because of physical disability with those unable to work because of mental disability, the board should have considered all disabled employees as one class, comparing their situation with that of non-disabled employees.

Protection against discrimination because of disability should be more restrictively interpreted than other grounds because, while there is history of invidious distinction between one race and another, between one sex and another, and between one religion and another, there is no history of disabled individuals treating other disabled individuals unfairly.

The Supreme Court unanimously dismissed all of the above arguments, comparing the situation of employees unable to work because of physical disability and those unable to work because of mental disability. In doing so, the court considered:

- that some human rights legislation (and section 15 of the Charter) specifies both physical and mental disability;
- that there is a history of disadvantage to persons with mental disabilities; and
- that the court's own jurisprudence that holds that it is not necessary to show that all persons bearing a relevant characteristic had been discriminated against to prove discrimination (discrimination against a subset of a group — in this case persons with mental disabilities as a subset of persons with disabilities — is sufficient).

With respect to the employer's last argument, the Supreme Court rejected any assumption that discrimination by one group against another within the prohibited classification is a prerequisite to protection under the Code...the object of the Code is to protect against the application of stereotypical assumptions...by anyone, regardless of whether that person shares those characteristics.56

The court also considered the purpose of the plan, noting that it was to protect employees against the income-related consequences of disability. It is worth noting that the Supreme Court in Gibbs reiterated its position that human rights legislation is quasi-constitutional, and therefore must be interpreted in a broad and purposive manner.57

56. Ibid. at 158–9.
57. This view was expressed in O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536, and
3. Education
The appeal from Re. Eaton and Brant County Board of Education\textsuperscript{58} was granted unanimously by the Supreme Court of Canada this term. The reasons for the decision have not been released as of the end of 1996.

II. HOW TO GET THERE FROM HERE:
Procedural issues relevant to achieving legal remedies
Deciding how to frame a cause of action involving discrimination, and choosing the appropriate tribunal, are obviously of great importance to the impoverished client. Unnecessary delay can be devastating to a client litigating survival issues. Moreover, unnecessary expense can result in a complete bar to having an issue litigated. Choices concerning procedure are therefore of prime importance. Unfortunately, two decisions released late in 1996 have made these procedural choices even more difficult.

1. Charter jurisdiction of administrative agencies and tribunals
In most administrative law schemes, there is an appeal as of right to a tribunal from decisions of an administrative agency. In relatively few instances, the agency itself acts as a ‘gate-keeper’, determining whether a matter will be referred to a tribunal. The two major examples of such ‘gate-keeping’ agencies are the federal and provincial human rights commissions.

In human rights legislation, rights are frequently subject to statutory limitations, some of which are clearly constitutionally suspect. When a complainant presents a prima facie case of discrimination that is only negated because of such an exception, human rights commissions have, on occasion, referred the matter to a tribunal. The tribunal would then decide both upon the merits of the complaint and the constitutional validity of the exception.\textsuperscript{59}

\textsuperscript{58} Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at 1134. Note also that the Supreme Court has approved the use of human rights legislation as an aid to the interpretation of other legislation. The court has likewise indicated that human rights legislation is expected to prevail when legislation (or an instrument such as a trust document or a collective agreement) is either silent or conflicts with human rights legislation: Simpson-Sears Ltd, supra, at 547, and Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at 157.

\textsuperscript{59} One example is Leshner v. Ontario (No.2) (1992) 16 C.H.R.R. D/184 (Ont.Bd.Inq.), in which a board of inquiry under the Ontario Human Rights Code "read into" the list of protected classes in the Code the phrase "sexual orientation" to render that legislation consistent with the Charter.
By virtue of a recent Supreme Court of Canada decision, the Canadian Human Rights Commission was held not to have jurisdiction to consider the constitutionality of provisions within its enabling statute. Although this jurisdictional ruling does not extend to tribunals under the Canadian Human Rights Act, in practice this means that Human Rights Tribunals will not be able to consider the constitutional validity of most provisions within the act, because such cases will not be referred to them by the Commission.

The provision at issue in Cooper v. Canada (Canadian Human Rights Commission) was subsection 15(c) of the Canadian Human Rights Act which creates an exception to the right against age discrimination to allow for compulsory retirement where an employee has reached "the normal age of retirement for employees working in [similar] positions". The Commission refused to refer to a tribunal a complaint by a person who was "retired" at age 60. The complainant applied for judicial review of the refusal. Ultimately, the matter reached the Supreme Court. All parties, including the employer, took the position that the Commission had at least a limited jurisdiction to question the constitutional validity of its own act. A majority of the Supreme Court ruled otherwise.

The seven member panel of the Court split on the question. A six-member plurality affirmed that administrative bodies have Charter jurisdiction according to the principles established in previous cases. However, the four who delivered the majority decision appear to have adopted a conservative reading of when an administrative body has the power to decide questions of law. They held that the Commission did not have such power.

The immediate result of this decision is, of course, that counsel pursuing a case involving a Charter override of a limiting provision in the Canadian Human Rights Act must go to court by way of an application for a declaration of unconstitutionality, judicial review, or another form of action. While Cooper does not immediately change the law on the Charter jurisdiction of other administrative bodies, it may signal a more cautious approach to this issue generally.

When assessing the course of action most economical and efficient in a case that could go to an administrative tribunal or to court, counsel would do well to compare the enabling legislation of the tribunal in question to the Canadian Human Rights Act, because that is an important part of distinguishing the situation in Cooper from any other case. It is worth remembering that the complaint-handling and appeal-tribunal scheme set out in the Canadian Human

Rights Act is significantly different in structure from other administrative law systems, such as social assistance, CPP and Worker's Compensation appeals. The Canadian Human Rights Commission is an investigative agency which also performs a "gate-keeping" function, since it is only by a referral from the Commission that a complaint can get to a tribunal. Thus, for such tribunals as the Social Assistance Review Board, only the Court's remarks in Cooper about tribunals would be directly relevant. Having said that, it still appears that the Cooper decision adds to the uncertainty of assessing when an administrative tribunal might be said to have Charter jurisdiction.

Justices LaForest, Sopinka, Gonthier and Iacobucci held that the Commission had no Charter jurisdiction because the Act contained no grant of power to the Commission to consider general questions of law. They made this finding despite acknowledging that the Commission:

- performs a "screening analysis somewhat analogous to that of a judge at a preliminary inquiry"; 62
- assesses the sufficiency of evidence before it in a complaint; 63 and
- must determine whether any complaint comes within federal jurisdiction constitutionally. 64

The majority acknowledged that a human rights tribunal, as opposed to the Commission, does decide questions of law and therefore has Charter jurisdiction in respect of some issues:

As with the Commission, there is no explicit power given to a Tribunal to consider questions of law...ss.50(1) and 50(2) of the Act state that a tribunal shall enquire into the complaint referred to it by the Commission to determine if it is substantiated. This is primarily and essentially a fact-finding inquiry with the aim of establishing whether a discriminatory practice occurred. In the course of such an inquiry a tribunal may indeed consider questions of law...these questions will often centre around the interpretation of the enabling legislation. However, unlike the Commission...a tribunal posses a more general power to deal with questions of law. Thus tribunals have been recognised as having jurisdiction to interpret statutes other than the Act...and as having jurisdiction to consider constitutional questions other than those noted above. In particular, it is well accepted that a tribunal has the power to address questions on the constitutional division of powers..., on the validity of a ground of discrimination..., and it is foreseeable that a tribunal could entertain Charter arguments on the constitutionality of

62. Ibid. at 14.
63. Ibid.
64. Ibid. at 16.
available remedies in a particular case.... Even in such instances, however, the legal findings of a tribunal receive no deference from the courts.65

Chief Justice Lamer, who joined Justices LaForest, Sopinka, Gonthier and Iacobucci in the result, argued that the whole issue of jurisdiction should be revisited by the Court. He argued that previous cases, such as Cuddy Chicks,66 were wrongly decided and that the jurisdiction to find laws to be unconstitutional should be reserved exclusively to courts.

Justice McLachlin, writing in dissent for herself and Justice L'Heureux-Dubé, had a more realistic view of what constitutes a question of law:

Questions of law encompass the meaning to be given to particular provisions of the statute under which the tribunal acts. But other types of legal questions may arise as well. There may be questions of conflicts between the tribunal's constituent statute and other enactments. Or there may be questions...of conflict between the tribunal's constituent statute and the fundamental law of the land, the Charter.67

Justice McLachlin considered specific sections of the Act68 in deciding that the federal Commissions and tribunals could be understood to be empowered to decide questions of law. With regard to the Commission, she observed that the list of duties set out in section 27 shows that the Commission is not to be considered a rubber stamp to the instructions of Parliament, since it has an advisory reporting power to Parliament which includes reviewing and commenting on inconsistencies between the act and other federal laws and regulations. She also noted that subsection 27(2), which empowers the Commission to issue guidelines on the application of the act, expressly empowers the Commission to interpret the act.

In relation to the Commission's complaint-handling function, Justice McLachlin noted that the Commission must obviously apply its own guidelines in determining whether to refer a complaint to a tribunal, and that this also involved interpreting questions of law.

Regarding the Canadian Human Rights Tribunal, she maintained that section 50, which gives the tribunal power to receive evidence and submissions,
"suggest[s] a full hearing extending beyond the facts to law," and noted that subsection 56(3) gives a review tribunal, which has all the powers of a tribunal, jurisdiction to deal with an appeal "on any question of law or fact...".70

It is probably safe to say that the majority of the Supreme Court have not departed from the Cuddy Chicks line of cases. However, the narrow interpretation given by the majority to the term "question of law" may create unwelcome uncertainty about the Charter jurisdiction of the more "minor" administrative tribunals. The court's remarks concerning lack of deference also remind us, if we needed reminding, that arguing Charter law before most of the administrative tribunals that govern the lives of the poor can be considered only a necessary and time-consuming first step to an inevitable putting of the question before a court.

2. **Access to judicial review**

As discussed above, the majority in *Falkiner* held that the "spouse in the house" application was premature and that the applicants did not have standing. The applicants should first have taken their Charter argument, as well as any statutory interpretation argument available to them, to SARB.

Justice Borins, who wrote the decision, held that the court should decline to exercise its discretion to entertain the Charter challenge for two reasons:

- because it was made in the context of an application for judicial review. It seems he felt that it could have been maintained as an application under Rule 14.

- because the Charter challenge was "characterized as a s.24(1) application for a remedy ... based on infringement or denial, by the impugned Regulations, of the applicants' rights ... therefore to be distinguished from the case the court is asked to declare that legislation per se limits rights and freedoms ... and is consequently of no force and effect ... [per] ... s.52 ... a proceeding which is not dependant on the infringement of the rights of an individual ... and which does not

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69. Ibid. at 17.
70. Ibid. at 17.
71. Supra, note 25.
72. The majority therefore expressed no opinion on the Charter issues. Justice Rosenberg, dissenting, disagreed with the majority on the exercise of their discretion to grant judicial review. He also went on to hold that both the new definition of "spouse" and the "no reasonable prospect of reconciliation" rule violated section 15 of the Charter.
73. Supra, note 25 at 5.
74. Ibid. at 18–19.
require, in that respect, a finding of fact. ... Whether any applicant is a spouse involves a question of fact to be determined, on the basis of evidence, by the tribunal. The court would benefit from allowing the SARB to make the initial interpretation of the amended Regulations and to determine the Charter issues raised by the Applicants.75

Justice Borins presumably overlooked the applicants' invocation of section 52 in the pleadings.

Despite the eight volumes of evidence before the court, Justice Borins suggested that they needed more evidence on what he called "adjudicative facts", although he did not suggest what these might be.

Ignoring the fact that the Court of Appeal has expressed the view that SARB is to be accorded no deference in the interpretation of its own legislation and regulations,76 much less in respect of Charter issues, Justice Borins opined that the court should have the benefit of SARB's expertise, and cited Supreme Court of Canada decisions in respect of expert tribunals.

Ignoring the jurisprudence concerning the absence of stare decisis at SARB77 and the submissions concerning the number of recipients affected (over 10,000), and the number of appeals that are at issue (several hundred at the time of the hearing), Justice Borins made his ruling "in the absence of any showing that the review process to the SARB...is inappropriate or less advantageous than the judicial review jurisdiction of this court".78

Having stated that the proper process was an appeal to SARB followed by an appeal of the SARB decision to Divisional Court, Justice Borins proceeded to indicate doubt as to whether Divisional Court could grant a section 24 remedy in that event.79

As a decision respecting factors to be considered when exercising jurisdiction to grant judicial review, Falkiner is obviously questionable. In addition, one might question whether the court's decision would have been different in light of the Supreme Court's confirmation, in Cooper, of the lack of deference to be accorded Charter decisions of an administrative tribunal.

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75. Ibid. at 5-7.
77. Ibid.
78. Supra, note 25 at 11.
79. Ibid. at 17.
III. **LITIGATION IS NOT ENOUGH: The importance of maintaining a variety of strategies for promoting equality rights**

As this article is mainly a review of litigation, it risks giving the impression that litigation is the strategy for obtaining justice for the poor. Nothing could be farther from the truth.

Litigation has always been a necessary adjunct to law reform activity, and, certainly on the provincial level, the non-response by government to lobbying efforts by and on behalf of the poor has necessitated litigation as the only available strategy on some issues. The current provincial government has ignored not only community organizations, but also government-commissioned studies such as the Report of the Social Assistance Review Committee, the Report on Systemic Racism in the Criminal Justice System, and the Cornish Report on the Ontario Human Rights Commission. Efforts to communicate with the government must be maintained, but other efforts, such as litigation, should also be maintained. As of the date of this article, litigation is underway to defend the right to equality in a number of government services and programs.

That said, the essential elements in any movement toward social change are community organization and law reform activity. It is critically important that they continue.

For advocates working with the poor in Ontario, 1996 has been an exhausting year. In the name of fiscal responsibility, governments have deprived the poor of modest gains previously made. Even more troubling is that politicians and the mainstream media have fostered the belief that we cannot ‘afford’ to care about the suffering of the least powerful in our society. The not-so-subtle subtext is that people who lack money are poor because of some intrinsic inferiority. Therefore, it is ‘alright’ if the poor are deprived of the necessities of life, either because they do not deserve a decent standard of living, or because they would not know how to handle it if they had it.

All of the above is strikingly and depressingly familiar to those who have studied discrimination based on race, creed or ethnicity. Racism, sexism, religious bigotry, homophobia, and abuse of people because they are poor are all part of the same phenomenon. It therefore behooves advocates for poor people to acknowledge the similarities, study the tactics used by other successful equity-seeking groups, and encourage whole-community solidarity. In planning any strategy, it can help to keep the following two points in mind.

First, because the current climate is very unfriendly to human rights issues, myths abound and discrimination is often blatant. It is therefore very important to engage in active ‘myth-busting’ and to publicize issues and successes.
Second, oppressed communities are easily divided. ‘Horizontal hostility’ — the tendency of oppressed people to blame themselves or scapegoat others who are also oppressed — is a common reason why community initiatives fall apart.

Horizontal hostility can occur for a number of reasons. For example, people who experience discrimination begin to believe the message that they are worthless. Human nature being what it is, a person who feels worthless often finds comfort by looking around for someone (or some group) who is ‘even more worthless’. It is more difficult and dangerous to fight a powerful oppressor than it is to ‘take out your frustrations’ on someone less powerful than yourself. We all give in to this temptation from time to time. Finally, we all have our areas of bigotry, conscious or — more often — unconscious.

It is essential to recognise the phenomenon of horizontal hostility and to discuss it in advance with any community group formed to address a community problem. It is also essential to continue to point out the problem when in-fighting occurs, as a prelude to discussing and defusing it. Community groups only succeed in solving a problem when they recognize their differences, resolve them or agree to disagree, and concentrate on the goal.

Community organization and law reform activity have been hampered by the sheer speed with which the provincial and federal governments are dismantling essential services. In these difficult times, people working to maintain and improve the quality of community life must maintain incredible patience and tenacity.

Despite the discouraging trends of the times, there are community organizations that are more active and strategic than ever. Their hard work, and the heroic efforts of individual public interest litigants, who sacrifice much on behalf of others in their situation, give us reason to hope that there will be more cheering developments to report in 1997.