

1992

Poverty Law in Ontario: The Year in Review [1992]

Randall Ellsworth

Ian Morrison

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/jlsp>

Citation Information

Ellsworth, Randall and Morrison, Ian. "Poverty Law in Ontario: The Year in Review [1992]." *Journal of Law and Social Policy* 8. (1992): 1-53.

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol8/iss1/1>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

POVERTY LAW IN ONTARIO: THE YEAR IN REVIEW

Randall Ellsworth and Ian Morrison*

RÉSUMÉ

Cet article fait la revue des événements de l'année dernière dans certains domaines de la défense juridique des personnes à faible revenu, y compris l'aide sociale, les accidents du travail, l'assurance-chômage et le Régime de pensions du Canada. Nous nous concentrons sur la réforme de la loi, sur les litiges et sur la pertinence de ces activités aux yeux de ceux et celles qui pratiquent ce domaine du droit. Nous considérons les effets de la récession et les actes des gouvernements fédéral et provincial dans les secteurs sélectionnés.

A. INTRODUCTION

This is our second annual review of poverty law developments for the *Journal of Law and Social Policy*.¹ The article covers the period from September 1991 to September 1992. The main focus of the article is again on income maintenance law and related issues, with particular reference to the activities of Ontario's community legal clinics. Once again, time and space constraints and the limits of our own expertise mean that we have had to be quite selective in deciding what should be reviewed. However, we have tried to place jurisprudential issues in the context of broader legislative, social and economic developments.

* Copyright © 1992 Randall Ellsworth and Ian Morrison. Randall Ellsworth is a research lawyer with the Clinic Resource Office of the Ontario Legal Aid Plan (CRO). Ian Morrison is a research lawyer and Executive Director of the CRO. The CRO provides legal research and resource and training materials to practitioners in Ontario community legal clinics. The authors would like to thank Judith Keene and Paul Rapsey of the CRO for their assistance with preparation of this article, and the many clinic caseworkers who have provided us with information and ideas. Any opinions expressed herein are those of the authors and not necessarily those of the Ontario Legal Aid Plan.

1. R. Ellsworth and I. Morrison, "Poverty Law in Ontario: The Year in Review" (1991), 7 *J.L. & Social Pol'y* 1. [hereinafter "Ellsworth & Morrison (1991)"].

The most important news item for poverty law advocates and activists during the past year has, of course, been the recession (or the depression, depending on one's degree of pessimism) and increasing poverty. Many people who held regular employment for years have lost their jobs with the recession and economic "restructuring" and face long term unemployment, as evidenced by the enormous rise in the number of unemployed people seeking welfare for the first time.² In September 1992, Statistics Canada reported that the number of unemployed people in Metropolitan Toronto had reached the highest rate since the 1930s Depression—with no clear hopes of improvement in sight.³

Increasing unemployment and growing poverty have been accompanied by enormous pressures on the social welfare programs which provide direct or indirect income support. The federal government has continued with its agenda of cutting social spending and shifting this burden to the provinces.⁴ Those provincial governments committed to maintaining or even desirous of expanding social spending have been further hampered by burgeoning deficits and diminishing revenues.

The causes of poverty generally and its demographic distribution cannot be reduced to a simple function of the economy. Many (too many) Canadians were living in poverty before the recession. Such factors as race, gender, childcare responsibilities and disability, alone or in combination, have always been strongly implicated in the unequal distribution of poverty as well. However, all the forms of disadvantage which place people at a higher risk of poverty are exacerbated in bad economic times.

We will not engage in an extensive review of poverty statistics here—most poverty law advocates have had enough first-hand exposure to the growing number of poor people in the past year. We will mention just a few figures. Perhaps the most disturbing are with respect to child poverty. In Ontario, it is estimated that one in six children lives in a family receiving social assistance, the bottom of the social welfare net.⁵ Nationally, one in six

2. Ontario, *Time For Action: Final Report of the Advisory Group on New Social Assistance Legislation* (Toronto: Queen's Printer for Ontario, 1992) (Chair: A. Moscovitch) [hereinafter "*Time For Action*"] 20.

3. "Jobless rate worst since Depression", *The [Toronto] Star* (5 September 1992) A1.

4. See National Council of Welfare, *The 1989 Budget and Social Policy* (Ottawa: Supply and Services Canada, 1989); National Council of Welfare, *The Canada Assistance Plan: No Time For Cuts* (Ottawa: Supply and Services Canada, 1991).

5. *Time For Action*, *supra*, note 2 at 21.

Canadian children lives below the poverty line.⁶ Most of these families are headed by single women, one of the most socially and economically disadvantaged groups in Canada (before even taking into account conditions of race and disability within this group).⁷ As of March 1991, the National Council of Welfare estimated that there almost 2,300,000 people on welfare across Canada.⁸ There are now more foodbanks than McDonald's restaurants in the major Canadian cities.⁹

Not surprisingly, the demand for legal services to help people seeking benefits from social welfare programs has increased. Most clinic caseworkers have reported an influx of new clients, especially those seeking assistance with social assistance problems. The demand for individual services has forced many clinics into a difficult choice between providing individual representation and freeing up time to pursue community development and lobbying for law reform.

The article has three main sections. First, we mention briefly some current issues of access to justice for poor people in Ontario. Second, we review legislative and jurisprudential developments and current law reform prospects in relation to the four income maintenance programs encountered most often in poverty law practice. Finally, we take a brief look at some current issues in constitutional and human rights law as it affects low income individuals and poverty law practice.

B. ACCESS TO JUSTICE

Although the main focus of this article is on substantive poverty law developments, a true picture of the state of poverty law practice must include some reference to the issue of access to justice. While we cannot give this topic the attention it deserves, there have been important developments in this respect in the past year which bear mentioning here.

-
6. M. Reitsma-Street, A. Van de Sande, R. Carriere, "Three Perspectives on Child Poverty in Canada" (School of Social Work, Laurentian University, 1992) [unpublished] 1.
 7. National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Supply and Services Canada, 1990).
 8. National Council of Welfare, *Welfare Reform* (Ottawa: Supply and Services Canada, 1992) at 3.
 9. "Three Perspectives On Child Poverty", *supra*, note 4 at 1.

1. NEW DIRECTIONS FOR LEGAL SERVICES IN ONTARIO?

Ontario has a mixed model of legal aid services. The needs of low income people for "traditional" legal services (criminal law, family law, general civil litigation) are primarily served by the private bar, reimbursed on a fee for service basis through legal aid certificates. Areas of law not traditionally served by the private bar and of special concern to low income people or groups at special risk of social and economic disadvantage are served by community legal clinics.¹⁰ An important difference between these delivery models is that, since their inception, clinics have seen their mandate as including not only individual client representation but also community development, law reform and lobbying.¹¹

Notwithstanding a substantial growth in the number of legal clinics in Ontario in the past fifteen years, the funding and administrative structure of the clinic system has remained largely unchanged, as has the relationship between the respective mandates of the legal aid certificate plan and clinics. Events of the past year, however, make the *status quo* seem increasingly fragile.

The first event of note is internal to the clinic system itself. While there are many—and vigorous—competing visions of what clinics should be and do, almost all participants in the clinic system agree that a review of the divisions of authority and roles of the various players in the system is overdue. In June 1990, the Clinic Funding Committee¹² funded a planning conference attended by representatives of "stakeholders" in the clinic system. The conference ended with a proposal for an independent operational review of the clinic system. The review team's consultations were carried out in late 1991 and 1992 and its initial report is expected in the fall of 1992.

10. There are about seventy community legal clinics in Ontario funded through the Ontario Legal Aid Plan Clinic Funding Committee, which operates under the authority of Part III of O.Reg. 59/86 (pursuant to *The Legal Aid Act* R.S.O. 1990 c.L-9). Most clinics provide general services in poverty law, but several specialize either in particular areas of law or in serving a particular target population, such as the disabled or elderly, or a particular community: for a full list of clinics see *Community Legal Services Directory* (Ontario Legal Aid Plan: August 1991), available from the Ontario Legal Aid Plan.

11. For a historical review of this mandate, see M. Blazer, "The Community Legal Clinic Movement in Ontario: Practice and Theory, Means and Ends" (1991), *J.L. & Social Pol'y* 49. The expanded mandate of clinics is expressly acknowledged in the *Community Legal Services Directory*, *supra*, note 10.

12. See note 10, *supra*.

Most people who have been following the review assume that the reviewers will recommend changes to clarify the roles and responsibilities of clinic staff, boards of directors and the clinic funding Committee and administration, as well as substantial changes to address current inadequacies of the clinic system's infrastructure, training programs, communications and other support services. While the operational review has been expressly stated not to be a strategic review, many would feel that this must be the next step. The process of the operational review has already built some pressures for a more thorough examination of what poverty law practice in the 90s should be and the role of clinics in providing it.

Pressures for reexamination and perhaps for a defence of the community clinic model may also come from outside the clinic system in the next year. The demand for legal aid certificate services increased greatly with the recession, which inevitably led the government to look for ways to control rising legal aid costs. The Attorney General of Ontario announced in the summer of 1992 that the Ontario Legal Aid Plan would be establishing, as "pilot projects", clinics to deliver services in the area of family law, criminal law and immigration law.¹³ The terms of the announcements suggest that these will not be "community legal clinics" on the model of the current system, directed by independent community based boards of directors, but rather that they will be "public defender" clinics—government offices with staff lawyers whose mandate is to do casework.

The private bar has reacted to these announcements with predictable hostility.¹⁴ Less has been heard publicly from within the clinic system (although at least one clinic group presented a brief to the Attorney General with respect to the proposed family law clinics) but changes to the legal aid plan will undoubtedly affect community legal clinics. How the private bar handles demands for legal services always has some impact on clinic operations, as people who cannot get legal help approach clinics for services. More importantly, it seems inevitable that if "clinics" using staff lawyers are established following a different model from community legal clinics, the results of the two delivery models will be compared.

-
13. News Release: "Attorney General Announces Major Review of Legal Aid and Court Systems as Justice System faces Massive Financial Problems" (Ontario, Ministry of the Attorney General) (25 June 1992); "Reforms coming to avert Ont. Legal Aid funding crisis" *The Lawyer's Weekly* (19 June 1992) 1.
 14. E.g., see "Reforms coming to avert crisis ...", *supra*, note 13; "Briefly Speaking" 13 CBAO Ontario Newsletter #8 (August 1992).

It is far too early to tell what will come of these changes. Changes which result from pressures to save money alone obviously pose a risk to any legal aid program, let alone one which sees its mandate as extending beyond individual casework. On the other hand, if a closer scrutiny of the clinical model for legal services is inevitable in any event, perhaps it is time not only for an affirmation of the importance of the broader mandate, but for a renewed examination and debate about the meaning of poverty law practice and legal activism.

2. PUBLIC LITIGATION FUNDING

Access to legal services is only part of the problem of access to the justice system for low income people. Legal aid programs provide counsel for most low income people, the major cost component of routine litigation, but in more ambitious "test case" the costs of seeing a case through to completion can amount to tens of thousands of dollars or more for disbursements alone. These costs can present an insuperable barrier to low income individuals and groups from pursuing rights claims in the courts. Thus access to litigation funding is also a crucial component of meaningful access to justice.

(a) The Court Challenges Program

In its February 1992 budget the federal government announced a series of program cuts it cited as deficit reduction measures—but a move seen by many others as a cynical attempt to silence its critics on social issues.¹⁵ The cuts included cancellation of the Court Challenges program, which had provided development and litigation funding for people seeking to assert equality rights and language rights claims against the federal government. Court Challenges money had been used by many groups, including legal clinics, to pay for costs of developing new legal arguments and to develop the often expensive and sophisticated bodies of empirical and statistical evidence required in much equality litigation.

The demise of Court Challenges shocked many people, coming as it did shortly after the government had announced that the program would be extended for five years to 1995. It was protested not only by many individuals and groups, but by the Parliamentary Standing Committee on Human Rights and the Status of Disabled Persons, which praised the program as innovative and cost effective, noting that it had received "glowing evaluations" from almost all sources.¹⁶ Nevertheless, at the time of writing the federal government has refused to reinstate the program and future prospects look bleak.

15. "Feds' budget cuts leave legal programs dead and injured", *The Lawyer's Weekly* (20 March 1992) 1.

(b) Class Proceedings and Class Proceedings Funding

In a more hopeful development for low income litigants, Ontario recently passed new legislation to facilitate class proceedings.¹⁷ The legislation is intended to overcome narrow judicial interpretations which established very narrow criteria within which an action had to fit to be brought as a class action.¹⁸ At the same time, the government passed companion amendments to the *Law Society Act* to establish a fund known as the "Class Proceedings Fund".¹⁹ The fund will be administered by a Committee established under the Act. A plaintiff to a class proceeding or who is seeking to have a proceeding certified as a class proceeding may apply to the fund for financial support "in respect of disbursements relating to the proceeding".

There are many unanswered questions about the *Class Proceedings Act*. It is not entirely clear what kinds of proceedings are covered and to what extent "class proceedings" will provide a useful forum to deal with problems specific to poor people. Furthermore, disbursements funding is discretionary and it remains to be seen how sympathetic the Committee will be to claims by poor people seeking to advance novel or unusual arguments.²⁰ It seems likely, though, that the existence of the Class Proceedings Fund will encourage counsel to try to structure actions as class proceedings wherever possible. While the fund does not cover legal fees,²¹ disbursements are a major cost concern in complicated litigation and other sources of disbursement funding are under tremendous pressure in the current fiscal climate. Also, under the new provisions, anyone who is granted disbursement funding is also granted immunity from an adverse costs award.²² The wording of the legislation suggests that this immunity adheres regardless of how much or little is

-
16. "Paying too dearly" Report of the Standing Committee on Human Rights and the Status of Disabled Persons, Bruce Halliday M.P. Chair, House of Commons, Issue #23 (June 11, 1992).
 17. *Class Proceedings Act*, S.O. 1992 c.6, (Royal Assent June 25, 1992, not yet proclaimed in force).
 18. *Naken v. General Motors of Canada Ltd.*, [1983] S.C.R. 1982.
 19. *Law Society Amendment Act (Class Proceedings Funding)*, 1992, S.O. 1992, c.7 (Royal Assent 25 June 1992, not yet proclaimed in force).
 20. Some concerns have already been expressed that because the Committee is directed to have regard to "the merits of the case" in determining whether to grant funding, novel legal arguments with respect to unfamiliar poverty law claims may be short-changed.
 21. *Law Society Act*, as amended by S.O. 1990 c.7, s.59c.
 22. *Ibid*, s.59d.

granted for disbursements. Since potential costs liability is a serious deterrent to many low income individuals and groups from pursuing litigation, obtaining this immunity may be just as important as disbursement funding in enabling these groups to pursue legal remedies.

C. DEVELOPMENTS IN INCOME MAINTENANCE LAW

This section will consider developments in the areas of social assistance, workers' compensation, unemployment insurance and the Canada Pension Plan, the income maintenance programs most commonly encountered by poverty law advocates. Both legislative changes and significant litigation initiatives will be addressed.

1. SOCIAL ASSISTANCE

The focus of this section will be on the two main components of the Ontario social assistance system, the *General Welfare Assistance Act* and the *Family Benefits Act*.²³ Social assistance caseloads and costs continued to rise throughout 1991-1992 (although the rate of increase of new claims slowed somewhat). The number of unemployed "employable" people on welfare increased not only in absolute terms, but also as a percentage of all recipients—from about 25% of the social assistance caseload in December 1990 to 36% in January 1992.²⁴ This was largely due to increases in the number of people who exhausted unemployment insurance benefits without finding new work²⁵: the percentage of the Ontario population under 60 who received social assistance increased from 8.1 to 13.9 percent from 1990 to 1991.²⁶

The effects of these increases on program delivery were described in last year's article and the comments made then still apply.²⁷ Discretionary spending has been put under even greater pressure, delivery standards are often arbitrary and capricious, law reform efforts have been impeded and public

23. The legislative framework for the provision of municipally administered welfare is found in the *General Welfare Assistance Act*, R.S.O. 1990 c.G-6 [hereinafter "GWA"] & *General Welfare Assistance Regulations*, R.R.O. 1980 O.Reg.441, as amended [hereinafter "GWR"]; for provincially administered family benefits, in the *Family Benefits Act*, R.S.O. 1990 c.F-2 [hereinafter "FBA"] & *Family Benefits Regulations*, R.R.O. 1980 Reg.318, as amended [hereinafter "FBR"].

24. *Time For Action*, *supra*, note 2 at 20.

25. *Ibid.* at 21.

26. *Ibid.*

27. Ellsworth & Morrison (1991) at 13.

resentment of social assistance spending—still funded in part from regressive local property taxation—is high.

(a) Legislative Developments

(i) The Back On Track Implementation

1991 was an active year for legislative change in Ontario. We wrote last year about *Back On Track*,²⁸ the interim report of the Minister's Advisory Group on New Social Assistance Legislation.²⁹ The government had at that time made an initial commitment to implementing a substantial number of its recommendations. We can now report on the results of this process, although there have been so many significant program changes in this period that they cannot all be described in detail.

The government carried through on many of its promises, including increased benefits, extended categorical eligibility for Family Benefits, enhanced employment incentives and some increased procedural protections. However, it has still not moved on other commitments made at the same time. These include making it easier for youth 16 to 18 to obtain welfare in their own right after leaving home, allowing families of disabled people to establish modest trusts to provide a better quality of life to those in long term need, and a variety of commitments to improve standards of fairness and accountability in service delivery.

Perhaps the most important of the broken commitments, as a test of the government's commitment to moving social assistance in new directions, were in relation to conditionality and employment. Issues of welfare and work are a major focus for social assistance critics from all points on the political spectrum. Disappointingly, the government refused to make even modest changes to existing legislation which would have signalled a move towards "transition" and away from "coercion" as a program philosophy.³⁰ Indeed, in August 1992 the government undermined many of the previous year's improvements to the income supplementation program of the social assistance system (known as "STEP")—also a key component of the "tran-

28. Ontario, *Back On Track: First Report of the Advisory Group On New Social Assistance Legislation* (Toronto: Queen's Printer, 1991) (Chair: A. Moscovitch).

29. Ellsworth & Morrison (1991) at 17.

30. For example, current legislation requires that a welfare applicant make reasonable efforts to obtain any full, part-time or casual employment that he or she is physically capable of pursuing: GWR s.3(1)(b). *Back On Track* argued that this was counter-productive and recommended that the wording be changed to refer to "suitable employment".

sitions” reform philosophy—by substantially restricting access to the STEP program.³¹

A final problem with *Back On Track* was the implementation process itself. Policy guidelines explaining changes to field staff were not issued for months after new, often confusing, regulations were passed. The guidelines eventually issued are in many instances confusing, incomplete or in some cases just wrong, and the responsible Ministry made no effort to provide or assist in providing comprehensive training to the workers responsible for implementing the changes.³² The problems encountered with the *Back On Track* implementation may unfortunately indicate problems that will have to be faced in the more ambitious project of implementing the promised new legislation

(ii) *Future Directions*

In June 1992 the authors of *Back On Track* released their final report, *Time For Action*.³³ Most advocates hoped this report would build on the highly regarded *Transitions*³⁴ report to provide a detailed blueprint for new social assistance legislation.

The substance of the report will probably meet with a mixed reception by consumers and advocates. Many of the recommendations were predictable and simply echo recommendations from *Transitions*. For example, it comes as no surprise that *Time For Action* recommends that benefits should be “adequate”, that all real necessities should be covered and that the delivery system should be improved. The report is generally progressive on issues relating to employment and employability: it rejects coercive conditionality rules in favour of voluntary “opportunity planning” and emphasizes the need for assistance towards self-sufficiency. On the other hand, the report will be disappointing to those who were critical of the *Transitions* approach to women’s issues around social assistance and hoped that their concerns would

31. These amendments [O.Reg.372/92 (*Family Benefits*) and O.Reg.373/92 (*General Welfare Assistance*)] have the effect that the STEP income exemption calculations are not applied to new applicants, as a result of which many people who would formerly have qualified for a “top-up” now will not be eligible for welfare at all.

32. These criticisms were put in detail to the Ontario government on behalf of the Ontario clinics Steering Committee on Social Assistance, by Ian Morrison in a letter dated May 4, 1992. The Minister of Community and Social Services acknowledged receipt of the letter but has never responded to the substantive criticisms.

33. *Supra*, note 2.

34. Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen’s Printer, 1988) (Chair: G. Thomson).

be more carefully examined this time around.³⁵ Background materials prepared for the Advisory Group by clinic advocates argued strongly for a new approach to the definition of the benefit unit, the obligation to seek child support and impact of child support payments on benefit levels.³⁶ Instead, *Time For Action* recommends abolishing categorical eligibility for sole support mothers while retaining the substance of the current rules of most concern to women.

Time For Action is also a disappointment on another level. Most advocates had hoped that the report would provide a detailed blueprint for new legislation. It does not do this. Many important issues are dealt with superficially or not at all—the report is long on generalities and short on specifics. This will make the job of attending to the details of new legislation all the more difficult for social assistance advocates.

In any event, consumer activists, advocates and others interested in progressive reform have a busy and difficult year ahead. The Ontario government has entered into detailed negotiations with municipal governments to “disentangle” provincial/municipal funding programs, of which social assistance is a key component. The government has indicated it will decide soon how social assistance will be funded and who should deliver social assistance services. A Cabinet submission will probably be made for decision on key policy elements of new social assistance legislation in early 1993. A draft bill is expected sometime in 1993.

It is ironic that the first sustained move towards substantial changes to social assistance programs in Ontario is happening when the provincial government is preoccupied with other concerns and under tremendous political and financial pressures to show “restraint” in all matters relating to public spending.

(b) The Social Assistance Review Board

The effects of the recession on the Social Assistance Review Board (SARB) became increasingly evident in 1991-92. The total number of appeals in 1990-91 rose about 16% over 1989-90 to over 4500,³⁷ then accelerated even

35. E.g., see F. Stairs, “Sole Support Mothers And Opportunity Planning in the Thomson Report” (1989), 5 J.L. & Social Pol’y 165.

36. See: Social Assistance Legislation Research and Technical Background Documents, Benefit Structure Project Team, Doc.# BS01 “Benefit Unit” (1991) [unpublished]; F. Stairs, “Child Support Issues”, Background paper for the Benefit Structure Project Team, Legislative Reform Project, (October 1991) [unpublished].

37. *Social Assistance Review Board: 1990-91 Annual Report* (Toronto: Queen’s Printer For Ontario, 1992) 12 [hereinafter “SARB Annual Report, 90-91”].

more, increasing 50% from 4500 in 90/91 to 7200 in 91/92.³⁸ The number of requests for interim assistance increased about 75% in the same period. Although the Board received some additional funding, it was only half of what was requested.³⁹ By far the greatest number of appeals under the *General Welfare Assistance Act* were in respect of job search and job loss issues.⁴⁰ The majority of appeals under the *Family Benefits Act* continued to be with respect to denials of eligibility as a disabled or permanently unemployable person.⁴¹

These pressures have caused serious problems for the appeals process: The process has developed chronic delays, the most disturbing of which are in processing applications for interim assistance. Decisions which should be made within days at most, to protect the integrity of the appeals system, routinely take weeks or even months. SARB has taken several steps to address these problems, as it has become clear that administrative procedures developed when caseloads were a fraction of their present size must be reviewed. It has attempted to implement a "fast track" system to deal with simple cases. It has also undertaken a review of all internal procedures to identify the causes of delays and propose a plan for reducing them.⁴² While social assistance advocates are concerned that client's rights not be prejudiced by any of these changes, all would agree that changes must be made—there are few areas in which the maxim "justice delayed is justice denied" applies more forcefully than in the resolution of issues involving fundamental needs.

(c) **Litigation Developments**

(i) *Social Assistance and the Charter*

Those who hoped that the *Charter of Rights*⁴³ would have a substantial impact on the substance or administration of social assistance programs continue to be disappointed. While there were no *Charter* decisions from

38. Letter from Laura Bradbury, SARB Chair, to Nancy Vanderplaats, Chair of the Steering Committee on Social Assistance (14 August 1992).

39. *Ibid.*

40. *SARB Annual Report 90-91, supra*, note 37 at 46. Job search and job loss cases made up 52.3% of GWA appeals in this time period, with the next highest category being 10.7% (excess income/assets).

41. *Ibid.* at 45. These made up 56.6% of all FBA Appeals.

42. *Supra*, note 38.

43. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982 (U.K.), c.11* [hereinafter "the Charter"].

Ontario courts during the past year dealing with social assistance matters,⁴⁴ some important claims in other jurisdictions met with defeat.

One important case is the decision of the Quebec Superior Court in *Gosselin v. Procureur General du Quebec*.⁴⁵ *Gosselin* was a class action which challenged, under ss. 7 and 15 of the *Charter*, a legislative amendment cutting welfare allowances for employable recipients between ages 18 and 30 to slightly over one-third of the allowance available to single people over the age of 30 unless they participated in a "workfare" program. The Court rejected both arguments—and indeed went so far as to suggest that the amendments were a positive move which could have been extended.

A second important but disappointing decision is *Fernandes v. Director of Social Services (Winnipeg Central)*,⁴⁶ a decision of the Manitoba Court of Appeal released shortly after *Gosselin*. The appellant was a disabled person living in the community who lost his caregiver and was forced to enter a hospital as an in-patient. He sought and was refused a social assistance allowance to pay for the care necessary for him to be able to return to the community. The Court held that neither his s.7 nor his s.15 rights were infringed by this decision.

Finally, mention should also be made of the decision in *Mireau v. Saskatchewan*,⁴⁷ in which the Saskatchewan Court of Queen's Bench held that neither s.7 nor s.15 of the *Charter* obliged the Saskatchewan Legal Aid Commission to provide the applicant with funded counsel to pursue "private" civil litigation, including an appeal from a denial of social assistance.

We will examine these cases in more detail below, when we consider the impact of the *Charter* on social welfare programs.

-
44. We reported last year that a preliminary decision of the Social Assistance Review Board, in which the Board held that it had *Charter* jurisdiction pursuant to s.52 of the *Constitution Act*, had been judicially reviewed: Ellsworth & Morrison (1991) at 11. The case has still not been decided, although it is now scheduled to be heard by the Ontario Divisional Court in the fall.
 45. (27 May 1992), No.500-06-000012-860 (Que. S.C.) [unreported]. We have been informed by counsel for the plaintiffs that an appeal from this decision has been filed. However, in light of the current backlog of cases in the Quebec Court of Appeal, it is not likely that the case will be heard and a decision rendered for two to three years.
 46. (10 June 1992), Suit No. AI 91-30-00477 (Man. C.A.) [unreported]. We have been informed by counsel in the case that an application for leave to appeal to the Supreme Court of Canada will be made.
 47. (13 December 1991), No. Q.B. 3758/91 (Sask. Q.B.) [unreported].

(ii) *The Canada Assistance Plan in the Supreme Court*

Litigation begun well over a decade ago may soon reach its end in the Supreme Court of Canada. Jim Finlay, a social assistance recipient, challenged the practice of the Manitoba social assistance authorities of recovering social assistance overpayments by making deductions from recipients' allowances. Finlay argued that this practice violated the terms of the *Canada Assistance Program*, pursuant to which provincial social assistance costs are shared by the federal government.⁴⁸ In 1990 he achieved a landmark victory, when the Federal Court of Appeal held that CAP imposed a legally binding obligation on provinces to pay people in need the amounts deemed necessary to meet their basic requirements.⁴⁹

The federal government appealed the decision to the Supreme Court. (Ontario initially intervened in the case to support the position of the federal government but the Ontario government withdrew its intervention after being strongly criticized by social assistance advocates and consumers for its stand in the case.) *Finlay* was argued in March 1992 and is currently on reserve at the Supreme Court. Ironically, even if the Court affirms the Court of Appeal decision, it may be a Pyrrhic victory for Ontario social assistance recipients. The remedy sought in the case is an order to make the federal government stop cost-sharing payments to the province until it complies with the terms of CAP. However, the federal government has already reneged on its commitment to equal cost sharing under the CAP agreement.⁵⁰

(iii) *Social assistance and access to shelter*

Access to shelter is an important issue for social assistance recipients. The basic problem of finding affordable shelter and paying deposits for rent and utilities usually demanded by landlords and utilities commissions is exacerbated by other barriers, including the pervasive discrimination practiced against social assistance recipients in the private rental market. A number of housing issues specifically related to social assistance programs have been or are being litigated in Ontario this year.

Until recently, Metropolitan Toronto—the largest welfare delivery agent in Ontario—gave welfare recipients money for last month's rent deposits under a discretionary program known as special assistance. However, faced with severe budgetary pressures, in 1992 Metro Toronto cut this program, along

48. *Canada Assistance Plan*, R.S.C. 1985 c.C-1 [hereinafter "CAP"].

49. *Finlay v. Canada* (1990), 71 D.L.R.(4th) 422 (F.C.A.).

50. See Ellsworth & Morrison (1991) at 14.

with a variety of other special assistance programs. It even went so far as to refuse to provide rent deposits under a new program, specifically intended to provide assistance in establishing a new residence. In June 1992 a group including both individual welfare recipients and institutions such as shelters whose clients were directly affected by these cuts, filed an application in the Ontario Court (General Division) challenging the legality of the cuts.⁵¹ It is hoped that there will be a decision before the end of the year. The case has potentially far reaching consequences. At issue is the scope of municipal discretion to provide or refuse to provide not just rent deposits but a wide range of important items which are not mandatory under the legislation.⁵²

The need to find money for rent deposits is not the only problem confronting poor people trying to establish a new residence. Many utilities companies require deposits for basic utilities services. This practice has been challenged by social assistance recipients in Peterborough, Ontario.⁵³ The application at this point makes three separate claims: firstly, attacking the law allowing utilities companies to demand such deposits; secondly, attacking the refusal of local welfare authorities to pay the required deposits as items of special assistance; and, thirdly, claiming that landlords must pay such deposits themselves where necessary to render the premises fit for habitation.

Finally, an attempt by a coalition of hostels to challenge their funding levels under welfare regulations failed recently. In *Our House Ottawa Inc. et al v. Regional Municipality of Ottawa-Carleton*,⁵⁴ the applicant hostels argued that the Director of Income Maintenance had improperly exercised his discretion and had acted on the basis of extraneous political considerations

51. *Simon et al. v. Municipality of Metropolitan Toronto* (Ont. Ct. (General Div.), File No. RE.1270/92). A study, commissioned as evidence for the action, originally intended only to ascertain how many commercial landlords demanded rent deposits as a condition of renting apartments, revealed that most landlords openly admitted that they would not rent to social assistance recipients, even though such discrimination is illegal under provincial human rights legislation.

52. "Special assistance" includes, for example, prescription drugs, transportation costs such as bus passes, dental services, eye-glasses and vocational training: GWR s.1(1)(o).

53. *Clark v. Peterborough Utilities Commission et al.* (Ont. Ct. (General Div.) File No. 6605/91). The applicant is represented by the Peterborough Community Legal Centre. A number of anti-poverty organizations have intervened on behalf of the applicant, while several local utilities commissions and Ontario Hydro have intervened on behalf of the respondents.

54. (19 May 1992), File No.750/89 (Ont.Ct. (Gen.Div.) Div.Ct.) [unreported].

in setting the *per diem* levels by which hostels were funded.⁵⁵ The Court rejected this argument on the facts, finding that nothing in the materials filed suggested that the Director had not made an informed and independent decision.

The applicants also argued that funding for “personal needs”, as required by the regulation, should include funding for counselling and vocational rehabilitation services for their residents. The Court rejected this argument also. Ironically, the Court found support in the provisions of the *Canada Assistance Plan*, which it held could properly be used to interpret provincial social assistance legislation.⁵⁶

(iv) Confidentiality of welfare records

In last year’s article we noted that welfare recipients in Hastings County, Ontario, had gone to court to resist an attempt by local politicians to get a list of the names of all welfare recipients in the county.⁵⁷ After many delays, a decision in the case was finally rendered on August 19, 1992.⁵⁸ The applicants had raised a wide range of issues in the case, including Charter arguments. In the end, however, the decision rested on a narrow ground. The Court held that applicable protection of privacy legislation barred release of the information unless the person seeking disclosure needed the information “in the performance of his or her duties”.⁵⁹ The Court found that the Council had adduced no evidence that it needed the information, stating that even if it was correct as a general proposition that some people get welfare who should not, “that is not evidence that there are persons in Hastings County receiving welfare who should not, and who will not be caught, and that help from Council is needed to catch them.”⁶⁰

There are many other issues of confidentiality that arise with respect to social assistance records. It is hoped that these will be dealt with in a comprehensive

55. Under GWR s.12(3)(b), the Director is granted the authority to approve the rates paid to hostels to provide board and lodging and personal needs.

56. *Supra*, note 54 at 15.

57. Ellsworth & Morrison (1991), at 26.

58. *Horlick et al v. The Corporation of the County of Hastings et al; Canadian Civil Liberties Assn. et al, Intervenors* (19 August 1992), Belleville No.3073/90 (Ont.Ct (Gen.Div.)) [unreported].

59. *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c.M-56, s.32(d).

60. *Supra*, note 58 at 4.

way in new social assistance legislation. In the meantime, there is some comfort in the fact that a Standing Committee of the Ontario Legislature, which completed a review of Ontario's privacy protection legislation this year, adopted several of the recommendations made to it by community legal clinics and proposed that protection of social assistance recipient's privacy should be strengthened.⁶¹

(v) Immigration and the welfare system

Immigrants, refugee claimants and their counsel have long had problems with social assistance programs. The main burden of providing for new arrivals falls on the general welfare system and therefore on municipal governments, who have grown increasingly resentful of this burden and the federal government's refusal to provide adequate assistance. New arrivals in Canada without jobs or families to support them are often caught in the middle of political "buck passing" between other levels of government which leaves them without access to basic necessities.

One common reason for denying welfare is that the applicant has not provided "information required to determine initial or continuing entitlement" to assistance.⁶² Workers often demand that welfare applicants produce information from Canada Immigration which they cannot obtain. SARB has fortunately taken the common sense approach that while an applicant must comply with all reasonable requests for information, it is not reasonable to deny welfare for failing to provide information for reasons beyond the applicant's control.⁶³

Another chronic set of problems arises with sponsorship agreements. Many regular immigrants and refugee claimants are sponsored by family members or by groups such as churches. The law specifically requires a sponsored person applying for welfare to seek assistance from his or her sponsor.⁶⁴ Unfortunately, sponsorship agreements sometimes break down or the sponsor is simply unable to provide financial assistance at a time when the immigrant needs it. Although sponsorship agreements cannot be legally enforced by the sponsored immigrants, welfare departments seem to have a policy of categorically refus-

61. The clinic Steering Committee on Social Assistance and the clinic representing the applicants in the Hastings County Case made presentations to the Standing Committee on October 16, 1991.

62. GWA s.10(2)(b).

63. E.g., see SARB K-01-11-05 (3 Sept. 1991; Morrish, Renault).

64. GWR s.3(3).

ing assistance to persons who have group sponsors. SARB has recently allowed appeals in a number of such cases, commenting that the applicants had made not just "reasonable" but "considerable" efforts to obtain assistance from sponsors, to no avail.⁶⁵

Finally, municipalities historically refused welfare to refugee claimants because they had not yet been granted permission to stay in Canada. In 1991 welfare regulations were amended to deem anyone who had made a refugee claim to be resident in Ontario for the purposes of the Act.⁶⁶ However, the regulation did not make it clear what happened to a person who lost their refugee claim but had not been or would not be deported.⁶⁷ This issue also went before SARB this year. A refugee claimant had lost his claim and exhausted his appeal rights, but could not be removed from Canada because he had no travel documents. He was ordered not to engage in employment but had no means of support. He even asked to be taken into detention pending removal but Immigration refused. SARB held that the new regulation applied to anyone who had made a refugee claim, even if the claim was denied, and ordered that the appellant be granted welfare.⁶⁸

(vi) Students and the welfare system

The plight of people seeking to continue or upgrade their education in Ontario continues to be a difficult one. Funds available for student assistance shrink while the costs of education continue to rise. Municipalities resent being called upon to fill the gap, although educational upgrading may be the only reasonable hope many people have for long term self-sufficiency.

Most litigation around student welfare stems from its discretionary nature. Employable people cannot receive welfare as students unless both the course they seek to attend has been approved by the welfare administrator (and for post-secondary education, by the Director of Income Maintenance also) and

65. See SARB K-12-09-36 (6 July 1992; Bolduc); SARB K-07-28-09 (20 May 1992; Bolduc); SARB K-10-24-20 (8 June 1992; Bolduc).

66. Section 7(1) of the GWA imposes an obligation to provide assistance to any person in need who "resides in the municipality". GWR s.1(6) now provides that "a person who resides in Ontario and who is legally authorized to reside in Canada or has claimed refugee status in Canada shall be deemed to be resident in Ontario."

67. It is the policy of the Canadian government not to deport people to certain countries even if they do not obtain refugee status and do not qualify for admission on other grounds.

68. SARB K-10-07-06 (28 Apr. 1992; Allen).

they have been given individual permission to attend.⁶⁹ As with most issues of discretion in municipal welfare, there are wide variations in how this discretion is exercised. Many administrators have adopted rules which automatically exclude certain classes of applicants or certain kinds of courses from consideration.

SARB rendered several decisions in the past year overturning denials of student welfare based on inflexible policies. The Board has often commented that welfare administrators may not fetter their discretion by applying policy rules which do not allow for exception. The Board has also often referred to the decision of the Divisional Court in *Kerr v. Metropolitan Toronto*,⁷⁰ discussed in this article last year,⁷¹ with respect to the importance of education in improving individuals' long term prospects of remaining off social assistance.⁷²

Unfortunately, the value of litigation in this area remains limited. Access to the appeal route itself is restricted and often of little value because of the substantial delays in the process and SARB's policy of refusing to grant interim assistance in such cases.⁷³ Many students must take educational courses when they are offered; their welfare eligibility must therefore be determined before or shortly after school commences. More importantly, even where people do manage to appeal successfully and are granted benefits, few welfare departments change their practices as a result of SARB decisions. This problem goes to the fundamental issue of SARB's role in social assistance administration, and change is not likely under the current legislative regime.

Another student welfare problem that cannot be resolved without legislative action is the rule which makes any student who is eligible for an OSAP grant ineligible for welfare.⁷⁴ Welfare administrators interpret this rule to mean

69. GWR s.6(1).

70. (1991), 4 O.R.(3d) 430 (Div.Ct.).

71. Ellsworth & Morrison (1991), 25 to 27.

72. For some examples of SARB decisions emphasizing the importance of an individualized determination of eligibility, see SARB J-11-28-06 (8 Oct. 1991; Novac, Brooks); SARB J-08-22-15 (4 Nov. 1992; Morrish); SARB J-09-10-01 (3 Feb. 1992; Bolduc); SARB J-07-15-10 (26 Aug. 1991; Brooks, O'Connell); SARB K-06-16-30 (9 Mar. 1992; O'Connell, Renault, Cardinal).

73. SARB has taken the position that appellants must be treated as if they are not eligible for assistance as students pending the hearing, and thus will grant only one month's interim assistance in such cases: *SARB Annual Report 90-91*, *supra*, note 37 at 32.

74. GWR s.6(2).

that if one parent in a family applying for welfare is an ineligible student, the entire family is disqualified. This rule has caused great hardship to many Ontario families—in some cases even forcing the parents of young children to separate so that the family could get assistance while one parent attended school.⁷⁵ SARB has affirmed this interpretation.⁷⁶

(vii) Income issues in social assistance calculations

Finally, we should note that the Divisional Court is expected to rule sometime in the next few months on some technical but very important issues concerning how various kinds of payments to social assistance recipients should be treated in determining the recipients' "income" for social assistance purposes.

The first set of issues has to do with mandatory deductions from other kinds of social benefits, most commonly Unemployment Insurance. Social assistance delivery agents have always treated these benefits as income (deductible dollar for dollar from benefits) in the gross amount of the entitlement. However, UI beneficiaries do not receive the amount of their gross entitlement. Deductions such as income tax are withheld at source from these benefits. In some cases, UI benefits are also reduced in order to recover overpayments or through third party garnishments to pay family law support orders. The result can be to leave the beneficiary destitute, with far less than even the minimal welfare monthly entitlement.

SARB has considered many appeals on this issue. In almost all cases the Board has held that social assistance recipients cannot be deemed to have received income they did not in fact receive, in the absence of express legislative language. Although the Board has recognized that there are conflicting social policies at issue, it has usually decided that providing basic necessities for those in need must prevail.⁷⁷ The Ontario government has appealed several of these decisions to the Divisional Court. The cases have not yet been argued.

75. Information from CRO files based on information provided by caseworkers in Ontario clinics.

76. SARB K-07-21-32 (10 Mar. 1992; Novac, Brooks); SARB K-07-21-33 (16 Mar. 1992; Brooks, Rangan).

77. E.g., see SARB K-01-30-13 (12 Aug. 1991; Rangan, Douglas); SARB K-09-09-15 (1 June 1992; Renault, O'Connell); SARB K-04-09-03 (30 Mar. 1992; Nikias); SARB K-05-29-13/K-05-07-08 (10 Mar. 1992; Heath, Nikias); but see *contra* J-12-27-12 (3 Jan. 1992; Novac, McLeod), holding that the appellant should be deemed to have received the portion of his unemployment insurance benefits being garnished for child support.

Social assistance recipients have been less successful on some other income issues which also affect many hundreds or thousands of people. Ontario's social assistance legislation exempts from consideration as income or assets up to \$25,000.00 in awards for pain and suffering.⁷⁸ Until 1990, people injured in motor vehicle accidents got this exemption if they got compensation for pain and suffering. However, problems arose with the establishment in 1990 of a "no-fault" insurance scheme in Ontario, which provided injured persons with guaranteed weekly payments in return for removing the right to sue. Unfortunately, the government also saw this as an opportunity to save on social assistance costs and determined that no-fault benefits should be treated as fully deductible income, although the regulations themselves are silent on the issue. This interpretation has been upheld by SARB.⁷⁹ This issue is currently under appeal.

Finally, many people who have lost their jobs and have been forced to turn to welfare will go to great lengths to try to hold on to their homes—often their only remaining substantial asset. Sometimes these people borrow money to make mortgage payments to avoid sale, especially at a time when real estate values have plummeted. Unfortunately for them, welfare authorities have treated the amount of the loans as income and reduced benefits accordingly, with the result that the recipients not only get no net benefit from the loans but are left even deeper in debt. Again, although social assistance regulations do not specifically address this situation, SARB has affirmed the decisions of the delivery agents.⁸⁰ An appeal in such a case is pending before the Divisional Court.⁸¹

Technical as these issues may appear to be, the outcomes of these appeals will affect many thousands of social assistance recipients in Ontario.

78. GWR s.1(1)(k)(iv) (definition of liquid assets), s.13(2) ¶40 (definition of income); FBR s.1(1)(a)(vi) (liquid assets), s.13(2) ¶41 (income).

79. E.g., see SARB K-02-06-16 ([undated]; Draper, Martin, Morrish); SARB J-09-27-28 (Feb. 1992; O'Connell).

80. See SARB J-08-29-01 (3 June 1991; Morrish, Nikias); SARB K-04-29-14 (28 Oct. 1991; Draper, Morrish).

81. An appeal from SARB J-08-29-01, *supra*, note 80 is currently before the Ontario Divisional Court.

2. WORKER'S COMPENSATION

(a) WCB Funding Strategy

As with other social benefit schemes, the worker's compensation system is under attack from its employer stakeholders over the funding implications of the program. And, as with other social benefit schemes, this attack is both the result of and driven by the continuing recession. As part of its response to these concerns, the Worker's Compensation Board issued a discussion paper which proposed solutions to the current "crisis".⁸²

The focus of the discussion paper is on the WCB's unfunded liability. The unfunded liability is the difference between the Board's total assets (assessments on employers and income from investments) and its total liabilities (the estimated future costs of all existing claims).⁸³ This unfunded liability began to arise in the 1970's as the provincial legislature made adjustments to benefit levels to account for inflation. No corresponding increase in assessment rates was undertaken to offset this increase in benefit levels. In fact, it was not until 1984 that the WCB first adopted a funding strategy.⁸⁴

The goal of this initial funding strategy was to retire the unfunded liability by the year 2014. This was to have been accomplished by raising assessment rates to include both the estimated future costs of existing claims (including the administrative costs of the Board) and a charge to pay down the unfunded liability.⁸⁵ However, the effectiveness of this strategy was impeded by both the current recession (which reduced assessment income) and the amendments to the *Worker's Compensation Act*⁸⁶ which resulted from the passage of Bill 162⁸⁷ (which provided injured workers with some additional benefits). This strategy was further compromised in 1991 when in setting the assessment rates for 1992 the Board based its projections on a more optimistic outlook for the economy (i.e., increased assessment revenue). Even when that

82. Ontario Worker's Compensation Board, *WCB Funding Strategy*, (Discussion Paper), February, 1992.

83. *Ibid.*, at 1. In any given year, if total liabilities exceeds total assets, the unfunded liability will increase.

84. *Ibid.* at 5-6. It is unclear why assessment rates were not allowed to keep pace. One might speculate that it is for the same reason that the WCB is once again forced to revamp its funding strategy; i.e., a reluctance to impose the actual cost of the compensation system on employers.

85. *Ibid.* at 7.

86. R.S.O. 1990, c. W-11.

87. S.O. 1989, c. 47.

outlook was found to be incorrect, the Board did not adjust the rates it had set.⁸⁸

The discussion paper examines the pros and cons of five possible funding strategies. The first would be to retain the present funding strategy and eliminate the unfunded liability by 2014. The second would involve moving to a 70% funding ratio by 2014. The third would involve retaining the commitment to full funding but moving the retirement date to 2024. The fourth would involve moving to both a 70% funding ratio and moving the retirement date to 2024. The final strategy would involve a 70% funding ratio, a retirement date of 2024 and an average assessment rate for the period 1993-1995 stabilized at \$3.20.⁸⁹

The paper does discuss some of the other policy initiatives which the Board has recently undertaken to reduce the adverse impact of any funding strategy which might be adopted in future. These include expenditure reductions through more effective vocational rehabilitation and re-employment measures, improved and cost-effective service delivery, examining the cost implications before adopting new policies, increased emphasis on workplace health and safety and improvement of the WCB's ability to collect assessments.⁹⁰

On the surface, it is difficult to find fault with the Board's concern over its funding situation. Neither workers nor employers are apt to be happy with a scenario in which the Board is unable to meet its future commitments. Some of the reasons that this situation has arisen are the direct result of actions which the Board has taken (or not taken, as the case may be). Other causes were beyond the Board's direct control. However, while the Board has not committed itself to any of the funding strategies discussed, the fear exists that the discussion of funding is simply a ruse for both contracting the benefits which the system already provides and preventing the provision of new benefits.⁹¹ A solution

88. *Supra*, note 82 at 9. The reasons given for not doing so seem to again reflect the Board's unwillingness to confront employers about the actual cost of the compensation system.

89. *Ibid.* at 22-27.

90. *Ibid.* at 15-18. However, it must be noted that to be successful such measures will themselves require substantial expenditures.

91. See M. Green, "The Funding of the WCB System – More Important Than It Seems for Injured Workers", (April, 1992) *The I.A.V.G.O. Reporting Service*, Vol. 6, No. 2, at 3.

which favoured employer's economic concerns to the detriment of injured workers would not sit well with workers or their advocates.

(b) Service Delivery and Vocational Rehabilitation

Perhaps as important as the discussion paper on funding is the Report of the Chairman's Task Force on Service Delivery and Vocational Rehabilitation.⁹² The Task Force's goal was to consult with the Board's major stakeholders and others (including WCB staff) to assess both immediate and long-term needs in the areas of service delivery and vocational rehabilitation and to make recommendations to improve and enhance endeavours in these areas. While it is difficult to encapsulate all the recommendations contained in the Report, there are some common themes which bear some notice.

On the service delivery side, the Report noted that while the Board relied on the *Act* and the Operational Policy Manual as a substitute for a strategic plan for the implementation of its legislative obligations, many staff had neither a copy of the *Act* nor the Manual.⁹³ Those who did have copies were provided with little or no training in the interpretation and implementation of the provisions therein. This factor, combined with the huge caseloads carried by Board staff, artificial deadlines for decision-making and the assignment of claims without regard to the complexity of the case or the skill of the staff member, resulted in poor quality adjudication.⁹⁴ These same observations were found to be relevant for Decision Review staff.⁹⁵

On the vocational rehabilitation side, the Report recognized that successful medical and vocational rehabilitation will result in a cost savings through reduced duration of claims.⁹⁶ However, the Report noted that the Board's efforts in this area lacked focus; there was no clear identification of the purpose and objectives of such rehabilitation.⁹⁷ Many of the observations

92. Ontario Worker's Compensation Board, *Report of the Chairman's Task Force on Service Delivery and Vocational Rehabilitation* (July, 1992).

93. *Ibid.*, at 15. Advocates will be pleased to find that one of the recommendations contained in the Report is that the Operational Policy Manual be updated and regularly maintained, and that all policy directives must be immediately numbered, minuted and incorporated into the Manual, so as to be readily available to decision-makers. It is hoped that this recommendation will also apply to manual holders who are not decision-makers.

94. *Ibid.*, at 23, 27.

95. *Ibid.*, at 81-83.

96. *Ibid.*, at 37.

97. *Ibid.*, at 38.

which the Report found applicable to service delivery, were also relevant to vocational rehabilitation. Staff were provided with no practical training and yet were expected to devise viable vocational rehabilitation plans. Managers and technical advisors were also found to have little experience in the area and thus could not provide assistance to caseworkers. Caseloads were found too high to provide quality service.⁹⁸ And, even if vocational rehabilitational services were activated, they were not likely applied in a timely manner.⁹⁹

The Report makes several recommendations to remedy the problems which the Task Force found evident (and which have been evident to injured workers and their advocates for some time) and suggests that the recommendations can be implemented with the reallocation of existing Board resources.¹⁰⁰ The Report also urges the Board of Directors to monitor the implementation of the recommendations and to issue a written progress report to all stakeholders involved in the consultation process.

Much of the Report is a sweeping indictment of the policy and procedures of the Board. While injured workers and their advocates may not agree with the content or extent of all the Report's recommendations, it is hoped that the Report will at least provide some motivation for an honest reevaluation of the Board's practices in the areas of service delivery and vocational rehabilitation and lead to some necessary reform.

(c) Regulations Governing Reinstatement In The Construction Industry

A new regulation governing the reinstatement of construction workers, enacted under authority of section 54(9) of the *Act* came into force in May of 1992.¹⁰¹ The regulation provides a somewhat restricted reemployment obligation for employers in the construction industry. Essentially, the regulation provides that an employer must offer to reemploy a worker who is able to perform the essential duties of his or her pre-accident employment in a position in the worker's trade if:

98. *Ibid.*, at 39-42.

99. *Ibid.*, at 43-44. The Report cites as an example a worker in receipt of temporary partial disability benefits being required to conduct an extensive job search before re-employment alternatives had been canvassed with the accident employer.

100. Of course these recommendations must be viewed in light of the discussion paper on the funding strategy.

101. O. Reg. 259/92, effective May 12, 1992.

- (a) there have been no reductions in the workforce since the injury of the worker;
- (b) work within the worker's trade is being performed by someone hired on or after the date of injury; or
- (c) there is an available position in the worker's trade.¹⁰²

There are also similar provisions to those contained in section 54 with respect to notice, accomodation of the work or workplace, and returning workers to suitable employment.

(d) Litigation Developments

(i) Reemployment

The issues surrounding reemployment obligations of employers are as contentious as ever. In the past year more and more such cases have reached the Worker's Compensation Appeals Tribunal. Not surprisingly, the Tribunal's approach to these issues has not been consistent.¹⁰³

Perhaps the Tribunal decision which sparked the most interest (both positive and negative) is *Decision No. 605/91*.¹⁰⁴ In that case the worker had suffered a compensable injury in April of 1990. The Board provided notice to the employer in July of 1990 that the worker was fit to perform suitable work as of June 13, 1990. Suitable work was provided in September of 1990, but the worker was terminated in October, 1990 for the failure to take a drug test. The first issue which the Panel was called upon to decide was when the employer's obligation under the reemployment provisions arose. The Panel found that based upon a plain reading of the statute, the obligation only arose after the employer received the requisite notice from the Board.¹⁰⁵ It concluded that there was no general obligation upon the employer to reemploy

- 102. *Ibid.* The provisions with respect to unionized workers are contained in section 7. Similar provisions apply with respect to non-unionized workers, see section 11.
- 103. For a discussion of past Tribunal decisions and the issues surrounding them see Ellsworth & Morrison (1991) at 35-37.
- 104. (1991), 21 WCATR 131. For commentary on this case see R. Pauker, "When is the Employer on Notice", (April, 1992) *The I.A.V.G.O. Reporting Service*, Vol. 6, No. 2 at 7 and A. Bome "Decision No. 605/91 - Just Cause and Section 54(10) of the Act", (April, 1992) *The I.A.V.G.O. Reporting Service*, Vol. 6, No. 2 at 12.
- 105. *Ibid.*, at 166. Section 54 (4) and (5) provide that upon receiving notice from the Board of the worker's fitness, the employer shall offer to reemploy the worker. The importance of determining when the employer's obligation arises, is because only at that time do the procedural and legal safeguards contained in the rest of section 54 attach.

the worker without this notice.¹⁰⁶ As the Board in this case had provided the requisite notice before the worker's termination, the Panel went on to consider the effect of the presumption contained in section 54(10).¹⁰⁷ It concluded that in order for an employer to rebut the presumption it was not necessary to show "just cause" for the dismissal, but only that the dismissal was not related to the worker's disability or his or her rights under section 54.¹⁰⁸ Finally, the Panel considered the standard of proof which must be satisfied in order to rebut the presumption and concluded that if there were "any substantial doubt as to whether the stated reasons were the real reasons or were all the reasons, then the finding must be against the employer".¹⁰⁹

(ii) *Permanent Partial Disability Supplements*

*Decision No. 40/92*¹¹⁰ will be of interest to injured worker's and their advocates. The case involve a consideration of the appropriate circumstances under which a section 147(2)¹¹¹ supplement may be cancelled and a 147(4)¹¹²

106. However, section 54(1) states that an employer of a worker who as a result of an injury is unable to work shall offer to reemploy the worker in accordance with this section. In fact, other decisions of the Tribunal have held that, in situations where the worker has already returned to work, the employer's obligation does arise even if there has been no notice from the Board; see *Decision No 716/911* (15 May 1992; Moore, Barbeau, Ferrari) and *Decision No. 746/9112* (10 June 1992).
107. Section 54(10) provides that where a worker who has been reemployed under the section is terminated within six months of reemployment, there is a presumption that the employer has not complied with his or her obligations under the section.
108. *Supra*, note 104 at 182.
109. *Ibid.*, at 195. The Panel's reasons seem to be that because the rebuttal of the presumption involved an investigation into the employer's intent, information not inherently within the knowledge of the worker or the Board, the standard should necessarily be higher than the civil standard of a balance of probabilities.
110. (2 July 1992; Moore, Ferrari, Shuel).
111. Formerly section 135(2), R.S.O. 1980, c. 539, as amended by S.O. 1989, c. 47. Section 147(2) provides:
147(2) Subject to subsections (9) and (10), the Board shall give a suppelement to a worker who, in the opinion of the Board, is likely to benefit from a vocational rehabilitation program which could help to increase the worker's earning capacity to such an extent that the sum of the worker's earning capacity after vocational rehabilitation and the amount awarded for permanent partial disability approximates the worker's average or net average earnings, as the case may be, before the worker's injury.
112. Formerly section 135(4), R.S.O. 1980, c. 539, as amended by S.O. 1989, c. 47. Section 147(4) provides:
147(4) Subject to subsections (8), (9) and (10), the Board shall give a supplement to a worker,
(a) who, in the opinion of the Board, is not likely to benefit from a vocational reha-

supplement should be substituted. The Panel noted that the *Act* authorizes the payment of a 147(4) benefit where the Board concludes that the worker will not benefit from a vocational rehabilitation program (147(4)(a)) or has not benefitted (147(4)(b)), to the extent required by subsection (2). The Panel reasoned that where the Board's decision is based on section 147(4)(b), there must be evidence of the absence of past benefit *and* the unlikelihood of further benefit.¹¹³ In that case, the objective of the worker's vocational rehabilitation program was to find a job in the worker's field of expertise. The obstacles to this program were the worker's disability, his age and the economic climate, but the Panel found that none of these factors made the objective unrealistic or impractical. The Panel concluded that the worker's vocational rehabilitation services were arbitrarily terminated because of his age. As there was insufficient evidence to demonstrate that the worker was unlikely to benefit from future vocational rehabilitational services, the basis for terminating the worker's 147(2) supplement had not been established.¹¹⁴

(e) Overpayments

In *Decision No. 24F2*¹¹⁵ the Tribunal delivered a precedent setting decision on its jurisdiction over questions of overpayments and the principles to be exercised in such cases. The case involved an overpayment of over \$116,000 in benefits, medical aid and health care costs, which had resulted from a successful appeal to the Tribunal by the employer. The first issue which the Panel had to decide was whether it had any jurisdiction to deal with the overpayment question. The Panel found that it had a general jurisdiction which included jurisdiction concerning overpayments. This jurisdiction was found to exist regardless of whether the question arose in appeals from Board decisions regarding overpayments or in the course of the Tribunal's disposal of other appeals properly before it.¹¹⁶

The Panel then went on to decide whether the overpayment should be collected. The Panel stated that the worker was blameless in this case; he had

bilitation program in the manner described in subsection (2); or
 (b) whose earning capacity after a vocational rehabilitation program is not increased to the extent described in subsection (2) in the opinion of the Board.

113. *Supra*, note 110 at 7. The Panel's reasoning seems to be that if the worker still met the criteria for a section 147(2) benefit, it would be irrelevant that he had not benefitted from previous vocational rehabilitation.

114. *Ibid.*, at 7-8.

115. (10 April 1992; Ellis, Apsey, Cook).

116. *Ibid.*, at 15.

done nothing which had contributed to the Board's error, he did not suspect that he was not entitled to the payments and he had relied on the payments and changed his lifestyle.¹¹⁷ To require the worker to make a repayment would result in a substantial burden. The Panel also found that the employer (a Schedule II employer) was also blameless and was entitled to be indemnified by the Board for the amount that the Board had already requisitioned for the payment of benefits.¹¹⁸ The Panel concluded that the costs of the claim should be paid for by all Schedule II employers as an administrative expense.¹¹⁹

(f) WCAT Charter Jurisdiction

On August 7, 1992 the Tribunal released its final decision in *Decision No. 534/90*.¹²⁰ The Panel had released an interim decision in this case, in which it concluded that it could hear and determine *Charter* issues.¹²¹ However, subsequent to that decision, the Supreme Court of Canada released its trilogy of cases on the jurisdiction of administrative tribunals to hear *Charter* issues.¹²² In light of this, the parties in *Decision No. 534/90* filed additional submissions. The Panel concluded that while the *Worker's Compensation Act* did not expressly authorize the Tribunal to decide questions of law (including *Charter* questions), it had implicit authority to do so. However, it also found that the Tribunal's jurisdiction could differ, depending on the issues before it. On the facts of *Decision No. 534/90* the Panel concluded it did not have jurisdiction to consider the *Charter* issue, as it would not have authority to fashion a suitable remedy.¹²³

3. UNEMPLOYMENT INSURANCE

(a) UI Funding

The biggest change which resulted from the enactment of the amendments to the *Unemployment Insurance Act*¹²⁴ (which became effective in 1990),

117. *Ibid.*, at 41-42.

118. *Ibid.*, at 42.

119. *Ibid.*

120. (Ellis, Cook, Apsey).

121. *Decision No. 534/90I* (1990), 17 WCATR 187.

122. For a discussion of the Supreme Court's jurisprudence and its effect on the jurisdiction of the WCAT, see Ellsworth & Morrison (1991) at 2-12.

123. For a discussion of the Tribunal's concerns over the appropriate remedy, see Ellsworth & Morrison (1991), note 34 at 10.

124. R.S.C. 1985, c. U-1.

was that the federal government was no longer responsible for the financing of any Unemployment Insurance services.¹²⁵ This meant that the Unemployment Insurance system was entirely financed by contributions from employers and employees. In 1991, the economy was undergoing a recession and a tremendous degree of restructuring. Due to a rate of unemployment which averaged close to 11%, there arose a shortfall of over \$4 billion in the UI account.¹²⁶ In order to eliminate this deficit, employers and employees were required to increase their levels of contributions. Beginning January 1, 1992, the employee contribution rate rose to \$3.00 per \$100.00 of insurable earnings, while the employer rate rose to \$4.20 per \$100.00 of employee earnings.¹²⁷ This represented a \$0.75 increase for employees and a \$1.05 increase for employers from rates as they stood on December 31, 1990.¹²⁸ It was envisaged that such an increase would eliminate the deficit by 1995.¹²⁹

As the recession deepened over the course of 1991 and 1992, there were the not unexpected cries from many employers that such an increase in payroll taxes was not justified and hindered competitiveness. However, little attention was paid to the effects of such an increase in rates on those who were still fortunate enough to have a job. With no corresponding increase in wage rates, such an increase in contribution rates was sure to result in hardship for those least able to manage it.

It is in this context which the federal government's withdrawal from UI financing must be viewed. Arguably, this would have been an appropriate situation for the government to have funded the shortfall from monies out of general revenues (as it would have in previous years). This would have had the effect of reducing the financial strain on both employers and employees at a time when they could least afford to bear it, and, to the extent that the increase in the number of UI claimants was due to economic restructuring, would have spread that burden throughout the population as a whole. From the point of view of equity and fairness, it would seem more appropriate that the shortfall, because of its causes, should be funded by monies raised through a progressive tax system rather than borne entirely by the employers

125. Ellsworth & Morrison (1991) at 37.

126. Canadian Employment Benefits and Pension Guide Reports, Part I - No. 369, (CCH Canadian Ltd., 1991) at 4.

127. Canadian Employment Benefits and Pension Guide Reports, Part I - No. 370, (CCH Canadian Ltd., 1991) at 2.

128. *Supra*, note 126 at 5.

129. *Supra*, note 127 at 2.

and employees who have managed to survive the metamorphosis of the economy to date.

(b) Litigation Developments

(i) UI Benefits And Indian Reserves

This year, the Supreme Court of Canada again had an opportunity to consider a case which involved some aspects of the *Unemployment Insurance Act* as well as the tax implications which attach to such benefits. *Williams v. The Queen*¹³⁰ will be important for poverty law advocates who are representing or have represented natives who are receiving or have received UI benefits.

Williams was a member of an Indian band. In 1984 he was in receipt of UI benefits. He qualified for such benefits by virtue of his former employment with a logging company on the reserve. The issue which the Supreme Court was called upon to determine was whether the benefits received by reason of such circumstances were exempt from taxation under section 87 of the *Indian Act*.¹³¹ The Court concluded that they were. However, the location of the qualifying employment was a very important factor for the Court.¹³² The location of the qualifying employment was determined by looking at several factors, including; where the work was performed, where the employer was located, where the employee was paid and where the employee lived at the time. In Williams' case, all of these factors were located on the reserve.

There are two observations about this case which advocates should note. First, the Court did not decide which of such factors was the most important for determining the location of the qualifying employment. Any native recipient who did not fulfil all of these criteria would not clearly be entitled to an exemption from taxation under section 87 of the *Indian Act* (nor for an income tax refund for past benefits which were taxed). Second, the Court did not examine the importance of the recipient's residence at the time of receipt, as Williams lived on the reserve at the time in question. Therefore, if a native recipient did not presently live on a reserve, he or she would not clearly be entitled to the exemption (or the refund) either. While the absence of such facts would not necessarily exclude someone from the exemption or the refund, their importance would have to be examined in the context of each individual case.

130. (1992), 90 D.L.R.(4th) 129 (SCC).

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

132. *Supra*, note 130 at 142-143.

(ii) UI Prosecutions

Another case which will be of interest to practitioners in the Unemployment Insurance field is *R. v. Beals*.¹³³ As with *Williams*, *Beals* is not strictly a UI case but it may have repercussions for present and future UI recipients. *Beals* had been charged with 26 counts of falsely stating that he had no earnings while making a claim for benefits, contrary to section 103(1)(a)¹³⁴ of the *Unemployment Insurance Act*. There were two issues in the case: (1) whether a statement which *Beals* was required to give under certain sections of the *Act*, was admissible in the criminal proceeding for breach of the *Act*, and (2) whether a 'reverse onus' clause contained in section 93(14) of the *Act* was a breach of *Beals*' right to be presumed innocent.

Section 41(5) and (6) of the *Act* gave the Commission the power to require a claimant to provide additional information and/or to attend to do so for the purposes of determining continuing entitlement to benefits. Pursuant to section 105 and 106 of the *Act*, anyone who fails to comply with a provision of the *Act* is guilty of an offence and may be subject to a fine or imprisonment. *Beals* had responded to such a "notice to report" and, after having been informed that he might face a penalty or prosecution under the *Act*, that he was entitled to retain counsel and that he had the right to remain silent, he made the incriminating statement to the unemployment insurance investigator.

Notwithstanding the warning, the Court found that the statement which *Beals* made, though compelled by statute, was voluntary, and could therefore not be excluded under common law principles.¹³⁵ The Court then considered whether the compulsion of a statement by statute violated section 7 of the *Charter*.¹³⁶ The Court found that the right to silence encompassed in section 7 included the freedom from compulsion to answer questions at the investigatory stage. In reaching its conclusion the Court stated:

The problem is not that the investigator is empowered to compel the disclosure of information, which is desirable from a regulatory perspective, but

133. (1991), 68 C.C.C.(3d) 277 (N.S.Co.Ct.).

134. Section 103(1)(a) provides that "Every person is guilty of an offence ... who (a) in relation to any claim for benefit, makes a statement or representation that he knows to be false or misleading".

135. *Supra*, note 133 at 279-280.

136. Section 7 provides:
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

rather that the information disclosed is being used in this criminal proceeding. The accused has been conscripted against himself. This flows from the ... finding that the statement is statutorily compelled.¹³⁷

The Court concluded that, because of the serious nature of the *Charter* violation, to admit this “self-incriminatory” statement into evidence would bring the administration of justice into disrepute.¹³⁸

The Court also considered the constitutionality of section 93(14) of the *Act*.¹³⁹ The evidence against Beals established that documents were submitted by someone using Beals’ name and address and that Beals was employed at the same time. The Court found that the effect of the ‘reverse onus’ clause in section 93(14) in this case was such that, absent Beals presenting evidence to the contrary, the judge must convict (even if he had a reasonable doubt that the Beals had signed the documents). The Court concluded that this violated Beals’ right to be presumed innocent, guaranteed by s.11(d) of the *Charter*.¹⁴⁰

The Court did not find that section 93(14) was a “reasonable limit” which was “demonstrably justified in a free and democratic society” as required by section 1 of the *Charter*.¹⁴¹ The Crown maintained that section 93(14) was designed “to cut down on the abuse of the unemployment system and maintain the honor system of obtaining benefits”.¹⁴² While the Court found administrative efficiency to be a laudable objective, it was not a “pressing and substantial” concern sufficient to justify overriding Beals’ *Charter* rights.¹⁴³

137. *Supra*, note 133 at 280.

138. *Ibid.*, at 280-281.

139. Section 93(14) provides:

In any prosecution for an offence under any Part other than Part III, the production of a return, certificate, statement or answer required by or under that Part or a regulation, purporting to have been filed or delivered by or on behalf of the person charged with the offence or to have been made or signed by him or on his behalf is, in the absence of evidence to the contrary, proof that the return, certificate, statement or answer was filed or delivered by or on behalf of that person or was made or signed by him or on his behalf.

140. *Supra*, note 133 at 284.

141. Section 1 provides :

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

142. *Supra*, note 133 at 285.

143. *Ibid.*, at 285.

(iii) Volunteers And The UI Scheme

Finally, mention should be made of the outcome in *Canada (Attorney General) v. Enns*.¹⁴⁴ At issue in that case was whether UI applicants or beneficiaries who may be providing unpaid, voluntary services to groups or organizations were eligible for UI benefits. The claimant in that case died one week before leave to appeal was granted. The appeal was discontinued, and the Commission agreed not to proceed against the claimant's estate for the overpayment which had been confirmed in the Federal Court of Appeal's decision.

4. CANADA PENSION PLAN**(a) CPP Funding**

As with the funding arrangements under the *Unemployment Insurance Act*, the funding arrangements under the *Canada Pension Plan*¹⁴⁵ have undergone revision. New contribution rates for employers and employees became effective January 1, 1992. The changes occurred in response to an actuarial report which projected "that the CPP fund would fall to less than half a year benefit payout" if the contribution rates were not increased.¹⁴⁶ The new rates are designed to ensure that the fund will increase to two years benefit payout.¹⁴⁷ Contribution rates will be raised over the course of the next twenty five years to ensure this result.

A Canadian earning the average wage will be required to contribute an extra \$7.00 in 1992, and an extra \$42.00 by 1996.¹⁴⁸ The combined employer-employee contribution rate will rise from 4.6% in 1991 to 10.1% in 2016. In a news release announcing the new contribution rates, it was suggested that the new rates would not have as large an impact on a worker's take home pay as the rates might indicate, because CPP contributions are creditable for personal income taxes.¹⁴⁹

144. (1990), 126 N.R. 393 (FCA); leave to appeal to Supreme Court of Canada granted (1991), 134 N.R. 400. For a discussion of the facts and issues in this case see Ellsworth & Morrison (1991) at 41.

145. R.S.C. 1985, c. C-8, as amended.

146. Canadian Employment Benefits and Pension Guide Reports, Part I - No. 366 (CCH Canadian Ltd., 1991) at 1.

147. *Ibid.*

148. Canadian Employment Benefits and Pension Guide Reports, Part I - No. 369, (CCH Canadian Ltd., 1991) at 2.

149. *Ibid.*

(b) Income Tax Amendments

Amendments to the *Income Tax Act*¹⁵⁰ affecting the payment of lump sum disability benefits pensions were also enacted in December, 1991.¹⁵¹ Before the amendments, a recipient of a lump sum disability benefit had that amount taxed in the year in which it was received. The effect of the amendments is to allow a recipient to spread the amount of such lump sum payments over the years to which it applies. This provision will only apply to lump sum payments received in 1991 and subsequent years.¹⁵²

(c) CPP Rehabilitation Initiative

In 1990 Health and Welfare Canada started a pilot project to provide rehabilitation and counselling services to a small number of CPP disability beneficiaries. The relative success of this pilot project in assisting recipients to re-enter the workforce led to the announcement, in December of 1991, of the expansion of the initiative. The expansion is to involve an expenditure of \$6 million over five years, and is part of the National Strategy for the Integration of Persons with Disabilities.¹⁵³

Since the announcement Health and Welfare has been attempting to identify disability recipients who would benefit from the program and to contact organizations in the rehabilitation field who would be willing to participate. An announcement regarding the commencement of this initiative is expected in the fall of 1992.¹⁵⁴

150. S.C. 1970-71-72, c. 63, as amended.

151. S.C. 1991, c. 49, s. 32(10).

152. Canadian Employment Benefits and Pension Guide Reports, Vol. 2, (CCH Canadian Ltd, 1991) 5515. See also H. Beatty, "Answers to Your Tax Questions for the 1991 Taxation Year" (1992) 10 ArchType No. 2 at 8-9.

153. Canadian Employment Benefits and Pension Guide Reports, Part I - No. 371, (CCH Canadian Ltd., 1991) at 7. The National Strategy for the Integration of Persons with Disabilities is a \$158 million program which involves ten federal departments and their agencies, and is coordinated by Health and Welfare. The goals of the National Strategy are equal access, economic integration and effective participation for people with disabilities in Canadian society.

154. Some advocates have expressed concern that participation in such a program may jeopardize a recipient's continued entitlement to disability benefits. On several occasions the Pension Appeals Board has held that participation in a training program is tantamount to the ability to pursue a "substantially gainful occupation", and has thus rendered the appellant ineligible; see *Hamilton* (1985), CEB & PGR #8508. However, pursuant to s.69(2) of the CPP regulations (CRC 1978, c. 385, as amended) the Director may refer a disability beneficiary for vocational rehabilitation. It is likely that this new initiative is being pursued under the authority of this section. It is hoped that Health and

(d) Amendments to The CPP Disability Eligibility Criteria

The past year has seen some substantial improvements in the legislative criteria governing disability benefits. Perhaps the most significant is the amendment which will allow people to qualify for a pension who would not previously have qualified because they had made insufficient contributions to the Plan.¹⁵⁵ The amendment is found in section 44(1)(b)(iv) which now provides that a disability pension will be payable to a person who:

... is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled had an application for a disability pension been received prior to the time the contributor's application for a disability pension was actually received.¹⁵⁶

The effect of this amendment is that an applicant who had met the contributory requirements under the Plan at the time he or she had become disabled, and who had continued to be disabled until the time of his or her application for disability benefits, would be eligible for a pension, regardless of whether he or she met the contributory requirements at the time of his or her application.

Health and Welfare has advised that applicants whose files are presently active (i.e., somewhere in the decision-making process) will be reviewed in light of these amendments. Those whose files are no longer active (i.e., those who have been previously refused and did not appeal) will be required to make a new application before they will be considered under these amendments.¹⁵⁷

Welfare would not conclude that a person is no longer disabled by reason of his or her participation in such a program.

155. For a discussion of the issues surrounding the contributory requirements, or the "late application" rules as they are sometimes referred to, see Ellsworth & Morrison (1991), at 42. Prior to the amendment, to have qualified for a disability pension an applicant must have made a certain minimum amount of contributions to the Plan and have applied within a specified time period after having become disabled.
156. (1992), c. 2, s. 1(1), effective June 26, 1992. It should be noted that the same amendment was made to the criteria governing eligibility for a disabled contributor's child's benefit. However, the ensuing discussion will focus solely on the disability pension.
157. H. Beatty "Applied 'Too Late' for CPP Disability?" (1992) 10 ArchType No. 4(b) 20 at 24. Health and Welfare appears to be sending letters to applicants within the system explaining this legislative change and informing them that their file has been referred to the Disability Operations Division to determine whether they would have had sufficient contributions at the time they became disabled. Applicants and their advocates are advised to contact Health and Welfare if they have not received such a letter and believe that they may be entitled to a benefit as a result of the new amendments. This will ensure that the payments will commence at the earliest possible time.

While this amendment will allow those who would not otherwise have qualified for a pension to be eligible, at best it will only entitle them to benefits commencing twelve months prior to their application. People who became disabled at some earlier date, but did not apply for benefits at that time, will not be entitled to benefits back to the date of their disability. This outcome is the result of the "deemed disability" section of the Plan.¹⁵⁸ This section restricts the date of disability to fifteen months prior to the date of application. Pursuant to section 69 of the Plan, disability benefits are payable in the fourth month following the month in which an applicant is disabled.¹⁵⁹ Other arguments will be necessary in order to rectify this seeming injustice.¹⁶⁰

Another amendment which affects the application for benefits, and which may be most relevant for disabled applicants, concerns the incapacity to make applications.¹⁶¹ Section 60(8) provides that where an application is made on behalf of a person, and the Minister is satisfied that the person was incapable of forming the intention to make an application on his or her own behalf on the date the application was made, the Minister may deem the application to have been made the later of

(a) the month preceding the first month in which the benefit could have commenced to be paid; or

(b) the month the Minister considers the person's last relevant period of incapacity to have commenced.¹⁶²

Section 60(9) provides that where an application is made on behalf of a person, and the Minister is satisfied that

158. *Supra*, note 145, s.42(2)(b).

159. *Ibid.* s.69.

160. In fact, several advocates in community legal clinics throughout Ontario are contemplating or in the process of making arguments that the "deemed disability" provision violates the equality rights section of the *Charter*. If successful, the result will render the "deemed disability" section "of no force or effect", pursuant to section 52 of the *Constitution Act, 1982*, thereby entitling qualifying applicants to benefits back to the date of their disability.

161. Subsections 60(8)-(11), enacted by S.C. 1991, c. 44, s. 14, effective January 27, 1992. Similar provisions govern the application for a division of pension credits, see sections 55.3(1)-(4).

162. *Ibid.*

(1) the person had been incapable of forming or expressing an intention to make an application at some time before the application was made but had ceased to be incapable before the date of the application, and

(2) the application was made at some time between the date the incapacity ceased and a period (not exceeding twelve months) comprising the same number of days as the period of incapacity,

the Minister may deem the application to be made the later of

(a) the month preceding the first month in which the benefit could have commenced to be paid; or

(b) the month the Minister considers the person's last relevant period of incapacity to have commenced.¹⁶³

For the purpose of sections 60(8) and (9) the period of incapacity must be continuous unless otherwise stated.

There are a few observations which may be made about this set of amendments. They only apply to individuals who were incapacitated on or after January 1, 1991. However, they do seem to remedy the situation where the individual's disability is precisely the reason that he or she cannot make an application for benefits. Further, they provide the Minister with the discretion to deem a date of application at some earlier point in time than the actual date of application, which in turn makes benefits payable at an earlier date.¹⁶⁴ This should be viewed in contrast with the situation which will ensue under subsection 44(1)(b)(iv).

(e) Disabled Contributor's Child's Benefit

As a direct result of the *Blais* decision¹⁶⁵ section 74(4) has been repealed.¹⁶⁶ Section 74(4) had prohibited the payment of a disabled contributor's child's benefit to a child who became a child of the disabled contributor after the contributor became disabled, unless the child was a natural child or legally adopted child of the contributor. Effectively, section 74(4) discriminated against factually adopted children of a disabled contributor.

163. *Ibid.* Where the period of incapacity is fewer than thirty days, the application must be made within one month after the person's incapacity ceased.

164. Again, this is by reason of the interaction of section 42(2)(b) and section 69.

165. *Minister of National Health and Welfare v. Armand Blais* (1991), CEB & PGR #8626. For a discussion of this case see Ellsworth and Morrison (1991) at 46-47.

166. S.C. 1991, c. 44, s. 18, effective January 27, 1992.

(f) Amendments to The CPP Appeal Process

The long awaited amendments to the appeal process were finally proclaimed in force on January 27, 1992.¹⁶⁷ There are several provisions which will be of importance to advocates in this area.

First, the time limit to apply for a reconsideration to the Minister, pursuant to section 81(1), has been reduced from twelve months to ninety days, although the Minister may extend this time period either before or after it has expired.¹⁶⁸

Second, the provisions which provide for the creation and constitution of the Review Tribunal are now in force. A person who is dissatisfied with a decision of the Minister may appeal to the Review Tribunal within ninety days of the Minister's decision or within such longer period as the Commissioner of Review Tribunals may allow.¹⁶⁹ A Review Tribunal shall be appointed from a panel of between one hundred and four hundred persons. At least twenty-five percent of the panel must consist of lawyers, twenty five per cent of the panel must be qualified to practice medicine or a related profession, and there must be members from all regions of Canada. A Review Tribunal shall consist of three persons, the chair of which shall be a lawyer and, if the appeal involves a disability benefit, at least one member shall be qualified to practice medicine or a related profession.¹⁷⁰

(g) Amendments to The Federal Court Act

Finally, amendments to the *Federal Court Act*¹⁷¹ will have an impact on the CPP decision making process. Section 28(1)(d) of the *Federal Court Act* now provides that the Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review in respect of the Pension Appeals Board. An application for judicial review must be made within thirty days

167. See Ellsworth & Morrison (1991) at 42.

168. S.C. 1991, c. 44, s. 20, proclaimed in force January 27, 1992.

169. S.C. 1991, c. 44, s. 21(1), proclaimed in force January 27, 1992; S.C. 1992, c. 1, s. 24(1), effective February 28, 1992.

170. S.C. 1991, c. 44, s. 21(1), proclaimed in force January 27, 1992. Section 74.3 of the regulations states that, for the purposes of the Review Tribunal, a prescribed related profession is audiology, biomedical engineering, chiropractics, dental therapy, dentistry, dietetics, medical physics, nursing, occupational therapy, opticianry, optometry, osteopathy, pharmacology, physiotherapy, psychology, respiratory therapy, speech pathology and speech therapy.

171. R.S.C. 1985, c. F-7, as amended by S.C. 1990, c. 8, s. 5, s. 8, proclaimed in force February 1, 1992.

from the time the decision in question is first communicated to the party directly affected, although the time may be extended before or after the expiration of thirty days by a judge of the Federal Court of Appeal.¹⁷² However, in a proper case, an application for judicial review may be made to the Trial Division of the Federal Court in respect of a decision of the Minister or the Review Tribunal.¹⁷³

(h) **Litigation Developments**

There have been some notable decisions from the Pension Appeals Board which will be of interest to CPP practitioners.

(i) *Disability pensions*

In *Marinakis*¹⁷⁴ the Pension Appeals Board considered the case of a claimant who had been receiving a retirement pension since February, 1988. On May 1, 1989 he suffered a stroke, and subsequently applied for a disability pension. Those familiar with the *Canada Pension Plan* will know that a retirement pension can only be cancelled in favour of a disability pension if the date of onset of disability is within six months after the date on which the retirement pension became payable.¹⁷⁵ While there was no dispute that the claimant had become disabled as a result of the stroke, the Minister argued that the date of onset of disability was more than six months after the retirement pension became payable. However, the claimant introduced evidence that he suffered from a number of different ailments, commencing as early as 1985, which culminated in the stroke of May 1, 1989. Despite these ailments, the claimant went to work in August of 1988 because of financial pressures, although his employer testified that he only allowed the claimant to remain on the job because he felt sorry for him. The Pension Appeals Board concluded that, due to the number of serious ailments, the claimant was disabled as of July 1, 1988. They reasoned that he was not capable of substantially gainful employment as of that date, and that he should not be penalized because of his employer's kindness. The claimant was therefore entitled to request the cancellation of his retirement pension in favour of a disability pension.

172. *Ibid.* s.28(1) and (2).

173. *Ibid.* s. 18.

174. *Emmanuel Marinakis v. Minister of National Health and Welfare* (1991), CEB & PGR #9201. The appellant was represented by West End Legal Services in Ottawa.

175. *Supra*, note 145, s. 46.2(2).

Another commendable decision by the Board is *Herritt*.¹⁷⁶ In that case the clinical medical evidence indicated that the claimant's physical limitations were not sufficient to preclude her from some form of gainful employment. However, the claimant's testimony indicated that her physical condition had progressively deteriorated and that the degree of her pain had progressively increased. The Board noted:

There might possibly exist in Mrs. Herritt some degree of functional overlay, in that she, in all truth and in her own mind, is unquestionably convinced that she does, in fact, suffer in the manner which she described, and to the extent that she described it, with the result that she could not cope with the challenge of finding a place for herself in the workforce, despite the strong medical evidence to the contrary.¹⁷⁷

The Board found that on the facts of this case this "functional overlay" was sufficient to offset the medical opinions, and found the claimant eligible for a disability pension.

The result in *Johnston*¹⁷⁸ was not so favourable. The claimant in that case had been denied a disability pension because she had insufficient contributions. She argued that the differing (and more onerous) contributory criteria for disability pensions, as opposed to all other pensions under the *Canada Pension Plan*, violated section 15 of the *Charter*.¹⁷⁹ While the Board accepted that there were different preconditions and standards used in determining eligibility for a disability pension than for all other benefits, it did not consider this to amount to discrimination. The Board concluded that the *Canada Pension Plan* had "two fundamentally different, and mutually exclusive, components". The retirement/survivor's benefit was designed to provide replacement income to a contributor (or his or her dependants) when a contributor was required to withdraw from the workforce, due to age or death. The disability benefit was a form of compensation to a contributor who was required to leave the workforce as a result of physical or mental disability. These differing components necessitated different criteria of eligibility. As

176. *Minister of National Health and Welfare v. Trudell Herritt* (1991), CEB & PGR #9209.

177. *Ibid.*

178. *Minister of National Health and Welfare v. Helen Johnston* (1991), CEB & PGR #9214.

179. Pursuant to sections 44(1)(b) and 49 a disability pension was only payable to a contributor who had made contributions in either of five of the last ten years in his or her contributory period, two of the last three years in his or her contributory period or for two years, if there are less than two years in the contributory period.

all persons who applied for either benefit were subject to the applicable criteria for that benefit, the Board reasoned that the differing criteria were not discriminatory.¹⁸⁰

(ii) *Definition of "Spouse"*

One final case of note is *Decoux*.¹⁸¹ In that case the Board had to determine whether a common law spouse was entitled to survivor's benefits. Pursuant to section 2 of the *Canada Pension Plan*, in order for a common law spouse to be entitled to benefits the spouse must show that they were cohabiting with the contributor at the time of death and that they had cohabited continuously for at least one year. In this case the claimant had lived with the contributor for over sixteen years, but she had been separated from him for a period of four months (although they later reconciled) in the year before his death. At issue was whether the "continuous period of one year" had to be immediately preceding the contributor's death. The Pension Appeals Board concluded that once a conjugal relationship had been established (through an examination of the intention of the parties) it was only necessary that there was cohabitation between the spouses in such a relationship at the time of the contributor's death and that at least one year of that relationship was continuous.

D. THE CONSTITUTION, HUMAN RIGHTS AND POVERTY LAW

In this last section we examine developments in *Charter* and human rights law. There are many factors contributing to poverty, and the effects of deliberate or systemic discrimination against individuals, whether in respect of housing, employment opportunities or distribution of social benefits are important. To the extent that the *Charter* and human rights legislation may help overcome discrimination, they may help people move out of positions of economic disadvantage.

1. CHARTER JURISPRUDENCE—GENERAL DEVELOPMENTS

We have already seen that the *Charter* has had little impact on the substance of social welfare programs in the past year, although cases such as *Beals*¹⁸² indicate that it may have some consequences for the policing of social welfare schemes through the criminal justice system. We will consider the caselaw

180. For a critique of the specious reasoning in this case see, *infra*, at 204.

181. *Minister of National Health and Welfare v. Elaine Decoux and Ruth Decoux* (1991), CEB & PGR #9203.

182. *Supra*, note 133 and following text.

dealing with substantive poverty law issues further below. However, we will first mention some general developments with respect to the Charter which may have an impact on further litigation in this area.

(a) Remedies For Charter Violations

One of the most important *Charter* decisions of the year for equality rights was the landmark decision of the Supreme Court of Canada in *Schacter v. Canada*.¹⁸³ In *Schacter*, it will be recalled, the Trial Division of the Federal Court held that the *Unemployment Insurance Act* violated s.15 of the Charter because new adoptive parents were given more generous leave than biological parents.¹⁸⁴ Strayer J. ordered that benefits be extended in accordance with his ruling. The government chose not to appeal the main ruling and subsequently amended the legislation. It did, however, appeal on the issue of remedies, arguing that where benefits legislation violated s.15, a court's only option was to declare the legislation unconstitutional and leave it to the legislature to decide whether the legislation would be changed. The government lost at the Federal Court of Appeal¹⁸⁵ and appealed further to the Supreme Court. The Supreme Court allowed the appeal. In the process it issued a complex set of guidelines for courts to follow in granting Charter remedies.

The *Schacter* decision has several positive aspects. The Court easily rejected the government's argument that courts could never extend underinclusive legislation which was found to violate s.15, saying that "equality with a vengeance" was contrary to the fundamental purposes of the *Charter*.¹⁸⁶ The Court also held that in remedying constitutional violations, judges are not to be constrained by technical drafting issues but may look to the real substance of the legislation and may even "read in" language to make the legislation comply with the *Charter*.

On the other hand, the Court sounded several cautionary notes about the exercise of this power, which will be of special concern to those litigating issues of entitlement to social benefits. The decision holds that courts may

183. (9 July 1992), File No. 21889 (S.C.C.) [not yet reported].

184. [1988] 3 F.C. 555, 52 D.L.R.(4th) 653.

185. [1990] 2 F.C. 129, 66 D.L.R.(4th) 635.

186. *Supra*, note 183 at 69. The phrase "equality with a vengeance" was adopted by the Court from the Women's Legal Education and Action Fund (an intervenor in the case). LEAF used the phrase to describe the approach of courts who responded to findings that benefits legislation discriminated by striking down the legislation so that no one got anything.

not add to what legislatures have done unless it can be safely assumed that the legislature would have so acted had it been given the choice. It suggests that particular caution should be exercised where what is claimed is a social benefit which is not itself a fundamental right: "For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude certain parties from entitlement under that scheme".¹⁸⁷ The Court was particularly concerned that judges respect budgetary constraints on legislatures and not make orders which might, by extending benefits to one disadvantaged group, cause others to be deprived.

In the end, the Court concluded that in the case before it, benefits should not have been extended. In a comment which may have some impact on how government lawyers deal with such cases in the future, the Court expressed strong dissatisfaction that the substantive equality was not before it and that it was faced with ruling on the substantive issue without an adequate s.1 record before it.¹⁸⁸ Noting that the group to which benefits were to be excluded was much larger than the group of adoptive parents to whom they were being compared—and also noting with the advantage of hindsight that Parliament's legislative response was different from what the lower court had ordered—the Court held that this was not an appropriate case to make an order extending benefits.

The *Schacter* Court's approach to judicial activism in relation to social welfare benefits is generally conservative, but in the end seems to strike a fairly reasonable balance between the demands of the *Charter* and wholesale intervention into the legislative realm. In any event, it will have to be studied carefully by all people seeking to assert equality claims in respect of governmental benefits.

(b) Gay And Lesbian Rights Affirmed

After several unsuccessful attempts by gay and lesbian litigants to challenge discrimination against them through the courts, gay litigants scored important victories in close succession. The Ontario Court of Appeal in *Haig*¹⁸⁹ and a Human Rights Board of Inquiry in *Leschner*¹⁹⁰ held, respectively, that the

187. *Ibid.* at 19.

188. *Ibid.* at 15, 36.

189. *Haig and Birch v. The Queen* (6 Aug. 1992), No.774/91 (Ont. C.A.) [unreported].

190. *Re Leschner* (31 August 1992), Ont. H.R. Bd. of Inquiry (Cumming, Dawson, Plaut).

*Canadian Human Rights Act*¹⁹¹ and the Ontario *Human Rights Code*¹⁹² violated s.15 of the *Charter* by failing to protect citizens against discrimination on grounds of sexual orientation. Indeed, the Court of Appeal in *Haig* had no difficulty in deciding that even taking into consideration the cautions expressed by the Supreme Court in *Schacter*, it should “read in” protection against discrimination on grounds of sexual orientation. The Court refused to believe that Parliament would prefer to abolish its human rights legislation over amending it to include a prohibition against sexual orientation discrimination.

If these decisions stand, the question of whether same-sex couples must be treated the same as other spousal units may have to be examined across a broad range of social welfare programs. Ironically, this result may not always work to the advantage of same sex couples in programs such as social assistance. It remains to be seen how far governments will go in equating the treatment of heterosexual and homosexual relationships.

2. SOCIAL WELFARE PROGRAMS AND THE CHARTER

In a previous article in this journal, Ian Morrison analyzed a number of *Charter* decisions dealing specifically with social benefits programs.¹⁹³ The article noted that *Charter* litigants had had little success in this area and suggested that judges interpreting the *Charter* are deeply committed to a paradigm of rights as, in the words of Justice Bertha Wilson, “an invisible fence over which the state will not be allowed to trespass”.¹⁹⁴ Claims of rights in respect of social benefits, themselves already an intrusion into the “natural” world of private social and economic ordering, do not fit comfortably into this paradigm. The idea that individuals might have the right to ask the state to come inside “the invisible fence” and lend a hand rarely meets with judicial favour. Even equality claims which were based on arguments of discriminatory treatment rather than claims of absolute entitlement to social benefits often saw this distinction elided.

The article also noted that not only had most *Charter* claims in respect of social benefits programs failed, but that judges were reluctant in most cases to find even a *prima facie Charter* violation, thus avoiding the need to engage in the explicit balancing of interests required by s.1. Section 7 claims were

191. R.S.C. 1985, c.H-6.

192. R.S.O. 1990, c.H-19.

193. I. Morrison, “Poverty Law and the Charter: The Year In Review” (1990), 6 J.L. & Social Pol’y 1. [hereinafter “Morrison (1990)”].

194. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 164.

routinely rejected as involving unprotected, "mere" economic interests. Equality claims met with little more success, especially those which had to rely on theories of adverse impact rather than direct discrimination. The article identified some common techniques used in cases to avoid the characterization of various programs or actions as discriminatory. We suggest that similar themes can be identified in the more recent caselaw.

One such technique is to deny that the claimant's disadvantage is caused in any relevant way by the law in question, to transfer accountability for problems to "natural" or personal causes. Thus, in earlier cases, courts found that people with AIDS were not disadvantaged because the state would not pay for their full medication costs; they were disadvantaged because they had a disease and were not willing to adjust their "lifestyles" accordingly.¹⁹⁵ People who lived in underfunded nursing homes had no disadvantage imposed on them by the state, because they "chose" to live there.¹⁹⁶

Courts have taken similar approaches in the recent cases. In *Fernandes v. Director*,¹⁹⁷ the disabled appellant sought the means to allow him to live in the community rather than as a long term hospital in-patient. The Manitoba Court of Appeal began by making it clear that they thought the very request was presumptuous, stating:

The personal choices of a particular individual are not generally to be considered when those choices affect the public purse ... [T]he desire to live in a particular setting does not constitute a right protected under s.7 of the *Charter*. Fernandes does not acquire any rights to a particular style of living as a result of his need for an allowance ...¹⁹⁸

Having disposed of the s.7 argument, the Court went on to dismiss the equality argument on the grounds that there was no connection between the appellant's disability and his disadvantage:

Fernandes is not being disadvantaged because of any personal characteristic or because of his disability. He is unable to remain community based because he was no caregiver, because he must rely upon public assistance and because the facilities available to meet his needs are limited.¹⁹⁹

195. Morrison (1990), *supra*, note 193, discussing *Brown v. British Columbia (Minister of Health)* (1990), 66 D.L.R.(4th) 444 (B.C.S.C.).

196. *Ibid.*, discussing *Ontario Nursing Home Association v. Ontario* (1990), 74 O.R.(2d) 365 (H.C.J.).

197. *Supra*, note 46.

198. *Ibid.* at 21.

199. *Ibid.* at 23.

Perhaps most remarkable about *Fernandes* is that in its determination to show that there were no constitutionally cognizable interests presented by the case, the Court ignored evidence—before it but not adverted to in the decision—not only that continued hospital living was seriously harmful to Fernandes, but that it was far more expensive to the taxpayer to keep Fernandes in hospital than to pay for him to have community care!

In *Sparks v. Dartmouth Housing Authority*,²⁰⁰ it was argued that the exclusion of public housing tenants from statutory protections afforded private market tenants amounted to adverse impact discrimination on grounds of race, family status and receipt of social assistance, because public housing tenants were disproportionately black single mothers on social assistance. The Nova Scotia County Court agreed that the recipients were members of disadvantaged groups within the meaning of s.15 and that they were disproportionately represented in the group affected by the laws applying to public housing tenants, but denied the application. It found that “what we are dealing with in this case is an individual’s merits and capacities and not an individual’s personal characteristics”²⁰¹ and went on to explain this surprising discovery thus:

The restrictions imposed by ... the Act are not imposed as a result of any characteristic of race or sex or source of income, but rather by virtue of having individually applied and individually been accepted for public housing. It is not a characteristic of being black that one resides in public housing. Similarly, it is not a characteristic of being a single mother or a female that one resides in public housing. The fact that there is a disproportionately large number of blacks, women and recipients of social assistance in public housing does not, in my opinion, make it characteristic of any of the three groups individually or the three groups considered as one group.²⁰²

This passage is particularly interesting, in that it constitutes an almost perfect inversion of the concept of constructive discrimination. By asking whether it is characteristic of being black that one resides in public housing, rather than asking whether it is a characteristic of public housing tenants disproportionately to be black, the concept of constructive discrimination is rendered fundamentally incoherent.

Another characteristic aspect of such cases is the judicial reluctance to examine the validity of distinctions drawn by legislators rather than the ones

200. (13 April 1992), Halifax No. 75171 (N.S.Co.Ct.) [unreported].

201. *Ibid.* at 26.

202. *Ibid.*

drawn by legislation.²⁰³ A good example of this is the decision of the Pension Appeals Board in *Johnston*.²⁰⁴ The Board seems to have accepted the legislative distinction between CPP disability benefits and retirement benefits as its own justification. Because one provided benefits on the basis of age (a "compulsory savings scheme") while the other provided benefits on the basis of disability (a "quasi-insurance scheme"), they could not be compared. It is suggested that the *Johnston* case has for all intents and purposes reintroduced to the analysis of equality rights claims in regard to benefits legislation the "similarly situated" test formally abandoned in Canadian equality jurisprudence.²⁰⁵ An even more extreme example of this can be seen in *Gosselin*,²⁰⁶ where despite a legislative distinction based directly (no question of adverse impact) on age (an enumerated ground under s.15), the Court suggested that there was not even a *prima facie* case of discrimination.

Finally, mention should be made of the decision of the Ontario Divisional Court in *Thunder Bay Seaway Non-Profit Apts. v. Thunder Bay*.²⁰⁷ This was an application for an order to compel a municipality to sell property to an organization wishing to provide non-profit housing to rehabilitated alcoholics and substance-abusers. The organization was joined in the application by two individuals who would have qualified for housing. The municipality had approved the sale until it learned of the nature of the proposed residents. A resolution to sell the property was then defeated in the municipal Council. In finding that no s.15 rights had been affected, the Court stated:

To decide whether or not there has been a s.15 *Charter* violation, one takes the impugned law, holds it up to s.15 and decides whether the law infringes, in whole or in part, s.15 of the *Charter*. That cannot be done in this case because no law was passed; ...²⁰⁸

The extraordinary implication of this reasoning is that the *Charter* cannot reach even the most blatant discrimination by government, as long as the discrimination results from inaction rather than action.

203. See Morrison (1990), *supra* note 193 at 25.

204. *Supra*, note 178.

205. In the seminal s.15 decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

206. *Supra* note 45.

207. (1991), 5 O.R.(3d) 667 (Div.Ct.).

208. *Ibid.* at 677.

A fuller analysis of all the doctrinal and ideological implications of these cases is not possible here. It is suggested however, that there is nothing in the recent *Charter* jurisprudence to indicate that judicial attitudes to claims in respect of social benefits programs have changed. Not only have the courts consistently rejected any idea that the *Charter* might impose a positive obligation on the state to provide social benefits, but they have refused even to scrutinize social benefits programs closely. By examining only the distinctions drawn by laws, rather than the distinctions drawn by lawmakers, courts have effectively reduced equality analysis in this area to the sterile formalities of the old "similarly situated" test, thus avoiding the more difficult—and more openly ideological—questions that would follow on a finding of discrimination and a s.1 inquiry into its justification.

3. THE CONSTITUTIONAL ACCORD

The dominant news item of the past year has of course been the lengthy constitutional negotiations which ended, shortly before the time of writing, with the Charlottetown constitutional Accord. Despite constitutional fatigue, we must at least mention some of the issues in the negotiations that have been—and will be—of special concern to poverty law advocates.

The text of the Charlottetown Accord provides in part as follows:²⁰⁹

A new provision should be added to the Constitution describing the commitments of the governments, Parliaments and the legislatures within the federation to the principle of the preservation and development of Canada's social and economic union. The new provision ... should not be justiciable.

The policy objectives set out in the provision on social union should include but not be limited to:

- providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities. ...

A mechanism of monitoring the Social and Economic Union should be determined by a First Minister's Conference.

What will this commitment mean to all the individuals resident in Canada who require housing, food and other basic necessities? It is impossible to answer this question at this time, but one is tempted to the cynical conclusion that the Social

209. This text is taken from the August 28 revised draft text of the Charlottetown agreement, as reproduced in the [Toronto] *Globe and Mail* (1 September 1992) A1, A8.

and Economic Union Clause was acceptable to all the players involved because, in the absence of an enforcement mechanism, it means nothing.

The *Charter* itself will not be amended. A proposal to add property rights to the interests protected by s.7 ("life, liberty and security of the person"), strongly opposed by most anti-poverty activists and poverty law advocates, was dropped from the final round of negotiations.²¹⁰

The Accord may however have indirect implications for *Charter* litigants. The Accord provides that a new provision should be drafted "to clarify the possible relationship between the new section and the existing Canadian Charter of Rights and Freedoms", but does not suggest what the negotiators' in fact believed this possible relationship to be. It further provides that a clause should be added to the Constitution stating that the Social and Economic Union does not abrogate or derogate from the *Charter*.

Some advocates have expressed concern that the existence of a section dealing specifically with social and economic rights may encourage courts to conclude that the *Charter* does not contain any such rights. However, in the absence of any sign from the courts that they will read such rights into the *Charter* in any event, it seems that the proposed Clause holds little in the way of either threat or promise.

Finally, disability advocacy groups have reacted angrily to the fact that the last draft of the so-called "Canada clause" establishes a constitutional commitment to sexual and racial equality, but fails to mention the rights of people with disabilities.²¹¹ They have expressed concern that equality rights for people with disabilities under s.15 of the Charter could take second place to other equality rights.

4. OTHER HUMAN RIGHTS DEVELOPMENTS

(a) The Ontario Human Rights Review

For years, the enforcement of human rights in Ontario has suffered from problems of accessibility, delays, and the investigative and settlement process. Many people, frustrated with the process, have not considered it worthwhile to pursue human rights complaints.

210. *Ibid.*

211. G. York, "Accord puts handicapped in jeopardy, coalition says", *The Globe and Mail* (4 September 1992).

In December, 1991, the government appointed a Task Force, chaired by Mary Cornish, to review the human rights enforcement system and to recommend procedural changes. The government announced its intention to amend the *Code* as soon as possible after receiving the Task Force recommendations. Several community legal clinics assisted client groups to make submissions. In addition, a committee of representatives from 18 Clinics, coordinated by the Clinic Resource Office, drafted and submitted to the Task Force two briefs, one with recommendations for the structure of the complaint system as a whole, and the other addressing priorities in complaint-handling and refusal of complaints.

The Task Force released its report in June 1992, recommending numerous changes to the legislation and its administration.²¹² At the time of writing, there has been no legislative response to the report. While the government reports optimistically in the Legislature concerning attempts to reduce the Ontario Human Rights Commission's backlog, it is unlikely that elimination of the backlog or prevention of backlog in the future can be accomplished without massive expenditure, legislative change, or both.

(b) Employment Equity

Many people would argue that employment equity legislation is the "next generation" in human rights legislation and, properly crafted, may be the only effective means of eliminating discrimination in the workplace. There has been some progress on this front, although it has been less than dynamic.

Employment equity was the subject of an NDP Private Member's Bill²¹³ when the NDP were in opposition. Bill 172 was closely modeled on the *Pay Equity Act*.²¹⁴ Following the September 1990 election, equity-seeking groups, who had expected that the government would reintroduce Bill 172, were surprised and disappointed when the government announced that it would hold consultations with a view to developing a completely new Bill.

The government appointed a reputable lawyer and activist from Quebec, Juanita Westmoreland-Traore, as Employment Equity Commissioner, although her sole mandate was to hold consultations. A report on the consultations was published.²¹⁵ On June 25, 1992, the government tabled Bill 79,

212. *Report of the Ontario Human Rights Code Review Task Force: "Achieving Equality: A Report on Human Rights Reform"* (Ontario Ministry of Citizenship: 1992) (Chair: Mary Cornish).

213. Bill 172, introduced on May 29, 1990.

214. R.S.O. 1990 c. P-7.

An Act to provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women (the *Employment Equity Act*). The government is now consulting in order to produce regulations. Bill 79 is likely to receive second reading in the Fall 1992 session.

The Bill is disappointing. As with the *Pay Equity Act*, coverage is limited in the private sector to employers with 50 or more employees, and the application of the Act is "phased in" over a 3-year period. There is no provision concerning related employers. There is no mandatory posting. Further, the Act appears effectively to suspend the application of the Ontario *Human Rights Code* vis-a-vis workplaces that have employment equity plans. Perhaps most disturbingly, provisions that would define what an employment equity plan must be based on and how it must operate are missing; the Bill provides that these areas will be dealt with through regulations. It is impossible, on reading the Bill, to arrive at an understanding of what the employer's actual obligations would be.

(c) An Ontarians With Disabilities Act?

Finally, while on the subject of new human rights initiative, we should report on the early stages of a proposal for an *Ontarians With Disabilities Act*. No such legislation currently exists, even in draft, but the Advocacy Resource Centre for the Handicapped (ARCH) has been given a grant from the Ontario Ministry of Citizenship to begin development of such legislation. ARCH has called on members of the community to bring forward their ideas and proposals.²¹⁶ The government has not committed itself to such legislation, but the NDP supported the idea of an ODA when in opposition.²¹⁷

E. CONCLUSIONS

We concluded last year's review by commenting that despite the economic downturn and the effects of the recession, the election of an NDP government and initial movement on a number of outstanding issues raised some hopes for the upcoming year. Unfortunately, the events of the year have made it hard to sustain much degree of optimism for the immediate future. Ontario's economic problems have turned out to be even more fundamental than almost

215. Ontario: *Opening Doors: a Report on the Employment Equity Consultations* (Toronto: Queen's Printer, 1992) (Chair: Westmoreland-Traore).

216. 10 ArchType No.4(a) (Special Edition) "Developing an *Ontarians With Disabilities Act*" (July 1992).

217. *Ibid.*

anyone thought. The government is increasingly embattled and has either forgotten some of its promises or has quietly dropped them as being too politically risky.

This has of course placed tremendous pressures on poverty law advocates. As we noted at the outset, caseworkers in legal clinics have been overwhelmed by increasing demands by desperate people for assistance, at a time when focussing energies on opportunities for systemic change are more important than ever. It has been a difficult and frustrating year in many ways, as so many caseworkers have reported. The amount that people have in fact been able to accomplish both in individual cases and as systemic action, in light of these obstacles, is commendable.

We will conclude by saying that, whatever the frustrations of working in this area at a time when cleaning the Augean stables may seem preferable to confronting the tasks at hand, there can surely be no more important time to do so.