Poverty Law and the Charter: The Year in Review [1990]

Ian Morrison
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THE YEAR IN REVIEW

Ian Morrison*

INTRODUCTION
The implications of an entrenched Charter of Rights for the economically disadvantaged has been and no doubt will continue to be a hotly contested issue amongst poverty law advocates, activists and academics.¹ This article will take the opportunity to deal with one aspect of this larger debate—the impact of the Charter on some key poverty law areas—in the context of a review of litigation developments over the past year.

In particular, the article will focus on social welfare programs providing direct benefits in cash or kind. These programs have the greatest direct impact on the situation of the low income community and form the core of the Canadian social welfare system. The article does not attempt to cover all the contexts in which the Charter has been invoked on behalf of disadvantaged groups in Canadian society, including some areas of law, such as immigration, which are unquestionably important for particular sectors of the low income community. Nor does it purport to be a comprehensive review of specific issues that intersect but go beyond the low income community, such

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¹ See Reuben Hasson, "What's Your Favourite Right? The Charter and Income Maintenance Legislation" (1989), 5 J.L. & Social Policy 1; Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989); cf. Kathleen Ruff, "The Canadian Charter of Rights and Freedoms: A Tool For Social Justice?" (1989-9) 13(2) Perception 19; and see the Mission Statement of the Charter Committee on Poverty Issues, a national organization of poverty law advocates and low income activists, dedicated to using the Charter in courts and tribunals "to achieve law reform, to enhance economic and social equity, to educate the public, to sensitize the Bench to poverty issues, and to create a climate that encourages progressive change. The Charter Committee on Poverty Issues is dedicated to using this locus in a strategic and thoughtful way to contribute to the ultimate elimination of poverty".
as more general issues of gender discrimination or disability discrimination litigation. The condition of economic deprivation is, of course, closely related to other modalities of disadvantage and oppression. However, a consideration of this complex and sometimes contradictory relationship is beyond the scope of an article such as this.

**CHARTER LITIGATION AND SOCIAL BENEFIT PROGRAMS: THE YEAR IN REVIEW**

This section will review both judicial decisions and selected tribunal decisions and litigation initiatives in relation to a number of social welfare benefit programs. Most of the programs reviewed are part of the collection of federal and provincial social assistance and social insurance programs which provide direct cash transfers to individuals and families. While not all people living in poverty rely primarily on such programs for subsistence, the individual/state relationship is most directly and closely articulated for the economically disadvantaged through the legal regimes established by these programs and they are obviously areas of major importance for poverty law practice. The section will also consider some decisions in relation to government funded health care programs which help to illustrate the general themes I propose to examine here. (I have only reviewed areas in which I am aware of some judicial activity in the past year: thus, some specific income maintenance programs and some in-kind social benefit programs such as subsidized housing, are not discussed.)

1. **SOCIAL ASSISTANCE**

As the social security program of last resort and thus an important focus for poverty law advocacy, social assistance has been the site of some of the greatest expectations around the Charter and social welfare. However, although there have been some very important recent non-Charter decisions affecting social assistance\(^2\), there is still very little Charter caselaw in this area. There appear to have been only two

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2. These would of course include the decision of the Federal Court of Appeal in *Finlay v. Canada* (July 6, 1990) A-76-89 (F.C.A.) [unreported], holding that deductions from welfare allowances to recover alleged overpayments violated the terms of a cost-sharing agreement between the province of Manitoba and the federal government under the Canada Assistance Plan; and the decision of the British Columbia Court of Appeal in *Reference re the Canada Assistance Plan* (1990) 71 DLR (4th) 99, holding that the federal government could not unilaterally "cap" transfer payments under the Canada Assistance Plan without consultation with the provinces affected.
judicial decisions in the past year in which the Charter was directly considered in relation to a provincial social assistance plan.

The first is *McInnis v. Director of Social Planning Department*[^3], in which it was held that the denial of welfare assistance to a pregnant 16-year-old living with her family did not violate s.15. The welfare policy in question allowed benefits to pregnant unmarried women pending birth, but a municipality had a further policy of only allowing such benefits to a woman living at home where she was over 19, this being the age at which the parental obligation of support under provincial law ceased. The Charter issue was dealt with very briefly. The Court held that the policy did not violate s.15(1) because the reason for denying social assistance was not age but the fact that woman over 19 were not required to be supported by their families. Rogers J. held, “Age, in this case, is not discriminatory, but the criterion by which a person is determined to be an adult.”[^4] He went on to add that if the distinction was discriminatory, it was “justified in the name of the rights and obligations to be attached to adulthood and childhood and supported under s.1 of the Charter.”[^5] The case was reversed on statutory interpretation grounds without reference to the Charter.[^6] The second decision is *Tanguay v. Quebec*[^7], in which it was held that requiring a welfare recipient to repay benefits upon receipt of a damage award for personal injuries did not violate s.7, on the grounds that the award was an economic right not protected by s.7.

In this area, as in most of the areas discussed below, the number of cases that have proceeded to decision is not representative of the amount of litigation activity.[^8] The following are some examples of this

[^4]: Ibid. at 297.
[^5]: Ibid.
[^7]: (1990), 21 A.C.W.S.(3d) 401 (Que.S.C.) [unreported].
[^8]: Here and below I will be referring to litigation initiatives which have either been discontinued or have not yet resulted in decision. This by no means purports to be an exhaustive review of these initiatives: the examples given here are ones which I have learned about in my professional capacity and most involve clients represented by Ontario community legal clinics. Identifying information will not be given about clients in matters, whether concluded or not, which have not proceeded to courts of public record.
activity illustrating both the range of issues that have been raised and the extent to which some of these cases involve fundamental questions of social welfare policy.

Several challenges have been brought to age-based distinctions in social assistance programs. A case in Ontario challenging a rule denying welfare to persons in need between the ages of 18 and 21 living at home, while allowing it for people the same age living away from their parents, was discontinued this year when the issue became moot, but is almost certain to arise again.9 Another Ontario case has challenged a welfare rule which prohibits single persons under 16 from receiving welfare in their own right regardless of their circumstances. However, although the case was argued before the Ontario Social Assistance Review Board more than a year ago, the Board has still not decided the preliminary issue of its jurisdiction to consider the Charter issue and has not yet heard argument on the substantive issue.10 Similar restrictions exist in most social assistance legislation, as do various other rules restricting the eligibility of teenagers and young adults; many of these also are likely to be challenged in the near future.11

A very important challenge has been brought in British Columbia to rules governing the obligation of sole-support mothers in receipt of social assistance to seek child support from the father(s) of their child(ren). The legislation in question, depending on the circumstances, allows the Crown to bring support proceedings against the mother's will; it also allows the Crown to enter into or modify a support agreement on her behalf and prevent her from initiating and

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9. The applicant in the case in question turned 21 before the Charter issue was raised in the proceedings; since she had been receiving interim assistance pending the outcome of the appeal, there was no longer a live issue to be tried. The client was represented by Kinna-aweya Legal Clinic, Thunder Bay.

10. The claimant is represented by Justice for Youth and Children, Toronto. Counsel for the youth has indicated to me that even if this particular case does not go ahead, they intend to pursue the issue.

11. For example, it has been reported that the Court Challenges Program has approved funding for case development for a case to challenge an Alberta social assistance rule which imposes serious restrictions on the eligibility of 16 and 17 years olds: see 10 Canadian Human Rights Advocate (May 1990) 7.
maintaining control over an action for support. The case raises important issues under both ss.7 and 15 of the Charter around the rights of single mothers on welfare to privacy and autonomy but will probably not be heard for at least a year, if at all.

A final example in this area: in Nova Scotia, a challenge has been brought to rules allowing for a pre-hearing termination of welfare benefits. This challenge attempts to raise directly the question of whether s.7 affords any direct protection of welfare rights, a question which does not yet seem to have been directly addressed in a Canadian case, although it has been the subject of much academic speculation. (It is particularly interesting that this case involves essentially the same issue addressed by the U.S. Supreme Court in its landmark decision of Goldberg v. Kelly, the first decision to recognize welfare as a constitutionally protected interest under the Due Process clause of the U.S. Constitution.) The case is expected to go to trial sometime in the next few months.

2. WORKERS’ COMPENSATION

The most important social insurance programs at the provincial level are the various provincial workers’ compensation schemes. The impact of the Charter on any of these schemes has been minimal to date. It has been long settled, at least in lower courts, that compensation bene-

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12. Federated Anti-Poverty Groups of British Columbia et al. v. Attorney General of British Columbia et al. (Statement of claim # A893060, Vancouver Registry, B.C.S.C., filed Nov. 15, 1989). The plaintiffs are represented by the Legal Services Society of B.C. and the B.C. Public Interest Centre.

13. According to Gwen Brodsky from the Public Interest Advocacy Centre in Vancouver, counsel for the corporate plaintiffs, the Crown has made a preliminary challenge to the standing of all the plaintiffs. That issue has been argued but is still under reserve in the B.C. Supreme Court.

14. The claimant is represented by the Metro Community Law Clinic, Halifax N.S.


fits are not protected by s.7. So far, it does not appear that injured workers will have much more success in using s.15 to challenge these programs. The terse decision of the Supreme Court of Canada in the Reference Re ss.32,34 of the Workers' Compensation Act (Nfld.) seems to have ended any likelihood of injured workers per se being considered a “disadvantaged group” within the meaning of the Andrews equality test. Neither of the two decisions of which I am aware from the past year resulted in rulings favourable to the claimant.

In Auger v. Alberta (W.C.B.), it was held that provincial workers' compensation legislation which exempted from compulsory coverage “any industry carried on by an Indian or Band on a reserve” did not discriminate on grounds of race. The reason given for the exemption was that the Board could not enforce assessment levies against employers on a reserve because of provisions in the Indian Act exempting them from execution. Holmes J. held that “the actual distinction drawn by the impugned legislation is between those employers granted the protection of ss.89 and 90 of the Indian Act and those employers not granted such protection.” He went on to suggest that, even though it was clear that most of the workers excluded from coverage by the rule were in fact Indians, the distinction was not discriminatory because it applied to all employees on a reserve regardless of race: “This being so, it can be said an employee has a choice of whether to be covered

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19. The leading decision from the Supreme Court of Canada on the interpretation of s.15(1) of the Charter remains Andrews v. Law Society of B.C. (1989), 56 D.L.R.(4th) 1, [1989] 2 W.W.R. 289. The test for a violation of s.15(1) enunciated in that case is commonly referred to as the "Andrews test". The requirements of this test in the context of social welfare equality litigation will be considered in more detail below.


21. Ibid., at 669.

22. The Court appears to have accepted that “most, but not all, employees working in industries on the...Reserve are status Indians”: Ibid., 663.
or not when he [sic] takes employment”.\textsuperscript{23} Finally, he held that any discrimination was justified in any event under s.1: since compensation was provided entirely from levies and the Board could not enforce levies against industries on reserves, the exclusion was justified by “the desire to assure and maintain the integrity of the Accident Fund”.\textsuperscript{24}

In \textit{Re Heidekamp and Director of Support and Custody Enforcement}\textsuperscript{25}, an Ontario decision, it was held that a provision of the Ontario \textit{Workers' Compensation Act} which permitted 100\% of a compensation pension to be diverted to pay a support or maintenance order did not violate s.15.\textsuperscript{26} The Court agreed that the applicant suffered a disadvantage in relation to wage earners and recipients of other kinds of income maintenance payments and that the distinction was “related to” the applicant's disability. It held, however, that the statute was not discriminatory because the burden on the applicant was “not...the result of the distinction identified (his physical disability), but is the result of his choice, while employed, to default in his child support obligations and to bring no application for review”.\textsuperscript{27}

3. \textbf{CANADA PENSION PLAN}

Of the major income maintenance programs in Canada, the Canada Pension Plan seems to have been subject of the least judicial activity to date. The highest level of appellate jurisdiction in CPP matters rests with the Pension Appeals Board—a unique administrative tribunal in income maintenance matters in that its members are superior court judges—which sits in appeal from decisions of Review Committees, appointed \textit{ad hoc} to hear individual appeals.

The PAB has yet to seriously engage with a substantive Charter argument. The Board initially took the position that it had no jurisdiction

\begin{flushleft}
\textsuperscript{23} \textit{Ibid.}, at 670. \\
\textsuperscript{24} \textit{Ibid.}, at 671. \\
\textsuperscript{25} (1989), 69 O.R.(2d) 607 (Ont.Unif.Fam.Ct.) \\
\textsuperscript{26} However, Hamilton Mountain Community and Legal Services, who represented the claimant, successfully lobbied the Ministry of Labour and the Attorney General to amend the legislation to make the \textit{Workers' Compensation Act} consistent with the \textit{Wages Act}. \\
\textsuperscript{27} \textit{Supra}, note 25 at 612.
\end{flushleft}
to decide Charter issues.\textsuperscript{28} It reconsidered and reversed this opinion in \textit{Minister of National Health and Welfare v. Kilpatrick}\textsuperscript{29}, but held that it was not necessary to decide the substantive issue raised in that case, which involved the rights of a former wife to a division of unadjusted pensionable earnings following divorce. The Court held that the relevant date for the purposes of the application of the Charter was the divorce, which had occurred prior to the date s.15(1) came into effect.

It seems that the only post-\textit{Kilpatrick} case in which the Board has considered a Charter argument is \textit{Muller v. Minister of National Health and Welfare}\textsuperscript{30}. The appellant in \textit{Muller} had insufficient contributory earnings for a CPP disability pension but had contributed to a compulsory national pension plan while resident in Switzerland during his contributory period. The Board summarily rejected his argument that his s.15 rights were violated by the failure of the Canadian government to enter into a reciprocal transfer arrangement for pension credits with Switzerland, stating that "Neither this Board nor any Court of competent jurisdiction can use s.15 to usurp the political function of the Government of Canada to make arrangements with foreign States or to refrain from doing so, or to forge links with them by agreement or otherwise."

Again, this jurisprudence does not reflect the full extent of litigation activity around CPP issues and it is clear that the PAB will soon be faced with other substantive Charter issues. One such issue is the constitutionality of the limitation period for applying for a CPP disability pension. The plan requires an applicant to have made contributions for a certain period before being eligible for a disability pension and also requires that an application for benefits be made within a fixed period of time from the end of the contribution period. Potential


\textsuperscript{29} (Aug. 11, 1989, P.A.B.) [unreported]. The Board held that it (and by inference a Review Committee) had jurisdiction under s.52(1) of the \textit{Constitution Act} but not under s.24(1) of the Charter. The issue of the jurisdiction of administrative tribunals to consider and apply the Charter is discussed further below. The Board's decision in this case seems to be consistent with the weight of judicial authority in this area.

\textsuperscript{30} (Sep. 8, 1989), C.E.B.&P.G.Rep. #8593.
applicants, especially those with psychiatric disorders such as para-noid schizophrenia and chronic memory disorders, often miss this limitation period for reasons flowing directly from their disability. CPP Review Committees have awarded benefits in at least two such cases in Ontario on the grounds that the limitation period in such cases discriminated on grounds of disability. The government eventually decided not to appeal these decisions, with the result that the claimants were awarded pensions. However, it seems that the issue will have to go further at some point; indeed, some advocates have considered arguing that the entire limitation period is discriminatory because it applies only to disability pensions, there being no such restriction for old age pension under the same Act.

There have been other interesting cases at the Review Committee level. In one case, a Review Committee held that s.15 was violated by a provision of the Act which denied benefits to disabled contributors on behalf of factually but not legally adopted children. The Act provided benefits for children factually adopted prior to the date of the contributor's disability (and for legally adopted children adopted at any time) but expressly excluded those factually adopted after this date.31 In another decision, a Review Committee held that a section of the Act (since repealed) governing survivor's benefits violated the Charter. The section provided a definition of “spouse” for the purposes of survivor's benefits which required, where the parties had not been married, that the applicant had been “publicly represented” as the spouse of the contributor. In the particular case the parties had been “street people” who had been homeless for much of the relevant period. Because the facts arose before s.15(1) came into effect, the Committee could not consider an equality rights argument. However, it found that the “public representation” requirement—which, as previously interpreted by the PAB, effectively required the parties to have lied about their status by purporting to have been married—violated s.2(b) of the Charter, guaranteeing freedom of expression.32 Both of these Review Committee decisions have been appealed to the PAB by the federal government.

31. The claimant was represented by Kinna-Aweya Legal Clinic, Thunder Bay.

32. The claimant was represented by Kensington Bellwoods Legal Clinic, Toronto.
4. UNEMPLOYMENT INSURANCE

Charter litigation has to date had more impact on the substance of unemployment insurance than most other income maintenance programs. This is reflected in Bill C-21, the bill to amend the Unemployment Insurance Act currently before the Senate. While the Bill contains major cutbacks and punitive measures against unemployed workers generally, it also contains some modest extensions of benefits due in part to the outcome of earlier Charter litigation.33

However, none of the judicial decisions in this area in the past year have accepted further Charter challenges to various provisions of the unemployment insurance scheme. In Canada (A.G.) v. Young34, the claimants challenged a type of “grandfather” clause which relieved certain people applying for unemployment insurance benefits from a disqualification provision, as long as they had applied for benefits before a certain date. The claimants, believing they were not entitled to the benefits, had not made such an application; they sought to have applications antedated to take advantage of the amendment. The Court held that the distinction between groups based on date of application created “two separate groups who are not equal” and was therefore not discriminatory. In Clarke v. Canada35, it was held that s.15 was not violated by the denial of unemployment insurance benefits to self-employed people generally, even though self-employed fishermen as a class were entitled to benefits. In Meredith v. Canada36, the Federal Court of Appeal summarily rejected an argument that s.33(1), which denied benefits to persons who lost their employment by reason of a labour dispute, violated an employee’s freedom of association or

33. In Tetrault-Gadoury v. Canada (Employment and Immigration Commission) (1988), [1989] 2 F.C. 245, 53 D.L.R.(4th) 384 (C.A.), the Federal Court of Appeal held that denial of full unemployment insurance benefits to claimants upon reaching age 65 violated s.15. In Schacter v. Canada (1988), 52 D.L.R.(4th) 525 (F.C.T.D.), the Federal Court Trial Division held that biological parents of newborn children were entitled under s.15 to the same child care benefits as adoptive parents. Schacter was appealed to the Court of Appeal on the issue of what kind of remedy could be granted by a court in the face of such a finding, but the federal government did not challenge the substantive decision on appeal: (1990), 66 D.L.R.(4th) 635 (F.CA.).

34. (1989), 100 N.R. 333 (F.C.A.)

35. (1990), 21 A.C.W.S.(3d) 138 (F.C.A.)

equality rights, stating that these issues had already been determined by prior caselaw.

5. HEALTH CARE

Finally, there have been some recent decisions in relation to government funded health programs of interest for the purposes of this review. While the specific programs and issues considered in the cases discussed below are perhaps not of the same kind of general importance to the low income community as the income maintenance issues discussed, they have been included here because the approaches taken by the courts deciding them illustrate in many ways some of the main problems surrounding the use of the Charter in this area.

In Brown v. British Columbia (Minister of Health)\(^3\), a group of AIDS patients challenged the decision of the provincial government not to provide full funding for treatment with the experimental drug AZT, except to persons on social assistance. Full funding was provided for drugs used in cancer treatment and organ transplants. The evidence was that most of the plaintiffs, even those not on social assistance, were unemployed and living on low fixed incomes. The Court rejected challenges to the government’s decision under both s.7 and s.15. With respect to s.7, Coultas J. held that any deprivation of security of the person “lies in the fact that they are infected with a debilitating and incurable disease” and not through any action of government. He went on to hold that their s.7 claim rested on “economic deprivation”; while accepting that the plaintiffs were suffering economic hardship, he stated that “a reduction in the standard of living is not a deprivation contemplated by s.7 of the Charter”.\(^3\) He concluded further that s.7 did not apply to the situation where a plaintiff was seeking a benefit to “enhance” life, liberty or security of the person.\(^3\)

With respect to s.15, the plaintiffs argued that they were discriminated against on grounds of sexual orientation (90% of AIDS patients were homosexual or bisexual men). Coultas J. conceded that sexual orientation was a prohibited ground of discrimination under s.15, in accord-

\(^3\) Ibid., at 466,467.

\(^3\) Ibid., at 469.
ance with the *Andrews* test. Nevertheless, he held that there was neither direct nor indirect discrimination on these grounds. The latter holding is of most concern for the purposes of this article. Coultas J. accepted a government argument that, in essence, full funding of some drugs for catastrophic illness was provided for the convenience of research administration; because the treatment therapies for cancer patients and AIDS patients involved different protocols for drug administration, the difference in funding was not the sort of inequality addressed by s.15. Finally, Coultas J. also made some *obiter* comments on the application of s.15(2) of the Charter. He held that even if the special drug funding programs for cancer and transplant patients could be considered discriminatory they would be justifiable under s.15(2). This leads to what in some ways seems to be the real heart of the decision: the statement that “a government, unable to confer benefits on any person unless it confers an equal benefit on all, will be faced with one viable option: of conferring benefits on no one.”

In *Ontario Nursing Home Association v. Ontario*41, the issue was the provision of “extended care”—i.e., nursing and personal care for the residents of certain care facilities—to residents of nursing homes. Due to a complicated division of legislative jurisdiction between provincial ministries, the levels of extended care provided to residents of nursing homes (operated for profit) were less than those provided to residents of facilities known as Homes for the Aged (not operated for profit). The plaintiffs argued that the differential levels of funding violated ss.7 and 15 of the Charter. R.E. Holland J. agreed that it was both illogical and unfair that homes for the aged should receive more funding per extended care resident than nursing homes, but rejected both Charter arguments. With respect to s.7 he held, in language very close to that used in *Brown* that while the plaintiff nursing home resident might receive greater care with additional funding, it could not be said that he was being deprived of life, liberty and security of the person: “The section does not deal with property rights and as such does not deal with additional benefits which might enhance life, liberty or security of the person”.42 With respect to s.15, Holland J. doubted that

41. (1990), 74 O.R.(2d) 365 (H.C.J.)
there had even been a deprivation of an equality right, since it was up to the nursing home to determine whether to provide more care than the statutory minimum based on its allocation of all funds received. He went on to hold that, in any event, any discrimination suffered by the individual plaintiff was based on the type of residence occupied, stating: “The place of residence was chosen by [the plaintiff’s wife] for the plaintiff. In the circumstances of this case, the place of residence is not a personal characteristic.”

OTHER CHARTER DEVELOPMENTS
A review of Charter developments with a direct impact on poverty law practice must also mention some developments in relation to Charter procedure and remedial powers that are of special importance for litigation in this area.

1. JURISDICTION OF ADMINISTRATIVE TRIBUNALS
Much poverty law practice is carried on before a wide range of administrative tribunals; thus, the jurisdiction of these tribunals to consider and apply the Charter is an important practice issue. As some of the cases discussed above illustrate, this issue has presented a stumbling block for some litigation initiatives in the past. However, the issue seems to be moving closer to resolution. There is a growing judicial consensus that most administrative tribunals have a limited jurisdiction to apply the Charter.\textsuperscript{4} It is generally agreed that there are two heads of remedial jurisdiction in Charter matters. The first derives expressly from s.24(1) of the Charter, which authorizes a “court of competent jurisdiction” to grant an “appropriate and just” remedy for a violation of a Charter right, while the second flows by inference from s.52(1) of the Constitution Act, 1982, which states that any law

\textsuperscript{43} Ibid., at 379.

\textsuperscript{44} There is a large body and growing body of caselaw dealing with this issue: e.g., see Douglas/Kwanten Faculty Association v. Douglas College, [1988] 2 W.W.R. 718 (B.C.C.A.); Zwarich v. Canada (1987), 82 N.R. 341, 26 Admin.L.R. 295 (F.C.A.); Tetraut-Gadoury v. Canada (Employment and Immigration Commission), supra note 33. My summary here of the state of the caselaw is somewhat simplified. For example, there are conflicting federal court decisions on this issue and the issue has still not finally been settled in that jurisdiction: e.g., see Vincer v. A.G.(Can.) (1987), 82 N.R. 352 (F.C.A.), per Marceau J.
inconsistent with the provisions of the Constitution is "of no force or effect" to the extent of the inconsistency. Most courts have now accepted that an administrative tribunal, at least one which is required to determine questions of law in the exercise of its functions, may and indeed must apply the Charter under s.52(1). If it determines that a particular law before it is inconsistent with the Charter (or presumably with any other section of the Constitution Act) it must treat the law as being of no force or effect to the extent of the inconsistency. This reasoning was adopted by the Ontario Court of Appeal in Cuddy Chicks Ltd. v. Ontario Labour Relations Board45, the most recent major appellate decision to consider the issue. Conversely, the weight of judicial authority is that most such tribunals do not constitute "courts of competent jurisdiction" within the meaning of s.24(1) and thus are not able to grant specific remedies under that section. Cuddy Chicks, along with one of the leading cases from the Federal Court of Appeal46, is now before the Supreme Court of Canada.

2. REMEDIAL POWERS

Apart from the special problems of the jurisdiction of administrative tribunals to consider Charter arguments, one of the most important general issues affecting Charter litigation in relation to social welfare programs is the extent of the remedial powers conferred by s.24(1). This issue was considered by the Federal Court of Appeal in its recent decision in Schacter v. Canada.47 The situation in that case was that in order to grant an effective remedy in relation to legislation which violated the Charter by being underinclusive—i.e., which excluded by omission a class held to be entitled to benefits extended to an included class—it was necessary for the Court to order the government directly to pay the benefits. A declaration of unconstitutionality in these circumstances would simply have deprived the included class of benefits while failing to extend them to the excluded class. The government argued that in such cases, such a declaration was the only

46. Tetrault-Gadoury v. Canada, supra note 33.
47. (1990), 66 D.L.R.(4th) 635.
remedial option. This argument had in fact been accepted in at least one earlier case dealing with social benefits.48

The majority of the Court in Schacter affirmed that s.24(1) was broad enough to empower a court in such circumstances to order the government to provide the benefits to the excluded class. Stating that s.24(1) must be interpreted with “flexibility” and “imagination” so as to provide meaningful remedies for Charter violations, Heald J.A. held that “underinclusive legislation invites a remedy extending benefits”.49 The majority expressly rejected the federal government’s argument that it was beyond the judicial power under the Charter to make an order that would effect “the appropriation of public funds” and thus impinge on Parliament’s authority to tax and raise revenues, observing that many kinds of Charter challenges necessarily resulted in the expenditure of public funds regardless of the form of the order, a result inherent in the nature of the process itself.

**CHARTER LITIGATION AND POVERTY LAW: CURRENT ISSUES**

There is a certain irony in the results of the Charter decisions reviewed above. On one hand, some of the procedural and remedial issues that have posed barriers to or at least caused uncertainties for Charter litigation in poverty law areas are being resolved in ways that might be seen as encouraging such litigation. On the other hand, the actual success rate of Charter challenges in this area, never very high, has been even lower over the past year—not one of the cases reviewed here which went to the point of judicial decision in the past year was successful. At least at this point in the history of the development of Charter jurisprudence, then, it seems that the main barriers to litigation in this area lie in the definition of substantive rights themselves.

Of course this does not mean that there are no other constraints limiting the impact of the Charter in this regard. All of the usual systemic factors constraining test case litigation strategies in this area still exist,

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48. See *A.G.(N.S.) v. Phillips* (1986), 34 D.L.R.(4th) 633 (N.S.C.A.) in which the Court responded to a finding that social assistance legislation violated s.15 by being underinclusive, by declaring the legislative provisions that provided authority to grant benefits to be unconstitutional.

49. *Supra*, note 47 at 650.
including limited financial and legal resources, problems of finding appropriate cases and clients who are willing or able to sustain lengthy litigation proceedings, etc. Furthermore, the importance of the developments in the law of procedure and remedies discussed above should not be overstated. For example, although the broad affirmation of the Charter's remedial powers in Schacter is obviously important, the very nature of s.15, which protects relational rather than absolute rights to social benefits, is such that the final decisions about resource allocations consequent on judicial rulings remain with the legislative branch. It is also not altogether clear to what extent developments regarding the jurisdiction of administrative tribunals to consider the Charter will make litigation in this area easier. To the extent that such tribunals can consider Charter arguments, poverty law advocates who regularly practice before such tribunals will probably be encouraged to make arguments in this forum. At least some judges have assumed that this will increase the ease and convenience of constitutional litigation. However, the jurisdictional dichotomy created

50. Some of these problems are in fact related to doctrinal issues not considered in this article. For example, the problem of finding a suitable plaintiff, prepared to undertake lengthy and stressful litigation for what may be a small amount of money, is affected by laws governing standing. Even though the law regarding public interest standing has been considerably liberalized in recent years, it is still often very difficult for groups such as non-profit corporations to get standing to sustain Charter litigation even though they may be the only ones realistically able to put forward positions on behalf of the people most affected by the issues. In some cases courts have held that incorporated bodies cannot assert "individual" rights: e.g., see the Ontario Nursing Home Association case, supra, note 41. In other cases courts have held that the issues could be raised by someone else, even though the body seeking standing may have been able to present the issue from a different perspective. Finally, a challenge to the standing of the claimants may cause substantial delays and increased expense regardless of the eventual ruling, as in the Federated Anti-Poverty Groups of B.C. case, supra, notes 12, 13.

51. Thus, it is always the prerogative of government whether to expand resource commitments to a particular program to effectuate a judicial decision, or simply to redistribute the same allocation so that some recipients benefit at the expense of cutbacks for others: the example usually given of this is Silano v. British Columbia (1987), 42 D.L.R.(4th) 307 (B.C.S.C.), where the provincial government responded to a finding that a social assistance eligibility rule violated s.15 by equalizing the benefits while keeping the amount of funds allocated to the program the same.

52. See Cuddy Chicks, supra, note 45, per Grange J.A.
by the caselaw may make this apparent convenience illusory. Even assuming that the distinction can clearly be made, it is often not easy to determine in advance what kind of remedy will be required or appropriate in a given case, especially where multiple theories about the nature of the constitutional violation are being advanced.

However, although significant barriers to Charter litigation in other areas still exist, they are not insurmountable and are diminishing as they become clarified by caselaw. The issue of ultimate importance here remains whether such litigation can succeed. In the following sections I propose to examine in more detail the substantive issues presented in the cases discussed above and to consider what this means about the judicial conception of what interests should be protected under the rubric of fundamental rights. In the end, no real assessment of the possibilities for Charter litigation in this area can be made without taking these attitudes and their ideological underpinnings into account.

To the extent that a single common theme emerges in this area, it is a deep reluctance to allow interests in relation to social benefit schemes to be characterized as “rights” at all.

This theme does not have only one doctrinal manifestation—and indeed I should make it clear here that in my view doctrine only occasionally provides a strong determinant of outcome in this kind of litigation—but rather operates through a variety of doctrinal devices. What I want to focus on here is not whether the purported application

53. My point here is not that doctrine never constrains results in constitutional litigation. It is clear that judges feel constrained at least to some extent by the internal logic of doctrinal argument. An interesting example of such constraint operating in an area closely related to those under consideration here is the decision of the Manitoba Court of Appeal in *Alcoholism Foundation of Manitoba v. City of Winnipeg* (1990), 69 D.L.R.(4th) 697 (Man.C.A.), reversing [1986] 6 W.W.R. 440, 59 Man.R.(2d) 83. striking down a municipal zoning by-law which placed geographic restrictions on the location of group care and rehabilitation housing for the aged, the disabled, convalescents, ex-prisoners and persons recovering from drug or alcohol addiction. At least one of the judges in the case, Monnin C.J.M., while openly sympathetic to the defendants and patently reluctant to allow the s.15 claim, indicated that he felt the Andrews decision to be determinative of the result. However, this does not change the fact that there are few Charter cases, especially equality cases, where plausible doctrinal argument cannot be made on both sides of the issue.
of constitutional doctrine is right or wrong in any particular case, but the significance of this reluctance. I suggest that perhaps the most important point revealed by these cases is the force of the ideological position that social benefits—especially those provided as social assistance but to some extent also those provided as social insurance—represent a privilege or government largesse; and that claims of entitlement to such benefits fit uneasily at best into a rights regime largely predicated on the concept of protecting the autonomy of individuals from state intervention. The following analysis will consider the only two Charter sections of any real importance in litigation in this area, ss.7 and 15.

1. SECTION 7

Since the Charter came into effect in 1982, s.7 has been invoked in numerous challenges to regulatory schemes outside the criminal law field. It has had a major impact on some areas of law of importance to elements of the low income community—most notably, of course, immigration law. However, it has become increasingly unlikely that s.7 will play any role at all in judicial regulation of social benefit programs of the kind under consideration here. Developments of the past year have simply confirmed themes already established in the caselaw.

The threshold issue for the application of s.7 is whether the particular interests being asserted fall within the scope of the phrase "life, liberty and security of the person" or, more precisely, whether the impugned state action in a particular case involves a deprivation of one of these rights. The caselaw has been virtually unanimous in holding that the

54. Unfortunately I will be able to do little more than sketch out this proposition here. I have dealt with this aspect of social welfare ideology and its manifestation in social welfare jurisprudence in more detail elsewhere: Ian Morrison, "The Impact of the Charter of Rights on Social Welfare Programs" (Prepared for the Southwest Region Clinics' Association Conference: October 1989) [unpublished].

55. Specifically, of course, the procedures for the determination of Convention refugee status under immigration laws. The seminal case in this area is the decision of the Supreme Court in Singh v. Canada, [1985] 1 S.C.R. 177, 17 D.L.R.(4th) 422, holding that refugee determination procedures fell within s.7 and therefore had to be in accordance with principles of fundamental justice. Section 7 has subsequently been invoked in a number of cases involving immigration procedures affecting refugee claimants.
provision or denial of social benefits does not implicate s.7 in this way. Cases decided prior to the period under review here had already held that s.7 does not protect interests in such things as workers' compensation benefits, unemployment insurance benefits or tenancy rights in subsidized housing. To this list can now be added the kinds of health care benefits at issue in Brown v. British Columbia and the Ontario Nursing Home Association case.

The decisions in all these cases have been based on a distinction drawn by the courts between “personal” rights of liberty and security of the person and “economic” or “property” rights. Despite claimants' arguments that in many contexts physical well-being is so integrally related to access to certain kinds of benefits that security of the person is directly affected by denial of such benefits, Canadian courts have uniformly relegated all forms of individual/state transactions mediated through economic forms into the excluded category of economic rights. The important thing here is not that s.7 has been interpreted as not protecting economic rights. The economic rights exclusion operates of course as a general principle and not always disadvantageously to the low income community. (For example, in a recent Ontario decision, this distinction was used to reject an attack by two landlords on residential rent regulation legislation. The Court held that s.7 did not protect landlords' purely economic interest in their investments and that, at worst, the plaintiffs in that case had suffered some reductions in their profits on an investment which had shown a large capital appreciation since it had been purchased.) Rather, what matters is that every interest asserted to date in relation to social benefit schemes has been placed on the economic side of the contingent and unstable line between “personal” and “property” rights. Admittedly, as noted above, the issue of whether s.7 might afford some protection to subsis-

56. See cases cited supra, note 17.
57. See Zwarich v. Canada, supra, note 44.
60. That the line is contingent is illustrated by the fact that even the Supreme Court has recognized the problem of untangling economic and personal interests: see infra, note 61. That it is unstable is illustrated clearly in the decision of the British Columbia Court of Appeal in Wilson v. British Columbia Medical Commission (1988), 30 B.C.L.R.(2d) 1 (B.C.C.A.).
tence level benefits remains open, and the Supreme Court has been careful not to preclude the possibility that liberty and security of the person may protect some rights with an “economic component”. However, even if welfare rights are protected on this basis, it seems clear that the general theme of this caselaw will not be reversed. The direction these doctrinal developments have taken and the way the liberty/property dichotomy is formulated in relation to particular interests has some important implications for the conceptualization of the nature of individual “rights” under the Charter.

Most cases in which these issues have arisen have simply labelled the interests at stake as “economic interests” because they involve cash transfers and are therefore excluded from s.7 ipso facto. Thus, all interests mediated through cash forms are assimilated to a common and broadly abstracted category. For example, the situation of the AIDS patients in Brown, required to pay up to $2000 per year from limited incomes for AZT treatment can be equated rhetorically to the situation of two Ontario landlords who argued that their s.7 rights were violated by residential rent regulation laws which reduced the rate of profit returned by their property investment. The consequence of this assimilation is that both cases become, in the language of Brown, questions of “lifestyle”. The exclusionary use of the liberty/property distinction, which previously had far less significance for any formal doctrinal purposes in Canadian law has now become a hierarchical dichotomy which not only excludes, but in the context of discourse involving “rights” claims, devalues the interests falling into the excluded category. In the language of the cases, the excluded interests easily become not just “economic rights” but “mere economic rights”.


It must also be said however that there is little in that Court’s jurisprudence to suggest that it would accept such an argument. On the basis of expressed opinions, most students of the Court would probably agree that the judge most likely to receive such an argument favourably is Justice Wilson. The same cannot be said for any other judge on the Court (and such speculation is complicated by the fact that there are so many new faces on the Court). Against Wilson J.’s views must also be balanced the apparently much narrower view of Lamer C.J., as stated in his obiter comments in Reference re Criminal Code, Sections 193 and 195.1(1Xc), supra.
Some cases, including Brown and the Ontario Nursing Home Association case, go beyond simply asserting the liberty/property dichotomy to raise the further issue of the meaning of “deprivation” by the state in this context. A distinction is drawn here between actions by the state which “deprive” individuals of security of the person, and the denial of benefits, characterized as a mere “failure to enhance security of the person”, a matter not within the purview of s.7. This is an important rhetorical move. The liberty/property dichotomy continues to operate for the most part within a framework of interests defined in legal terms and characterized or able to be characterized as legal entitlements. The causation analysis, however, distances both the state and the legal system even further from the issue at stake: here, events simply flow from “natural” causes following their course, like the disease killing the AIDS patients in Brown.

This approach reflects an interesting twist on one of the main ideological structures of the Charter. Andrew Petter and Alan Hutchison have argued that “the major function of a liberal Charter is to police the boundary that separates the political and the collective from the pre-political and the individual—to contain the state so as to prevent it from intruding, in its utilitarian zeal, upon the ‘natural’ realm of individual liberty”.62 In these cases, it seems, the Charter does not just police this boundary so as keep the state out, but equally so as to prevent the matters allocated to the private sector from placing any claims on the state.

None of this means that s.7 could never have an impact in this area. The liberty/property distinction can be inverted by arguments that “personal” aspects of liberty and security of the person are infringed by coercive use of state economic power operating through social benefits.63 However, such arguments present an opportunity, not an obli-


63. For a successful use of this approach, see Wilson v. British Columbia Medical Commission, supra, note 60. An example in a current case attempting such an approach in the social welfare context is the argument that compelling single mothers to pursue child support, from men they may wish for good reason to have no contact with, as a condition of receiving social assistance, infringes their liberty and security of the person: see the Federated Anti-Poverty Groups of British Columbia case, supra, note 12.
gation, for courts to escape this dichotomy and there is little in the caselaw to date to suggest that judges are eager to take up this opportunity.\textsuperscript{64}

2. SECTION 15

Section 15 has had more impact on social benefit programs than s.7. However, the jurisprudence reviewed in this article indicates that success in equality litigation in this area is at least temporarily stalled. This is an interesting development, since the cases reviewed here are also the first group to show the impact in this area of the equality test enunciated by the Supreme Court of Canada decision in \textit{Law Society of British Columbia v. Andrews}.\textsuperscript{65} These cases show that there are still major doctrinal and ideological barriers to equality arguments in relation to exclusions from social welfare benefit schemes.

In almost all the cases reviewed above the claimants were seeking to challenge under s.15 their exclusion from some kind of direct government benefit. What is immediately noticeable about these cases is not simply that the claimants failed in all of them, but that in not one of the cases was the court prepared to accept that even a \textit{prima facie} case of discrimination had been made out sufficient to call upon the government for justification under s.1. As with s.7, the courts have gone as far as possible in these cases to avoid recognition of the claims asserted as presenting constitutionally cognizable interests, which would of course move the inquiry to the more openly political issue of balancing state interests against individual rights. There are a number of points arising from these cases worth considering here.

\textsuperscript{64} See, for example, \textit{Camire v. City of Winnipeg} (1989), 57 Man.R.(2d) 192 (C.A.), where it was argued that an order making receipt of welfare benefits by an alcoholic conditional on his residing in a treatment centre violated ss.7 and 15. The Court of Appeal refused to grant leave to appeal, stating that the case did not present an issue of substance. The point is made even more clearly in \textit{Re A.G. (Nfld.) and Nfld. & Labrador Housing Corp.} (1988), 38 D.L.R.(4th) 355 (Nfld. C.A.), where the Court stated in response to a challenge against subsidized housing tenancy regulation: "[N]o one is obliged to become a subsidized tenant. While a certain amount of compulsion may arise out of economic circumstance, subsidized housing is not the only form of social assistance available".

\textsuperscript{65} \textit{Supra}, note 19.
a. The "personal characteristics" requirement

The equality test posed by the Supreme Court in *Andrews* requires, in order for there to be a finding of discrimination, that any inequality in treatment created by a law must be based in some way on the kinds of personal characteristics enumerated in s.15(1) or characteristics analogous thereto. While this has probably made some kinds of equality arguments on behalf of disadvantaged groups easier, *Andrews* may also have narrowed the scope of s.15 in this area. It seems likely that economic disadvantages can be more easily perceived by courts as *indicia* of other kinds of disadvantage than as a disadvantage itself. For example, the Alberta Court of Appeal held in a recent case that s.15 was not violated by rules which made provision of funded counsel for indigent accused discretionary in criminal appeals, stating: "If indigency can fell legislation under the Charter, the Charter should say so".66 Ironically, the Court suggested that the claimants argument may have had more force before *Andrews*.

However, as the discussion in the following section will show, the main problem in the cases reviewed here has not been the identification of the claimant with a disadvantaged group, but the translation of that characterization into prohibited discrimination.

b. Adverse impact discrimination

One of the most important issues arising from the jurisprudence reviewed here is its implications for "adverse impact" equality arguments. In many of the cases discussed above, it was accepted by the courts that the claimant belonged to a disadvantaged group in the sense required by the *Andrews* test. However, in only one of these cases did the impugned legislation expressly draw a distinction on the basis of the characteristics in question. Thus, the main doctrinal issue in the caselaw, whether explicitly stated in the judgment or not, was the concept of adverse impact discrimination.

This is a very important concept for equality litigation in this area: there can be little doubt that adverse impact arguments have potentially far more sweeping consequences for equality litigation arguments in relation to social benefit schemes than express discrimination arguments. Unfortunately, the cases under review here show little inclination on the part of the courts to engage in such an

analysis. These cases illustrate the use of two closely related techniques to avoid giving effect to an adverse impact analysis.

**Voluntarism:** The first technique is the attribution of the cause of discrimination to something other than the structure of the legal regime itself, usually to the "voluntary" conduct of the individual claimant. Examples of this can be seen in Re Heidekamp and Director of Support and Custody Enforcement where it was held that any inequality between the claimant and wage earners subject to garnishment was "caused" by his own actions in defaulting on support payments and in Auger v. Alberta (W.C.B.), where it was suggested that the compensation scheme did not discriminate against the claimant because he had the "choice" of working for another employer. In the Ontario Nursing Home Association case the Court actually invoked two levels of intervening cause to separate the government from the impugned disadvantage, holding first that the level of nursing care received by nursing home residents was up to the home and, second, that in any event the plaintiff's wife had "chosen" this kind of care by choosing the residence for him. A closely related theme appears in Brown v. British Columbia, where the judge stated: "To the extent that the drug is efficacious, it can be said that those being given it receive a benefit. No one is compelled to take the drug".

From a doctrinal point of view these comments seem little short of bizarre; certainly there is no effort made in any of the cases to suggest why any of these "voluntary" acts should be relevant to an equality analysis. However, what is important here is the fact that the comments would be made at all. What these comments indicate, I would suggest, is not necessarily an ideological antipathy to the idea of equality rights *per se*, but rather another manifestation of a reluctance to accept that interests in social benefits provided by the state should be the matter of constitutionally protected "rights", even under s.15. Judicial attitudes towards anti-discrimination claims no doubt vary considerably, but it is significant that these comments were all made

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67. Supra, note 37 at 464.

68. The implied reasoning here may be tested against the argument that exclusionary distinctions made on the basis of pregnancy are not discriminatory because pregnancy is (usually) a voluntary state: cf. Brooks v. Canada Safeway Ltd. (1989), 59 D.L.R.(4th) 321 (S.C.C.).
in the context of claims where the legislation in question did not explicitly draw distinctions on s.15 grounds.

**Structural rationality:** The second technique I will examine here has even more potential for undermining the concept of adverse impact discrimination. What may be seen in most of the cases, implicitly or explicitly, is an assertion that the impugned distinction was justified because it was required to maintain the structural integrity or internal logic of the benefit scheme under attack. Of course one would expect such arguments to be made in relation to s.1, as reason not to give effect to a *prima facie* finding of discrimination (and this issue was in fact treated this way in *Auger v. Alberta*). However, the point I wish to make here is that these kinds of factors seem to have been adopted in most of the cases considered above as reasons for holding that the legislative scheme was not discriminatory, thus avoiding reference to s.1 altogether.

Again, *Brown v. British Columbia* provides a good illustration, since the Court expressly dealt with an adverse impact argument in that case. While the Court acknowledged that adverse impact discrimination was covered by s.15, the actual reasons given in the case would seem to negate the concept entirely. The Court held, as noted above, that there was no discrimination because the treatment protocol for AZT was different from the treatment protocols for the drugs used to treat cancer and transplant patients: the government was entitled to fully fund the latter but not the former as an incentive to doctors to follow these protocols.

If the parameters of the benefit scheme and its internal logic form the entire landscape within which discrimination can be sought, it will not often be found. Few eligibility rules in social benefit schemes cannot be explained as having some kind of current “purpose” in relation to the internal logic of the benefit scheme. If this is so, however, the idea that effect as well as intent implicates the prohibition against discrimination is rendered almost meaningless. Such cases will never even get to the point of permitting an inquiry, under s.1, whether remedying the disadvantage of the claimant should take precedence over the fiscal interests or administrative convenience of the state. Again, I suggest that this technique is in no sense doctrinally mandated, but provides a convenient method of limiting the extension of rights claims into areas uncomfortable for courts to deal with.
c. **Direct Discrimination**

The limited amount of caselaw in this area to date suggests that the best chances of success in an equality challenge to social benefit legislation is where the legislation expressly distinguishes classes on the basis of an enumerated or analogous characteristic. However, the only such case in the jurisprudence reviewed here, *McInnis v. Director of Social Planning Department*, shows how even in these cases judges can find techniques for avoiding a *prima facie* finding of discrimination. In *McInnis*, the trial court avoided finding an express age-based distinction to be discriminatory simply by asserting that the distinction was “based on” the legal attributes of the age in question.

The decision in *McInnis* illustrates another important problem of equality litigation. As many equality theorists, particularly feminist theorists, have pointed out, it is precisely the most deeply embedded modes of disadvantage which are the most difficult to make visible as disadvantage, being so firmly established in legal and social practice that they appear part of the natural order.⁶⁹ Thus, as *McInnis* shows, the very disadvantage at issue can be formulated as its own justification. Furthermore, the issue may not even appear as a formal issue of justification, but may be invoked to preclude even a finding of discrimination.

d. **Section 15(2)**

The final doctrinal issue I want to consider here is the application of s.15(2), the so-called “affirmative action” section, to social benefit programs. Section 15(2) provides that s.15(1) “does not preclude” any law, program or activity aimed at the amelioration of disadvantage. The purpose of the section seems clear: to protect governmental attempts to advance the situations of disadvantaged groups and individuals from attacks by relatively advantaged individuals. Until recently, s.15(2) arguments had not been given much attention in equality litigation in this area and were not successful in the few cases in which they were

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⁶⁹. A fuller exposition of this issue is beyond the scope of this article. For a recent discussion of this problem in the context of gender discrimination issues in Charter litigation, see Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward Or Two Steps Back* (Canadian Action Committee on the Status of Women, 1989).
Recent developments, however, show that s.15(2) is susceptible to some very different interpretations and that its application in this area is far from settled.

It will be recalled that in Brown v. British Columbia, the Court held that if discrimination existed, it would be obviated by s.15(2). Specifically, the Court held that, "Even if the special drug funding programmes for cancer and transplant patients could be considered discriminatory, they would, in my view, be justified pursuant to s.15(2))."\(^{71}\) There is an interesting slippage in the language of the case at this point which has very serious consequences for the application of s.15(2). Section 15(2), as noted, simply provides that ameliorative action is not precluded by s.15(1). The plaintiffs in Brown were, of course, not attacking the validity of the funding programs for cancer patients but were claiming that the government was discriminating against them by its refusal to provide full funding for AZT. Even accepting the Court’s proposition that cancer and transplant patients are "disadvantaged" groups within the intended meaning of s.15(2), if this line of reasoning is correct it seems that if a program is ameliorative for anyone, it is immune from attack on equality grounds, even where alleged to be discriminatory in relation to some other disadvantaged individual or group.

Another very problematical recent use of s.15(2) in a slightly different context is the decision of the Ontario District Court in Fleming v. Reid.\(^ {73}\) The case involved a challenge to a provision of the Ontario Mental Health Act, arguing that it violated the equality rights of incompetent involuntary patients in psychiatric facilities by allowing them to be treated with narcoleptic drugs against their expressed wishes. In rejecting this argument, the Court stated, inter alia, "surely the provisions of s.15(2) are directed to legislation like [the Act] which is of a social interest character aimed at ameliorating a disadvantaged group in our society." If anything, the implications of this reasoning go even further than Brown, suggesting that s.15(2) may even immunize legisla-

\(^{70}\) See Reference Re Family Benefits Act (1986), 75 N.S.R.(2d) 338 (C.A.); Silano v British Columbia, supra, note 51.

\(^{71}\) Supra, note 37 at 463.

\(^{73}\) (1990), 73 O.R.(2d) 169 (Dist.Ct.)
tion from equality attacks by the very individuals whose disadvantage is supposedly ameliorated by it. 74

CONCLUSIONS
The review of cases and litigation activity in the first part of this article suggests that (bearing in mind that the volume of test case litigation in poverty law areas tends to be limited at best) there are a substantial number of Charter challenges being brought to various aspects of social welfare programs. If anything, this volume is increasing. 75 This growth reflects the fact that the Charter is having a growing impact on Canadian legal discourse, or at least those parts of it concerned with matters of public law and the relation between government and individuals. The Charter is undoubtedly affecting the expectations of advocates and activists—and probably many clients as well—about what issues can be framed as “legal” issues subject to judicial review. The Charter has certainly expanded the “legal” realm to include a large part of what were previously exclusively political questions. I have little doubt that many poverty law practitioners will continue to invoke the Charter in challenges to social welfare programs, both to try to obtain benefits for individual clients and to try to compel law reform.

In contrast, Charter decisions in relation to these matters have not shown a comparable expansiveness on the part of the judiciary towards rights claims involving social benefit programs. While Charter arguments have found favour with a few administrative tribunals charged with overseeing these programs, they have met a uniformly cool reception at the judicial level. As the analysis of recent decisions in the last section shows, it has been very difficult to persuade courts to acknowledge claims in relation to social benefits as presenting constitutionally cognizable interests.


75. I would note here, from personal experience, that the number of advocates using the research services of the Ontario Legal Aid Plan for assistance in formulating Charter arguments in relation to social benefit legislation has slowly but steadily increased in the four years that research services have been offered in this area.
I would not want to overstate the implications of these developments. The fact that litigation successes in this area seem to be halted does not mean that the Charter will have no further impact in this area. Indeed, as the American experience shows, the nature of constitutional adjudication is such that the substantive content of constitutional rights can never be considered finally determined as long as there is constitutional litigation. However, it seems clear that, in the short term at least, the decks are loaded against success in Charter litigation in relation to social welfare programs, except perhaps in the clearest cases of discrimination based on grounds that courts can easily recognize. The obvious judicial reluctance to interfere in the name of fundamental rights with what the state gives, as opposed to what it takes away, suggests that the reality of any such litigation will usually involve a struggle just to have the issues brought within the ambit of "fundamental rights". And, as the analysis in this article suggests, doctrinal arguments abstracted from cases dealing with other issues in other contexts may not have much force in the face of this reluctance.