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Poverty Law in Ontario: The Year in Review

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POVERTY LAW IN ONTARIO:

The Year In Review

RANDALL ELLSWORTH, IAN MORRISON, JUDITH KEENE, PAUL RAPSEY AND GWYNETH PEARCE*

Résumé

Cet article traite des domaines importants du droit qui sont au centre des activités des avocats qui travaillent dans les cliniques juridiques de l'Ontario : aide sociale, indemnisation des accidents du travail, assurance-chômage, Régime de pension du Canada, logement, droits de la personne et *Charte canadienne des droits et libertés*. Il met principalement l'accent sur l'aspect législatif, les politiques et les nouveaux développements concernant les questions litigieuses reliées à ces domaines de même que les effets sur les personnes qui bénéficient de ces différents programmes. De plus, cet article étudie les divers processus de réforme de la loi qui sont en cours, notamment l'examen fédéral de la sécurité sociale et l'examen provincial de l'indemnisation des accidents du travail et de leurs effets anticipés dans la pratique du droit des pauvres.

^{* ©} Copyright 1994, Randall Ellsworth, Ian Morrison, Judith Keene, Paul Rapsey and Gwyneth Pearce. Randall Ellsworth, Judith Keene, Paul Rapsey and Gwyneth Pearce are research lawyers 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 the many clinic caseworkers who have provided us with ideas and information for this article. Any opinions expressed herein are those of the authors and not necessarily those of the Ontario Legal Aid Plan.

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A. INTRODUCTION

This is the fourth review of poverty law in Ontario which we have written for the Journal of Law and Social Policy.¹ This year's article will cover the same substantive areas of law as last year's: social assistance, workers' compensation, unemployment insurance, Canada Pensions, housing, human rights and the Canadian Charter of Rights and Freedoms.² Our focus will again be on the legislative, policy and litigation developments in these areas and their impact on the individuals who are the beneficiaries of these various programs.

As in years past, we have had to exercise some discretion to decide which issues will receive attention in the article. This discretion has been exercised based both upon the seeming importance of the issues for the practice of poverty law and the interests and experiences of the authors. Issues which are omitted from discussion in the article are simply victims of the limitations of time, space and the authors' expertise. Omission of any given issue is no reflection upon its relative importance.

Each year we have attempted to place the article within a context, by focussing on the nature of economic restructuring, the recession/depression and the political and societal responses to which these events have given rise. However, changes in caseloads or the unemployment rate or the Gross Domestic Product do not seem to be as relevant to this context any more. This year's article is unique, because in 1993-94 social policy has become the context. This is true on the international,³ national,⁴ provincial⁵ and local level.⁶ Almost all of the

- See R. Ellsworth and I. Morrison, "Poverty Law in Ontario: The Year in Review" (1991), 7 J.L. & Social Pol'y 1 [hereinafter *Review 1991*], R. Ellsworth and I. Morrison, "Poverty Law in Ontario: The Year in Review" (1992), 8 J.L. & Social Pol'y 1 [hereinafter *Review 1992*], and R. Ellsworth, I. Morrison, J. Keene & P. Rapsey "Poverty Law in Ontario: The Year in Review" (1993), 9 J.L. & Social Pol'y 1 [hereinafter *Review 1993*].
- 2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982 (U.K.), 1982, c.11. Hereinafter the Charter.
- See for example, Organization for Economic Co-operation and Development, "The OECD Jobs Study: Facts, Analysis, Strategies" (OECD, 1994) and Organization for Economic Co-operation and Development, "New Orientations for Social Policy" Social Policy Studies No. 12 (OECD, 1994).
- 4. See the discussion below on the federal review of social security under Social Assistance.
- 5. An Ontario provincial election is expected in the spring of 1995. Both provincial opposition parties have already made public pronouncements on issues such as workers' compensation and social assistance, and will probably make these election issues. They will also have to take a position on the federal social security review as well. The governing New Democrats will have to run on their legislative record which, as will be discussed below, contains efforts in all these issues.
- 6. See for example Child Poverty Action Group, Family Service Association of Metropol-

income maintenance programs we will discuss are under some type of review or "reform". As well, most of the areas to be discussed were also the subject of major legislative change.

Further, it is becoming more and more evident that changes to any individual program can and do have implications for other programs. Unfortunately, this fact is often not even recognized by the people responsible for implementing the changes. The impact that these cross-program implications might have is magnified by the fact that so many of the programs are under review, and that these reviews seem to be proceeding independently.⁷ Finally, the continued convergence of fiscal and social policy means that those concerned about social policy must strive to be equally conversant with financial and economic issues.

While our discussion of the various areas of poverty law practice will attempt to illustrate the importance of each, we have also attempted to place that discussion in this broader context.

B. DEVELOPMENTS IN INCOME MAINTENANCE LAW

1. Social Assistance

Growth in social assistance caseloads in Ontario moderated significantly over the past year, showing by far the lowest increase since the start of the recession. Some eligibility categories even declined, reflecting the start of a modest economic recovery.⁸ However, this has not translated into good news for recipients and advocates. The dominant themes of the year are still the contraction of eligibility and attacks on the poor. Over the past four years the rate at which new issues and problems with social assistance have emerged has accelerated tremendously, as the government has twisted and turned in the ideological breezes in its attempts to deal with the "welfare problem". The issues covered in this section will, we hope, highlight the themes of restricted eligibility and backlash, and indicate some major areas of concern for the future directions of social assistance in Ontario.

itan, Social Planning Council of Metropolitan Toronto "The Outsiders: A Report on the Prospects for Young Families in Metro Toronto" (1994).

7. See for example R. Ellsworth "Social Policy Review: What's in it for Injured Workers?", (May/June 1994) *The I.A.V.G.O Reporting Service*, Vol. 8:2 at 39.

8. According to Ministry of Community and Social Services [hereinafter MCSS or "Ministry"] statistics, the total social assistance caseload grew by only 1.7% between August 1993 and August 1994 (cf. 8.2% annual growth August 1993, and 20.6% August 1992). The general welfare caseload declined, reflecting employment market improvements, while there was a small increase in the Family Benefits caseload.

(a) Major Legislative and Policy Developments

Previous articles in this series have commented on the backlash against the poor and the welfare system, which grew as the recession deepened. Most significant this year is how the government chose to situate itself in relation to the backlash. By the start of the period under review, economic and political pressures had already stalled the NDP's initial agenda for reform. By the end of the period the government had moved even further to identifying with and even reinforcing the "welfare fraud" hysteria which represents the most overt component of the new anti-welfare sentiment.

(i) Social Assistance law reform

A decade of movement towards a comprehensive overhaul of Ontario's social assistance came to an end this year. At this time last year, Ontario had finally released its official position on social assistance reform, *Turning Point*, touted widely as a plan to "end welfare as we know it".⁹ It contained three main components: the Ontario Child Income Program (OCIP), a universal benefit to all poor children delivered through the tax system; an Ontario Adult Benefit (OAB), intended to consolidate and replace the complex and outdated two-tier system of municipal welfare and provincial family benefits with a single piece of legislation with simplified eligibility requirements; and JobLink, intended to provide social assistance recipients with guaranteed educational and job creation placements.

By the summer of 1994, almost all of the *Turning Point* program had been quietly abandoned. First to go was OCIP, dropped in the early spring of 1994 when it became clear that necessary federal funding would not be forthcoming. The proposed new adult benefit legislation was quietly dropped a few months later, by April 1994. A version of JobLink was in fact announced in June 1994, but bore little resemblance to the ambitious initial proposal. The original announcement of 100,000 targeted placements in educational and training programs had shrunk to 4000, while the government's total initial contribution was a mere \$25 million.¹⁰

At the time of writing Joblink is still under development, and the federal government has announced a matching financial contribution to the program. It appears that some of the JobLink initiatives may be of some interest and value to recipients, especially as current versions of the program appear to have taken

^{9.} Ontario, Turning Point: New Support Programs For People with Low Incomes (Toronto: Queen's Printer, July 1993). See Review 1993 at 18-21 for further discussion of the Turning Point proposals.

MCSS News Release (21 June 1994), "Silipo Announces JobLink Ontario to Help Move People Off Welfare".

into account community criticisms of earlier proposals.¹¹ In the end, however, JobLink remains a very small drop in a very large bucket of needs.

Abandonment of comprehensive welfare reform got a mixed reaction from activists and advocates. People who had worked for progressive reform were obviously disappointed, after years of increasing hopes, but in the end many of those most closely involved with the reform process were relieved that the project was abandoned, as they watched the steady drift to the political right, and the emergence of the Expenditure Control Plan and Enhanced Verification as the main issues for social assistance recipients in Ontario.

(ii) Expenditure Control and Enhanced Verification

The spate of rollbacks and eligibility restrictions begun in 1993-93 continued throughout 1993-94 as MCSS combed programs for savings. However, by spring of 1994, more than just incremental cuts were on the table. News was leaked in early March that the Cabinet was considering broad across-the-board social assistance rate cuts.¹² It was widely rumoured that Premier Bob Rae and Finance Minister Floyd Laughren, both of whom have showed increasing public and private hostility towards social assistance during the government's mandate, were in favour of cuts.

The rate cut proposal was eventually dropped,¹³ but we may never know for certain to what extent defeat of that proposal and subsequent events are connected. Shortly after that decision, government rhetoric about social assistance became much more aggressive. On March 28 Social Services Minister Tony Silipo publicly announced that "Ontario is stepping up its fight against welfare fraud", promising to "pursue...abusers of the system more vigorously".¹⁴ The new anti-fraud campaign centred around a policy initiative called "Enhanced Verification and Casefile Investigation", the main components of which were more frequent and intensive investigation of social assistance recipients, increased formal information demands from recipients (particularly for documentary evidence of eligibility) related to the new and more restrictive eligibility rules intro-

^{11.} JobLink has evolved through consultation with consumers and community groups to place greater emphasis on community economic development (CED) and self-employment. The original JobLink proposal ignored both CED and self-employment, which caused the proposal to be heavily criticized by consumers.

^{12.} W. Walker, "NDP puts welfare cuts on the table: Explosive issue to be taken to caucus amid deficit woes" *The Toronto Star* (21 March 1994) A1.

^{13.} Defeat of the rate cut proposal was due at least in part to an intense last-minute campaign against cuts by recipients, advocates, social agencies and faith groups.

^{14.} MCSS News Release (28 March 1994).

duced over the past two years, and increased pressure on recipients to pursue other potential sources of income.

"Enhanced Verification" itself already existed in March 1994. Work on intensifying eligibility verifications began as a result of the 1992 Report of the Provincial Auditor, which was very critical of MCSS.¹⁵ The first Enhanced Verification policy directive was distributed to MCSS offices in November 1993. What *was* new in the March 28 announcement was the explicit situating of Enhanced Verification as the centrepiece of an "anti-fraud" campaign and a crucially important shift in emphasis from the (alleged) inadequacies in Ministry verification practices to recipients as the "problem". The March 28 announcement included the existing initiative but extended it to municipalities, along with promising 270 new FB caseworkers and substantial new funding for municipalities to conduct their own casefile investigations.

Final versions of the Enhanced Verification policy manuals have only been in field offices for a few months. Nevertheless, experience with the initiative is rapidly accumulating. Three main points can be made here. First, the new documentation demands, many of which are irrelevant or unnecessary, and more demands for "enhanced verification" interviews have increased the general sense of harassment felt by recipients. Second, greater scrutiny, more rules and substantially increased resources for "investigation" have meant an explosion in the level of abusive treatment suffered by clients. Such treatment has ranged from completely arbitrary information demands¹⁶ to far more abusive and threatening treatment from the growing number of "welfare cops". Finally, intensified scrutiny of clients has resulted in a wide array of threats to the rights of privacy and confidentiality which have taken years to achieve.

Aspects of these points will be discussed in more detail below. The point to be made here is that in many places Enhanced Verification is coming to dominate the experiences of recipients and their advocates. There does not appear to be any likelihood that this will change in the near future. At the time of writing the rhetoric around welfare fraud is again heating up, again deliberately instigated by Social Services Minister Tony Silipo, and probably presaging a new round of "crackdowns".¹⁷ The 1994 Auditor's Report is expected to be released in the fall and is likely to again be critical of the Ministry.

^{15.} See *Review 1993* at 8.

^{16.} For example, one clinic reports that a client was ordered to obtain a "legal" separation agreement with respect to a man to whom she had never been married and with whom she had not lived for several years. There was, of course, no legal justification for the demand.

^{17.} W. Walker, "Major welfare foulups revealed: Fraud, error found in 20% of Ontario

(b) Litigation Developments And Current Issues

The list of significant issues from 1993-1994 is long indeed. The order of presentation is somewhat arbitrary, but starts with issues of general impact for all recipients and moves towards issues for particular categories or communities of recipients.

One general comment is perhaps in order before reviewing such a wide range of issues and legal responses. An analysis of legal developments illustrates the limits of litigation as a strategy, in and of itself, in the face of determined government opposition. Increasingly, the response to successful litigation has been simply to change the law. Several legal victories at the tribunal and judicial levels have been reversed by quick regulatory action¹⁸ and in one case the Ministry changed the law before a decision was even rendered!¹⁹ Clearly, the longstanding debate over how legal and non-legal strategies can be utilized together to achieve genuine results is taking on a new urgency.

(i) Procedural justice and the Social Assistance Review Board

We have reported before on the strains on the Social Assistance Review Board (SARB) caused by increased caseloads.²⁰ The situation has continued to deteriorate. SARB now anticipates approximately 20,000 requests for hearing in the 1994/95 fiscal year, an increase of about 60% over 1993/94, which in turn was an increase of about 80% over the previous year.²¹ Significantly, this increase

- 18. For example: the decision in *Rubino v. Metropolitan Toronto* (1992), 11 O.R. (3d) 289 (Div.Ct.) that money borrowed by a welfare recipient was not income was reversed (O.Reg.788/93;789/93); regulations were amended to prevent the Social Assistance Review Board from exercising discretion to relieve recipients from repayment of large overpayments which had been incurred upon receipt of lump sum retroactive benefits from other programs (O.Reg.788/93; 789/93); regulations were amended to reverse SARB decisions which had held that individuals living apart from their spouses could get FB sole support parent benefits where there was no "marital breakdown" (O.Reg.436/93).
- 19. See the discussion below under Social Assistance and Immigration, note 65.
- 20. *Review 1993* at 12.
- 21. Estimates provided to Ian Morrison by SARB. By way of comparison, in 1989/90 SARB received 3,866 requests for hearing.

cases" *The Toronto Star* (22 September 1994) A1, A28. The story reported on statements made by Silipo to the press purporting to justify the Enhanced Verification initiative. The Progressive Conservative finance critic (unconstrained, as usual, by facts) made the scurrilous allegation that fraud could be responsible for up to \$1 billion in losses out of social assistance spending of around \$6 B (Walker, *Ibid.* A28). Initial reporting of the issue in most media was sensationalist, although some later and more careful accounts acknowledged that the announcement in fact showed nothing of the sort: e.g., J. Laucius, "Welfare official disputes 20% overpayment figure" *Ottawa Citizen* (24 September 1994).

comes at a time when the caseload growth has virtually levelled off.²² The increased demand would seem to be mostly attributable to eligibility restrictions and Enhanced Verification. It is not surprising therefore that SARB's struggle to control its backlog has been only partly successful. SARB has instituted a number of internal streamlining initiatives, including issuing shorter decisions and orders, deliberately overbooking some appeals and sitting as one member panels only except in unusual cases. However, while these have helped somewhat, they are insufficient to meet the full extent of the problem.

The backlog means that the average time taken by the Board to render a decision in a case is far too long for an appeals tribunal dealing with entitlements to basic necessities. The only reason the appeals system has avoided full fledged crisis is because of SARB's authority to order interim assistance pending decision. In turn, however, the interim assistance program has come under attack, diverting attention away from the structural issues facing the Board. Interim assistance is hotly resented by many delivery agents. Accusations of "abuse" of interim assistance grew louder this year, and hostility towards interim was reflected in public attacks on SARB through the media, by opposition politicians in the Legislature, and in the ongoing problem of refusals to pay interim assistance ordered by SARB. The latter issue almost went to court this year on an application for *mandamus* to compel payment of an order, but the matter was settled on the day of hearing, with the municipality agreeing that it was obliged to honour an order for interim assistance.²³

The Ministry claims that it is committed to improving the appeals process. At the time of writing the Ministry has amended the regulations governing SARB membership to allow for up to nine additional members.²⁴ It remains to be seen whether the Ministry initiatives will be successful or whether the backlog will have reached a point of no return before adequate resources are made available.

(ii) Social Assistance and the Charter

An important *Charter* development this year (although not directly applicable to Ontario law) was a challenge to the infamous "man-in-the-house" rule, which

^{22.} Supra, note 8. Estimates provided to Ian Morrison by SARB.

^{23.} Cole v. Administrator, City of Barrie (Ont.Div.Ct. No. G10024 (Barrie). The applicant was represented by Simcoe Legal Services Clinic. The municipality had counterclaimed that SARB could not order interim assistance without affording the municipality a full hearing. While the counterclaim was spurious, it is indicative of the hostility towards SARB and interim assistance of many delivery agents.

^{24.} O.Reg. 554/94 made under the *Ministry of Community and Social Services Act*, R.S.O. 1990, c. M-20.

arose in a Nova Scotia case. R. v. $Rehberg^{25}$ involved a fraud prosecution of a sole support parent for living with an undisclosed "spouse". The accused successfully argued that the Nova Scotia "man-in-the-house" rule violated s.15 of the *Charter*. The Court accepted that the "man-in-the-house" rule was based on an oppressive stereotyping of women and therefore violated the equality guarantee contained in s.15.²⁶

Two other cases challenged age-based eligibility rules in welfare programs, with conflicting results.²⁷ After years of procedural wrangling, SARB finally released its first major *Charter* decision, dismissing an argument that the categorical exclusion of people under the age of 16 from general welfare assistance in Ontario violated the *Charter*.²⁸ The Board accepted that the rule imposed an age-based discrimination contrary to s.15(1) but held that it was saved by s.1 of the *Charter*. The decision is currently under appeal to the Ontario Divisional Court.²⁹

A Manitoba Court, on the other hand, struck down a policy of the City of Winnipeg which discriminated on the basis of age. The applicant was a 17-yearold woman who lived in a common-law relationship and had a child. She was refused assistance on the basis of a blanket policy which required any person under 18 to show that she was unable to return to her parental home. The Court had little difficulty concluding that the rule was discriminatory and that it was not saved by s.1.³⁰

- 28. SARB G-12-08-21.2 (August 23, 1993; McCormick). For previous developments in this case, see *Review 1993* at 10.
- 29. Mohamed v. Metropolitan Toronto (Ont.Div.Ct. No. 609/93). The appellant is represented by Justice for Children and Youth, Toronto.
- Clemons v. City of Winnipeg (April 28) Suit No. CI-94-01-78835 (Man.Q.B.) [unreported].

^{25. (1993), 127} N.S.R.(2d) 331 (N.S.S.C.T.D.). On October 17, 1994 the Attorney General of Nova Scotia abandoned an appeal in this case.

^{26.} This argument was first theorized by feminist legal scholars years earlier. A case using this argument was started in 1985 in Ontario with the support of the Womens' Legal Education and Action Fund (LEAF). The Ontario definition of spouse at that time was similar to that considered in *Rehberg*. It was eventually settled when the government undertook to amend the definition of "spouse" to bring it in line with the definitions used in Ontario family law legislation.

^{27.} This discussion is restricted to cases argued and decided on the merits. A number of challenges to a rule denying welfare to people between 18 and 21 living at home have been allowed by SARB based on concessions by MCSS counsel that the application of the rule in those cases violated the *Charter*, see *Review 1993* at 10.

Finally, some important *Charter* issues may be decided in the next year. One Ontario case scheduled for hearing in early 1995 raises the question of whether s.15 of the *Charter* prohibits discrimination on the basis of "poverty" or the receipt of social assistance.³¹ At issue is whether the practice of utilities companies of demanding security deposits, which many social assistance recipients seeking accommodation cannot pay, violates the *Charter*. Also at issue is whether the Ontario *Human Rights Code*³² violates the *Charter* by failing to prohibit discrimination against social assistance recipients in the provision of public services.³³

(iii) Privacy rights of welfare recipients

Protection of privacy has been an issue of growing importance for advocates for some time, as recipients' rights to privacy have come under steady attack. Several important issues relating to the right to privacy arose this year.

In November 1993 the Lambton County Council passed a resolution authorizing the County Warden to obtain and review a list of the names of all welfare recipients in the County.³⁴ This occasioned an acrimonious stand-off between the municipality and the province, with the local legal clinic threatening litigation if the matter was not resolved. The matter was not in fact finally resolved until the province cut welfare transfer payments to the municipality, forcing the municipality to rescind its resolution.³⁵

Meanwhile, it was revealed in February 1994 that the Municipality of Metropolitan Toronto, the largest welfare delivery agent in Ontario, was exploring the possibility of fingerprinting all welfare recipients.³⁶ Nothing came of the idea at the time, but fingerprinting is used in a number of American jurisdictions and the issue may only be in temporary abeyance.

- 32. R.S.O. 1990 c H-19.
- 33. The Code currently prohibits discrimination on grounds of social assistance in respect of accommodation, but does not extend this protection to other services.
- 34. In 1990 another municipal Council attempted to obtain the names of welfare recipients to police the welfare rolls. The Council's resolution was ultimately quashed in court: *H.(J.) v. Hastings (County)* (1992), 8 Admin.L.R.(2d) 157; see *Review 1992* at 16.
- 35. It appears that the resolution was never acted on once it became a contested issue, and that the refusal to rescind the resolution ultimately became a test of local autonomy.
- 36. "Fingerprint plan for welfare urged" The Globe and Mail (16 February 1994) A1.

^{31.} Clarke et al v. Peterborough Utilities Commission et al (Ont.Ct.(Gen.Div.)) Nos. 6605/91, 6900/91,7045/91. The National Anti-poverty Organization, the Centre for Equality Rights in Accommodation and the Ontario Coalition Against Poverty have all intervened.

Finally, issues of privacy and social assistance were addressed in hearings by the Standing Committee on the Legislative Assembly into the *Municipal Free*dom of Information and Protection of Privacy Act.³⁷ The ideological gulf in the battle over privacy rights was made clear during these hearings. On one hand, clinics appeared before the Committee to plead for increased legislative protection of welfare recipients' privacy;³⁸ on the other, the Committee heard a controversial municipal politician attack the basic premises of the Act with the increasingly common argument—and one which undoubtedly reflects the views of a significant number of provincial and municipal Ontario politicians—that receipt of social assistance itself entails a forfeiture of civil rights.³⁹

Whatever the Standing Committee eventually recommends, the reality is that violations of recipients' privacy rights are commonplace.⁴⁰ Moreover, despite rhetorical support of privacy rights, MCSS continues to erode those rights that do exist. The Ministry's most recent action in this respect was to replace an already broadly worded mandatory "consent to disclose" form, which recipients must sign as a condition of getting assistance,⁴¹ with an even more sweeping one, which for all practical purposes authorizes uncontrolled release of infor-

- 39. Ontario, Legislative Assembly, Standing Committee on the Legislative Assembly, Official Report of Debates (Hansard) (19 January 1994), presentation of E. Dodds (Thunder Bay City Council). The essence of Ms Dodds presentation can be taken from the following passage (at M-204): "[T]he time has come that the right of the public to protect its money must outweigh the right of the individual to privacy when public funds are accessed... For thousands of years [sic] it has been known that the greater the dependence of the citizenry on its government for support, the more liberty has to be given up. It's simply a fact. If you depend on the government to support you, you give up your right to privacy because the taxpayers' right not to have their money abused is greater." Ms Dodds also presented a lengthy brief arguing that MFIPPA prevented effective fraud detection and prevention.
- 40. Several examples are provided in the clinic briefs to the Standing Committee, *supra*, note 38. The point has often been made that privacy protection is such a low priority that many routine business practices of delivery agents potentially reveal the identities of social assistance recipients.
- 41. General Welfare Assistance Regulations, R.R.O. 1990, Reg. 537 (GWA) Form 3. An application for assistance must be accompanied by a completed Form 3: Reg.537, s.9(3). The same form is prescribed for Family Benefits applications.

^{37.} R.S.O. 1990 c. M-56 [hereinafter *MFIPPA*]. The review is pursuant to the Act itself (s.55), which required the Standing Committee to undertake a comprehensive review and report to the Legislature.

^{38.} Briefs were presented by the Ontario legal clinics' Steering Committee on Social Assistance, Community Legal Assistance Sarnia (whose geographical catchment area included Lambton County), and the Renfrew County Legal Clinic (serving a number of unconsolidated rural municipalities).

mation to any party.⁴² The new form has caused alarm amongst many recipients⁴³ and at the time of writing a legal challenge seems probable.

(iv) Welfare fraud and the criminal process

Another consequence of Enhanced Verification and the general welfare backlash has been a dramatic increase in the number of welfare fraud prosecutions,⁴⁴ contributing further to the prevailing atmosphere of anxiety and insecurity.

People faced with a threat of prosecution have good reason to be afraid, even if innocent. Usually their benefits will have been terminated, adding to the stress, especially for those with children.⁴⁵ They confront a criminal defence bar mostly unfamiliar with the complexities of social assistance legislation and who may not be aware of available defences. In many cases they will have signed documents "admitting" fraud, having been told by an investigator that they have no choice.⁴⁶ Most advocates are aware of people who plead guilty to charges of welfare fraud simply to "get it over with".⁴⁷ There will undoubtedly be more such cases in the future.

Of particular concern is a recent decision undermining years of struggle for better legal protection of women. The definition of "spouse" contained in Ontario social assistance regulations provides in part that "in determining

- 44. While we do not have precise statistics for this phenomenon, advocates in clinics across the province report unprecedented increases in the number of fraud charges. This has also been evidenced by the substantial increase in the number of requests for adjournments before the Social Assistance Review Board by people awaiting criminal trial, such that the Board has actually distributed a formal practice direction with respect to this situation (Practice Directions: "Adjournments where appellants are facing criminal charges" 17 October 1994)
- 45. Although comprehensive statistics are not available, it appears that women are disproportionately charged with fraud: see D. Martin, "Passing the buck: Prosecution of welfare fraud; Preservation of stereotypes" (1992), 12 Windsor Yearbook of Access to Justice 52. It is also striking how many clinic staff, from different clinics and dealing with different offices, report that Eligibility Review Officers display misogynistic behaviour and selectively (or exclusively) pursue investigations of female recipients.
- 46. Instances of people being told to sign documents or have their benefits terminated immediately are routinely reported by social assistance advocates. At the time of writing a formal complaint has been made to the Ministry by Hastings & Prince Edward Legal Services with respect to several incidents of this nature documented by the clinic.
- 47. See also D. Martin, supra, note 45.

^{42.} O.Reg.318/94.

^{43.} For example, one recipient wrote in a letter to her MPP (a Cabinet Minister) [copied to Ian Morrison]: "I would starve before I would allow anyone to rampage through my personal life in this manner... Why is it that only subsistence level poor are subject to this type of degrading, humiliating and integrity destroying social torture?"

whether or not a person is a spouse...sexual factors shall not be investigated or considered".⁴⁸ In *R. v. Jantunen*,⁴⁹ Kurisko J. of the Ontario Court (General Division) held that this section had no application to a fraud prosecution based on alleged unreported cohabitation. Kurisko J. summarily dismissed the suggestion that criminal liability should be based on the same test of cohabitation used to determine eligibility, castigating the section as creating a "distorted and unrealistic" test which "has shackled the Director with an artificial and unrealistic approach to the meaning of cohabitation that is inconsistent with the common law".⁵⁰ Evidence of sexual activity was admitted and the accused convicted.

Jantunen should sound alarms for feminists and social assistance activists for many reasons—not least of which is an express distinction drawn in the decision between "legitimate" and "illegitimate" sex by poor women.⁵¹ More generally, the language in the case is consistent with a growing hostility towards the relatively privileged position of sole support parents in the complex hierarchy of social assistance "deservedness".⁵²

(v) Financial Eligibility

As we have noted before, many technical issues concerning financial eligibility have very important consequences for social assistance recipients. Because it is generally difficult or impossible to develop any kind of political campaign around these kinds of issues, the legal role is particularly important in this area.

One problem in this area is whether payments from other sources should be treated in their net or gross amounts as income for social assistance purposes. The issue arises with respect to a wide range of deductions, including income tax withheld at source, support payment and other garnishment deductions from employment and social insurance payments. In 1993 the Divisional Court rendered an unfavourable decision in the *Wedekind*⁵³ case, holding that the UI payments should be deducted from income in their gross amount, disregarding

51. *Ibid*.

^{48.} Family Benefits Regulations, R.R.O. 1990 Reg. 366, s.1(2).

^{49.} April 18, 1994; Ont. Ct. Gen. Div.) [unreported]; currently under appeal.

^{50.} *Ibid.* at 8. Although the language in the decision is tempered somewhat, press reports suggested that during the hearing the judge was openly hostile to the whole definition of "spouse" describing it as a "loophole large enough to drive a truck through".

^{52.} See further the discussion of *Sole Support Parents*, below.

^{53. (1993), 62} O.A.C. 70 (Div.Ct.). For a discussion of this case see Review 1993 at 15-16.

income tax deductions. A decision from the Ontario Court of Appeal on this issue is expected this year.⁵⁴

Another problem area in the definition of income is the treatment of "no fault" automobile insurance payments. Social assistance regulations exempt from income monies paid as compensation for pain and suffering, up to a limit \$25,000. Prior to the introduction of no-fault insurance, this usually meant that accident victims received some compensation which was not "taxed back". However, SARB has generally refused to characterize no-fault awards as compensating for pain and suffering; in January of 1994 this position was affirmed by the Ontario Divisional Court.⁵⁵

(vi) Teens and welfare

One of the most politically contentious issues in social assistance is the eligibility for benefits of teens and young adults, especially 16 and 17-year-olds. They are only eligible for assistance as single adults if they can show "special circumstances" (usually physical, sexual or psychological abuse or severe family breakdown).⁵⁶ The past year saw a stream of attacks on teen welfare, both in the press and in the Legislature.⁵⁷ The attacks also targetted legal clinics and SARB, who are inevitably accused of contributing to the "abuse" of the system by assisting teens refused by local welfare departments.⁵⁸

The importance of this issue lies in its ideological significance. While media construction of the issues paints a picture of rampant abuse, the actual numbers involved are trivial—in fact, from everything that is known about the extent of

^{54.} Wedekind is scheduled to be heard in the Court of Appeal November 14, 1994.

^{55.} Gates v. Ontario (Ministry of Community and Social Services) (1994) 19 O.R.(3d) 158. An application for leave to appeal to the Ontario Court of Appeal has been filed. The appellant is represented by the Kingston Community Legal Clinic.

^{56.} *General Welfare Regulations*, R.R.O. 1990, Reg. 537, s.7(b). The regulation refers only to "special circumstances"; the restriction of this category to cases of abuse and severe family breakdown is by policy only.

^{57.} Ontario, Legislative Assembly, Official Report of Debates (Hansard) (28 March 1994) 5188; (28 March 1994) 5189; (29 March 1994) 5231; (12 April 1994) 5533; (18 April 1994) 5670. While few would be naive enough to expect cool objectivity during Question Period, it is nevertheless striking the degree to which both the law and the statistics were misstated in these exchanges.

^{58.} For example see "A study in frustration: Clogged appeals system lets welfare applicants collect now, explain later" *The Sault Star* (14 June 1994). This article, which attacked both SARB and the local legal clinic for providing interim assistance, was part of a week long series in the same paper attacking the availability of teen welfare. Accusations that the appeals system was a dupe in the manipulations of the system by teens were also part of the series of exchanges in the Legislative Assembly, *ibid*.

physical, sexual and emotional abuse within families, the number of teens who apply for welfare to escape impossible family situations is clearly only a tiny fraction of those potentially eligible.⁵⁹ However, constructing a "crisis" of welfare abuse around teens incorporates some of the most important themes of the welfare backlash: it targets a relatively powerless and unorganized group with little effective ability to respond, the issue is framed as a defence of the "family" (i.e., the power relations and inequalities within the nuclear family), and it both implicates and contributes to the perception that the abuse of welfare programs is widespread. These themes are also crucial strategies in the campaign to contract income maintenance programs and to make them more coercive and punitive.⁶⁰

(vii) Social Assistance and Immigration

Immigrants and refugees have been special targets for fiscal restraint. When last year's article was written, Ontario had just acted to disentitle failed refugee claimants and certain other non-residents from benefits, and to slash entitlements to sponsored immigrants.⁶¹ This measure was met with outrage by immigrant communities and social assistance activists. Unprepared for the vehemence of the community response, the government again amended the regulations in December 1993.⁶² However, while the December amendments removed most problems with respect to refugee claimants, the sponsored immigrant rules remain highly contentious.⁶³

Only some of the legal issues from the December amendments have been litigated to date.⁶⁴ Some issues relate to the statutory exemptions to the new

- 59. For example, in July 1994 there were 346,500 GWA cases in Ontario, representing 610,000 beneficiaries. Of these less than 8000 were 16 & 17 year old "special circumstances" cases.
- 60. Space precludes a fuller examination of these issues in this article, but the issue of teen welfare usually includes alternative proposals with significant coercive and/or punitive elements.
- 61. See *Review 1993* at 16-17.
- 62. O.Reg.788/93; O.Reg.789/93.
- 63. The August amendments reduced eligibility to a nominal \$50.00 per month by deeming recipients to be in receipt of income from the sponsor up to this amount, but allowed recipients to show that their sponsors were unable to provide support. The December amendments abolished this presumption, but enacted a mandatory \$100.00 deduction for recipients living apart from sponsors (more for those living with sponsors), regardless of the sponsor's ability to pay. The regulations recognize exemptions where the sponsor is also on assistance or where the sponsorship breakdown involved "family violence".
- 64. The sponsored immigrant changes are a major contributor to the strain on the appeals system. A substantial proportion of the appeals in the past year have involved spon-

deeming rules. Because the scope of the exemptions is not clear and their application requires detailed indivualized case examination, much room is left for dispute and therefore litigation. Moreover, careless drafting (nothing new in social assistance law) has resulted in the need for clarifying amendments.⁶⁵

The greater issue, however, is whether the province will succeed in imposing what amounts to a new "poll tax" on poor immigrants.⁶⁶ A group of clinic lawyers in conjunction with community agencies has indicated an intention to challenge the constitutional validity of the new rules. The issue has become even more important as governments increasingly target refugees and immigrants for cuts to social benefit programs.⁶⁷ Litigation on a variety of related topics in the upcoming year seems likely.

(viii) Disability Issues

As predicted last year, a province-wide "blitz" to force disabled social assistance recipients to apply for *Canada Pension Plan (CPP)* disability benefits has caused a host of problems for recipients.⁶⁸ Many of these stem from the fact that social assistance delivery agents seem to know little about either the eligibility rules for *CPP* disability benefits, or the process of applying for benefits. Advocates report that many people who are clearly ineligible for *CPP* have been forced to apply, some recipients have been told (illegally) that their applications for Family Benefits will not be processed until they have completed an application for *CPP*, and longstanding problems of obtaining medical reports from uncooperative doctors have been exacerbated. Applicants and recipients with psychiatric disabilities, who are often especially vulnerable to inappropriate treatment, have been particularly affected.

sored immigrant reductions.

- 65. One of the largest classes of sponsored immigrants are "parents". By incorporating "immigration" definitions which had not been used in immigration legislation for decades, the original amendments inadvertently excluded this class. This interpretation was confirmed in *SARB M-07-15-02/M-11-21-06* (September 12, 1994; Bradbury, Renault), a case argued jointly by Scarborough Community Legal Services and Metro Toronto Chinese and Southeast Asian Clinic. In a break from its usual practice of reversing adverse decisions, the Ministry amended the regulations to preclude this argument before a decision was even rendered; see O.Reg.419/94;420/94.
- 66. Thanks to John McKean, Bloor Information and Legal Services, for this pithy characterization of the \$100 deduction.
- 67. For example, immigrants and refugees have also been targetted for medical insurance cuts.
- 68. See *Review 1993* at 17-18.

Further problems from Enhanced Verification are expected. The program anticipates that the eligibility of all people receiving benefits as disabled or permanently unemployable persons under the FBA will be reviewed.⁶⁹ Furthermore, all recipients found to be permanently unemployable as a result of an appeal to SARB⁷⁰ are to have their eligibility reviewed after two years, necessitating a further round of doctors' visits and expensive medical reports, regardless of the Board's specific findings on the nature and duration of the conditions. This will, of course, further strain the capacity of legal clinics to provide services.

(ix) Sole support parents

Finally, we must mention the specific consequences of Enhanced Verification for women and particularly sole support parents. In many respects it has and will be felt most severely by women.

There are several reasons for this. Some Enhanced Verification items primarily affect women, such as a proposal by which all parents of school-aged children would be required to provide MCSS a form signed by the school to "prove" their children's attendance. After vehement opposition by recipients (supported by the more progressive of teachers' associations) this particular proposal was substantially modified.⁷¹ Enhanced Verification also requires workers to review all spousal and child support orders and to pressure women to seek increased support. The mandatory obligation to seek support without reference to the wishes of the recipient has long been the subject of bitter complaint from some recipients, who argue that it forces them into a legal system which is easily manipulated by men to harass them, with no attendant benefit.⁷²

- 69. The initial (November 1993) Enhanced Verification policy on medical reports/reviews was particularly offensive, instructing workers to complete a narrative of their observations of the client "at the office and *not* in the presence of the client". Observations were to include, for example, whether the client was "friendly, cooperative". Representatives of the disability community objected strongly, arguing that income maintenance workers were not trained or qualified to diagnose disabilities and that such narrative reports would be uninformed and prejudicial. The proposed process was amended as a result.
- 70. Appeals of disability eligibility determinations have traditionally made up roughly a quarter of all appeals to SARB. This is particularly unfair to recipients in some parts of the province, as the initial eligibility determination is highly arbitrary, with acceptance rates ranging from approximately 40% to 80% of all applicants, depending on the office where the application is made.
- 71. The Enhanced Verification policy now requires school attendance verification forms only with respect to dependent children over 16, although it appears that some delivery sites are still attempting to require the form for all school aged children.
- 72. Child and spousal support payments are deducted from social assistance allowances dollar for dollar in Ontario (unlike some jurisdictions which allow a limited flow-through of support).

More importantly, sole support parents are specifically targetted by Enhanced Verification for investigation. The Enhanced Verification policy includes identification of "high risk" cases to be targetted for "priority verification".⁷³ It is no accident that the number of reports from various sources of women being harassed by eligibility review officers erupted after the start of the "anti-fraud" campaign.

Finally, the nature of the eligibility rules for sole support mothers is such that even allegations or suspicions about them can have particularly severe consequences. For example, an allegation that a woman was living with an unreported spouse implies the possibility of a fraud charge, the loss of custody of children or at the very least an overpayment which could easily run into thousands or tens of thousands of dollars.

The most positive thing that can be said for sole support mothers on assistance in Ontario is that worse did not happen. There is a growing hostility within the Ontario government to the current eligibility standards for sole support parent benefits and it is clear that the government would like to restrict them. It is an open secret that some Cabinet members would like to see the cohabitation period for determining spousal status reduced from three years to one, and to impose employment-seeking obligations on these parents much sooner than the law presently allows.⁷⁴ However, while none of these changes have yet materialized, pressures in this area are certain to increase.

(c) Future Directions

We close with a few observations on the future directions of some policy initiatives currently under way within MCSS, as well as some of the larger implications for social assistance of other social policy initiatives.

(i) Pending issues

In the summer of 1994 MCSS released a "workplan" indicating Ministry priorities for policy development over the next year (which encompasses the duration of the current government's mandate).⁷⁵

MCSS Social Assistance Programs Branch: Briefing Package #1, Casefile Investigation (28 March 1994) 8. The "high risk" category has been carried forward into the Enhanced Verification policy.

^{74.} Ontario's rules in this regard are relatively generous, essentially allowing benefits to continue throughout secondary school. In some jurisdictions conditionality rules begin to operate when children are as young as one year old.

^{75.} The "workplan" is not a formal publication of the Ministry, but an informal summary of the Ministry's proposed initiatives.

Some initiatives could be positive, such as the development of a consistent Ministry-wide policy for responding to situations of family violence,⁷⁶ a code of conduct for workers, new delivery standards and better worker training.

Other initiatives are more troubling. Of these, some are further cost-recovery measures which will cause more financial hardship to recipients, such as a plan to recover "administrative error" overpayments (which are currently not recovered). Some are simply further reflections of the government's ideological capitulation to anti-welfare sentiment, such as a proposal that shelter costs should paid directly to landlords to prevent the "abuse" by recipients of not paying rent. Some, however, indicate deeper structural changes to social assistance administration. The issue of greatest concern here is an initiative innocuously entitled "outcome planning", which is intended to "ensure that the approach of identifying and monitoring specific outcomes, introduced through the Casefile Investigation initiative, is expanded and incorporated into regular MCSS business practice". Those familiar with similar US "initiatives" around the Aid For Dependent Children program will be cognizant of the cause for alarm.⁷⁷

The most important pending event, however, is the provincial election which must be held in 1995. Social assistance will be a major election issue, and the provincial Tories (who engage in frequent and vociferous welfare bashing) intend to run on an anti-welfare platform, which promises the introduction of welfare police (to match the infamous Quebec "bou bou macoutes"), distinctly lower rates and mandatory workfare and learnfare programs.⁷⁸

(ii) National issues

We close this section with some observations on the possible impact that the current federal social security review may have on social assistance programs.

- 77. See T. Casey & M. Mannix, "Quality control in public assistance: Victimizing the poor through one-sided accountability" (1989) Clearinghouse Review 1381.
- 78. The promise to cut rates and impose workfare is contained in the party's election platform as outlined in *The Common Sense Revolution* (1994). Tory politicians routinely assert gross exaggerations of the probable extent of welfare fraud in Ontario and have often expressed their approval of the Quebec model of welfare policing.

^{76.} Development of a "family violence" protocol was a response to a legal clinics' initiative. At the time of writing a draft position paper has been circulated for comment and the Ministry has committed to bringing in the protocol, but the timing and contents of the final version remain uncertain. Issues of "family violence" intersect social assistance rules in several places, including determining when an exemption will be granted from the obligation to pursue child or spousal support, eligibility of 16 & 17 year-olds, and an exemption from the automatic \$100 deduction from sponsored immigrant allowances.

The federal government released *Agenda: Jobs & Growth*, the long-awaited discussion paper on its options for restructuring federal social security programs and spending in October, 1994.⁷⁹

The release came as business and the financial sector launched a fierce and carefully orchestrated campaign to convince Canadians that we are near bank-ruptcy as a nation and have no choices except to make massive cuts to social spending.⁸⁰

Human Resources Minister Lloyd Axworthy's embarrassment over the discussion paper commenced immediately. The release of *Agenda: Jobs and Growth* was overshadowed by another leaked government document which stated that the federal government intended to take another \$7.5 *billion* out of social spending by 1999.⁸¹ Mr. Axworthy attempted to deny that this document reflected the government's real intentions, but his denials were not believable, and, indeed, Finance Minister Paul Martin has subsequently made it clear that he is looking at even further and deeper cuts.

There were no big surprises in the discussion paper. Drafts of the paper and information about internal government discussions had been leaked almost daily since the review process began. Most of the paper contained a description of the problems facing Canada's social safety net. The actual list of "key issues for discussion" was only a few pages long.

Even without further cuts, the federal government's agenda for "reform" will mean more poverty and hardship for low income Canadians. However, it is clear that the goals of the federal review include substantial spending cuts to federally funded programs, including Unemployment Insurance and cost-shared programs. Regardless of how these cuts are distributed, the results will strain provincial social assistance programs even further. Removing billions of dollars from the social security spending envelope can only mean a greater increase in income inequality and poverty (unless one anticipates immediate and massive job creation). As the income security program of last resort, social assistance will inevitably feel the consequences of these cuts.

^{79.} Canada, Agenda: Jobs and Growth – Improving Social Security in Canada (Human Resources Development Canada) (Supply and Services Canada), October 1994.

See for example, "Wherein the mouse squeaked" *The [Toronto] Globe and Mail* (7 October 1994) A20; T. Corcoran "Spending crisis closing in on Ottawa" *The [Toronto] Globe and Mail* (12 October 1994) B2; P. Cook "The bad news on the budget never sleeps" *The [Toronto] Globe and Mail* (12 October 1994) B2.

^{81.} D Ferguson "Social reform price tag: \$7 billion" *The Toronto Star* (5 October 1994) A1.

Just as worrisome may be the fact that the provisions of the Canada Assistance $Plan^{82}$ (CAP) will be up for discussion. CAP is best known as the federal provincial cost-sharing program which, prior to 1990, provided a 50% federal contribution to provincial social assistance spending (an arrangement on which the federal government reneged in 1990 and which has the subject of a bitter dispute between Ontario and Canada). However, CAP also establishes some important standards for the design and administration of social assistance programs, including the guarantee of an appeals system and a prohibition against "workfare".⁸³ Any review of CAP means that these guarantees are open for political debate—at a time when many provinces are increasingly voicing complaints about the restrictions imposed by CAP.

Agenda: Jobs and Growth is right about one thing. Our current social safety net has lots of problems. Unemployment Insurance and welfare *should* be overhauled and improved. Canada's training and retraining strategies *should* be reviewed and updated. We *should* make child poverty an issue for the top of the agenda. The employment situation of disabled people in Canada *is* a national disgrace.

People who read *Agenda: Jobs and Growth* will find that it contains a less than hidden "agenda" and will look in vain for any serious discussion about jobs or growth. They will also look in vain for any serious suggestion that big business or the financial community have obligations to the people from whom they profit. The government has ruled out any deficit-fighting on the revenue side. In short, the government has reaffirmed its commitment to the direction Canadian society has been taking for over a decade—the rich will get richer and the poor will pay for it.

2. Workers' Compensation

(a) Assessment Rates for Employers

Compensation payments made to injured workers under the *Workers' Compensation Act*⁸⁴ are funded by assessments which the Workers' Compensation Board (WCB) levys on employers. Employers are classified on the basis of their business activities and the underlying injury risk, and then assigned to a rate group. Each rate group has its own assessment rate.⁸⁵ The assessment rate based

^{82.} RSC 1985, c. C-1.

^{83.} See I. Morrison, "Beyond Cost-sharing: The Canada Assistance Plan and National Welfare Standards" (Clinic Resource Office: 1994).

^{84.} R.S.O. 1990, c. W-11, as amended. Hereinafter the WCA.

^{85.} In 1993, the average assessment rate for employers was \$2.95 per \$100.00 of payroll. The highest rate was approximately \$18.50 per \$100.00 and the lowest rate was \$0.21 per \$100.00 of payroll; See Humphrey, Loewen & McArthur, *Ontario Workers' Com*-

on an employer's classification is then applied to the assessable payroll of that employer to determine the amount that the employer must pay to the WCB in any given year.

In January of 1993 the WCB adopted a new classification scheme, which was meant to ensure a closer relationship between an employer's assessments, business activities and injury risk.⁸⁶ In the fall of 1993 the WCB announced the assessment rates it was planning to charge employers for 1994. This rate increase was meant to cover the costs of new claims, the administrative overhead and legislative obligations of the WCB and to assist in the long term elimination of the unfunded liability of the WCB.⁸⁷ The average assessment rate increase was to be 3 per cent. However, this rate increase was also to be applied to the new classification scheme which the WCB had adopted.

The resulting increase in the level of assessments paid by many employers produced outrage and indignation in the employer community.⁸⁸ Opposition politicians hounded the Minister of Labour over these "job-killing rate increases".⁸⁹ As with many issues in workers' compensation, debate over this increase proceeded along partisan lines, with neither employers nor politicians being able (or at least willing) to explain these increases properly.

The purpose of the new classification scheme was to ensure that those employers and industries who had high accident rates had higher assessment rates and those who had lower accident rates had lower assessment rates. In many situations under the old classification system low risk employers were subsidizing high risk employers. Therefore, regardless of whether there was an assessment rate increase for 1994, many employers would have been faced with higher assessment rates simply by reclassification. The 3 per cent increase in the average rate simply magnified the effect of switching to the new classification system.

- 87. Workers' Compensation Board of Ontario: Annual Report 1993 at 17. In fact, employers had not been charged the full rate associated with the new classification scheme for 1993.
- "1994 Assessment Rates: WCB Responds to Business Lobbying" (February, 1994) 8:1 Ontario Workers' Compensation Review 1 and James Rusk "Rae refuses to roll back WCB fee hike" *The [Toronto] Globe and Mail* (7 December, 1993) B3.
- 89. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (6 December 1993) at 4537.

pensation - An Employer's Guide 2nd Edition (Toronto: Carswell, 1994) at 9-6.

^{86.} Ontario Workers' Compensation Board: Annual Report 1992 at 13. In fact, this was the first review and change to the classification system used by the WCB since its inception. The new classification scheme increased the number of rate groups from 108 to 219.

What the employer community (and the opposition politicians who supported their complaints) were saying was that, at least in the present economic climate, they could not afford to pay the total cost of the accidents they were causing. This may or may not have been a valid economic argument. The WCB however, continued to be responsible to pay benefits to those workers who were injured on the job. To the extent that employers did not pay the full amount required to cover those costs, the Board's unfunded liability grew. Yet, as will be evident below, the unfunded liability was an unparallelled symbol for employers of the WCB's mismanagement and financial irresponsibility!⁹⁰

(b) "Restructuring" at the WCB

In December of 1993 a major shakeup of the upper echelons of the WCB began. Four senior executives left the Board.⁹¹ There were several other internal promotions.⁹² According to the Board, the changes were a result of the "social contract"⁹³ and operational planning. However, even though the employer community and opposition politicians had interminably been calling for changes at the Board, these changes did not satisfy them. They wanted the removal of the WCB chairman.⁹⁴

They were not disappointed. As part of the introduction of its workers' compensation reform package the government announced that the chair of the WCB, Odoardo Di Santo and the vice-chair of administration, Brian King, would be "stepping down" at the end of their terms of office.⁹⁵ In their place the

- 90. In fact, the employers' arguments carried the day. The WCB Board of Directors agreed to place a cap on the increase in premiums which resulted from this new classification system and the increase in the average rate; see "1994 Assessment Rates: WCB Responds to Business Lobbying", *supra*, note 88 at 2.
- 91. Sam van Clief, Senior Vice-President of Client Services Division and Henry MacDonald, a department head in Client Services Division, "retired". Robert Coke, Senior Vice-President of Finance and Administration and Sig Walters, Senior Vice-President of Human Resources and Client Appeals resigned; see "Major WCB Executive Shakeup and Restructuring", (14 December 1993) Vol 6:4 I.A.V.G.O. Reporting Service Newsletter at 2.
- 92. Catherine Rellinger (already the Chief Vocational Rehabilitation Officer) became the Senior Vice-President of Client Services. Glen Cooper (already the Chief Financial Officer) had his position combined with the duties of Senior Vice-President of Finance and Administration. Linda Jolley (already the Senor Vice-President of Strategic Policy and Analysis Division) became the Senior Vice-President of Human Resources and Client Appeals; see *Ibid.* at 2.
- 93. For a discussion of the "social contract" see Review 1993 at 5.
- M. Gibb-Clark, "Four WCB executives leave in "restructuring" The [Toronto] Globe and Mail (10 December 1993) B5 and Ontario, Legislative Assembly, Official Report of Debates (Hansard), (9 December 1993) at 4793-4795.
- 95. The government introduced its reform proposals on April 14, 1994. The proposals and

government installed a transition team, which included WCB and government officials and representatives from business and labour.⁹⁶ There was no representative of injured workers on the transition team.⁹⁷

The purpose of this transition team was to assist in the implementation of the government's reform proposals. It was to act as a sounding board for the business, labour and injured worker communities to ensure that the proposals addressed their concerns. It was also to "advise" the current Board of Directors to make sure that any actions which they took before the passage of the new legislation would be in keeping with intent of that legislation.⁹⁸

(c) Board of Directors Draft Strategic Plan

In 1992 the Board of Directors established a Strategic Planning Coordinating Committee (SPCC) to develop a five year strategic plan for the WCB. The plan was required to "(provide) direction to the organization and (coordinate) its activities by focussing them on common goals".⁹⁹ The Board of Directors felt that this process must examine such issues as the changing nature of the workplace, governance and adminstration, and revenues and funding.¹⁰⁰ The *Draft Strategic Plan 1994* which evolved out of this process, while good in parts, included some potentially serious incursions on the historic compromise upon which workers' compensation is founded.

The Draft Strategic Plan 1994 adopted the following as a mission statement:

their subsequent history will be discussed below. Di Santo and King's terms of office expired in April, 1994.

- 97. The team was to be headed by William Blundell, former president and CEO of General Electric. Ken Copeland, former president and CEO of Digital Equipment of Canada Ltd and one of the employer representatives on the Premier's Labour Management Advisory Committee (PLMAC), was appointed interim vice-chair of adminstration on May 18, 1994. He was also a member of the transition team. Other members of the transition team included the Deputy Minister of Management Board, the Secretary of Cabinet, the Special Assistant to the Minister of Labour. Approved observers of the process included the president of the Ontario Federation of Labour, the Director of the Office of the Worker Advisor and a member of the employer working group from the PLMAC; see "Interim Vice-Chair of Administration Appointed to the WCB" (16 August 1994) Vol 7:3 I.A.V.G.O. Reporting Service Newsletter at 1-2 and "Transition Team at the WCB Laying the Groundwork for Bill 165" (16 August 1994) Vol 7:3 I.A.V.G.O. Reporting Service Newsletter at 2.
- 98. Ibid. "Transition Team at the WCB Laying the Groundwork for Bill 165" at 2.
- 99. Ontario Workers' Compensation Board, *Planning for the Future Draft Strategic Plan* 1994, Board of Directors (28 January 1994) at 1.
- 100. Ibid. at 6.

^{96.} Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (14 April 1994) at 5620-5621.

To make the system work—humanely, fairly, and promptly—for the benefit of workers, dependants and employers.

One wonders why a system which was devised to compensate workers who were injured on the job must be made to work "humanely, fairly and promptly" for employers? Injured workers' entitlement to benefits should not be balanced against "fairness" to employers.

The *Draft Strategic Plan 1994* also adopted the "financial viability and sustainability of the system" as one of its seven goals.¹⁰¹ At first glance this goal seems innocuous, and even contains some good strategic action for achieving this end, such as making the establishment of good standing with the WCB a condition for the eligibility for business registrations, licensing, government grants and incentives.¹⁰² However, there are other actions suggested which are particularly troublesome, such as finding ways of "reducing the duration of benefits without impacting unfairly on injured workers" or "contracting out WCB services".¹⁰³

In truth however, the tenor of the *Draft Strategic Plan 1994* may be of little import. As with many other things in the field of workers' compensation, the *Draft Strategic Plan 1994* has been overtaken by legislative and political events.

(d) Amendments to the Workers' Compensation Act

In 1992 the Premier of Ontario established the Premier's Labour Management Advisory Committee (PLMAC). The PLMAC was made up of representatives from business and labour and was created to devise ways in which Ontario could achieve economic renewal. In May of 1993 the Premier asked the PLMAC to conduct a review of the province's workers' compensation system.¹⁰⁴

The PLMAC released a "framework agreement" in March, 1994 although both labour and management had their own versions of the agreement reached.¹⁰⁵

103. Ibid.

105. Labour's version was called the "WCB Reform Conceptual Agreement".

^{101.} Ibid. at 17. The other goals were: a) ensuring that workers, surviving dependants and employers receive benefits and services in a fair, effective and timely manner; b) providing effective management in an environment which values and respects employees and clients; c) encouraging safe and healthy workplaces; d) ensuring workers receive rehabilitation and re-employment services which will maximize their potential for independence and return to meaningful employment; e) ensuring an effective system for providing benefits and services to occupationally diseased workers and their surviving dependants; and f) improving the workers' compensation system.

^{102.} Ibid. at 23.

 [&]quot;PLMAC: Initiatives to WCB Reform" (February, 1994) Vol 8:1 Ontario Workers' Compensation Review 6.

There were major areas of agreement between the two versions. Both agreed that there should be a Royal Commission to study all aspects of the workers' compensation system. They agreed that the board of directors should be strictly bipartite and that its primary focus should be on the fiduciary interest of the WCB. They also agreed that a "purpose clause" should be added to the *WCA* which would declare that workers are entitled to "fair compensation" and that the board of directors would be required to exercise the highest level of financial responsibility and accountability in administering the system. Finally, they also agreed that workers' compensation benefits should no longer have full protection from inflation, but rather should only be partially indexed, according to the "Friedland" formula.¹⁰⁶

There were also some significant discrepancies between the two agreements. The labour version stated that certain benefits would still retain full inflation protection, while the business version simply said that some recipients may need "special consideration".¹⁰⁷ The business version of the agreement stated that business and labour had agreed that there was to be a "financially responsible framework", although the labour agreement made no mention of this fact. Finally, the labour version stated that it was agreed that unemployed injured workers who were injured prior to 1990 and were eligible for a WCB pension would receive a \$200 monthly increase in their pensions. The business version of the agreement simply stated that such workers may require some special treatment with respect to their pensions.

The PLMAC agreement was heralded by business, labour and government.¹⁰⁸ However, within a month after its release business and labour were pronouncing it dead.¹⁰⁹ Despite this, the Premier announced in the Legislature a series of

Management's version was called "WCB Reform Framework".

107. The recipients to receive full inflation protection were people receiving survivor and dependant benefits, 100% pensions, 100% future economic loss benefits and some unemployed old Act injured workers.

- 108. M. Mittelstaedt, "House cleaning urged for Ontario WCB" The [Toronto] Globe and Mail (12 March 1994) B1.
- 109. M. Mittelstaedt, "OFL incensed as WCB reform pact dies" *The [Toronto] Globe and Mail* (1 April 1994) B4. The area of major disagreement was the terms of the payment

^{106.} The "Friedland" formula is a reference to the formula which was recommended by the Task Force on Inflation Protection of Employee Pension Plans. The formula adopted in the PLMAC agreement (and eventually adopted in the legislative amendments, discussed below) was less favourable to beneficiaries (in this case, injured workers) than that proposed by the Task Force. Basically, the formula only allows for the indexation of benefits to a percentage of the Consumer Price Index. Further, the percentage increase in the level of benefits is capped at 4%. Therefore, if inflation was 6.7% or greater, injured workers would receive only a 4% increase in their benefits.

amendments to the WCA and the creation of a Royal Commission into the workers' compensation system.¹¹⁰ To a great extent, the legislative amendments, eventually introduced by the Minister of Labour in May, 1994, mirrored much of the PLMAC agreement.¹¹¹ There was to be a bipartite board of directors. A purpose clause was to be added to the WCA, although the requirement that the board of directors act in a financially responsible and accountable manner was to be placed in the part of the Act dealing with the board's duties. The Friedland formula was to be applied to almost all benefits paid by the WCB. Finally, there was to be provision for the payment of an additional \$200 to older injured workers who were receiving permanent disability pensions, if the worker would have been entitled to a supplement to that pension.

During the public hearings into the bill, much of the focus of injured workers and injured worker advocates was on the implications of the Friedland formula and the proposal for the payment of the \$200.¹¹² Injured workers had fought for years to get benefit levels indexed to inflation, which finally occurred in 1988. The Friedland formula removed that protection. It would be an annual, legislated reduction in benefits. The only justification offered by the government was that the reduction in benefits was necessary in order to reduce the unfunded liability.¹¹³ In fact, the application of the Friedland formula also insured that employers compensation costs would not rise above a set level in any one year. This type of financial certainty would be a boon to employers. The financial uncertainty which the Friedland formula would wreak on injured workers seems to have been of little concern.

At first glance, one of the few positive aspects of the government's reform package was the \$200 payment to certain older injured workers.¹¹⁴ However, it

of the \$200 to old Act injured workers.

- 111. Bill 165, An Act to amend the Workers' Compensation Act and the Occupational Health and Safety Act received first reading on May 18, 1994. It received second reading on June 14-15, 1994 and was referred to the Standing Committee on Resources Development for public hearings.
- 112. The Standing Committee on Resources Development held public hearings on Bill 165 during the last two weeks of August and the first week of September in Toronto, London, Sault Ste. Marie and Ottawa.
- 113. Supra, note 110.
- 114. Ironically, one of the reasons that these older workers were in poverty was the lack of inflation protection for their benefits prior to 1988. Further, the \$200 payment was to be

^{110.} Ontario, Legislative Assembly, *Official Reports of Debate (Hansard)*, (14 April 1994) at 5620. At the time of writing (some six months after the Premier's announcement) the terms of reference, the timelines for reporting and the members of the Royal Commission have still not been announced.

soon became apparent that what the government claimed and what the legislation actually said were two different things. The government said that the \$200 was to be added to the lifetime pensions of these injured workers.¹¹⁵ The legislation stated that the \$200 would only be payable to those who are entitled to a supplement to their pension. However, a supplement can be terminated for any number of reasons and the failure to maintain eligibility for a supplement would effect the eligibility for the \$200 increase. Further, the government stated that the \$200 payment would not be subject to the "social assistance clawback".¹¹⁶ The legislation contained no such guarantee, although during the public hearings the parliamentary assistant to the Minister of Labour stated that the Minister of Community and Social Services had assured her that the \$200 would not be subject to the "clawback".¹¹⁷

The Standing Committee on Resources Development was to have begun a clause by clause consideration of the amendments during the last week of September, 1994. On the first day of that clause by clause analysis over seventy pages of amendments were introduced by all three parties. The government amendments proposed placing the requirement that the board of directors "act in a financially accountable and responsible manner" into the new purpose clause. The provisions governing the payment of the \$200 to older injured workers were to be changed so that entitlement to the \$200 could reduce the amount of a supplement which a worker was receiving, and entitlement to Old Age Security benefits could reduce the amount paid to older injured workers below the \$200 amount specified. Finally, the indexing of all Future Economic Loss awards was no longer to be subject to the

funded out of the money saved by de-indexing most other benefits.

- 115. This claim was made by the Premier in his initial announcement, by the parliamentary assistant to the Minister of Labour on second reading of the Bill, and by the Minister of Labour in his opening address to the Standing Committee on Resources Development.
- 116. Supra, note 110. The "social assistance clawback" is a reference to the provisions contained in the regulations under the *Family Benefits Act* and the *General Welfare Assistance Act* whereby each dollar of outside income reduces the social assistance entitlement by a dollar. This guarantee by the government was of some importance because of the number of older injured workers who were also receiving social assistance (in part due to the size of their pensions).
- 117. Ontario, Legislative Assembly, Standing Committee on Resources Development, Official Reports of Debates (Hansard), No. R-46 (7 September 1994) at 1285. The difficulty with this assurance is that the regulations under the Family Benefits Act or the General Welfare Assistance Act can be changed overnight by the Cabinet. An Act of the Legislature can only be changed by the Legislature. Thus the best way to ensure that the money was not subject to the clawback would be to have included such a provision in Bill 165.

 $Friedland formula, but unfortunately would be subject to an even more complex indexing formula. ^{118}$

The Standing Committee only conducted five days of clause by clause analysis before they adjourned. Reports are that all committee members were confused over the implications of the deindexation of benefits proposed in the amendments. Committee members were supposed to receive individual briefings on this issue from Ministry of Labour staff. It was not known when the Standing Committee would resume its hearings, but the government had stated that the passage of the amendments was one of its foremost objectives when the Legislature resumed sitting in November, 1994.

(e) Litigation Developments

(i) Charter Challenge to Future Economic Loss (FEL) provisions

In Yolkowski v Attorney General of Ontario¹¹⁹ the applicant is seeking a declaration that section 43(2) of the Workers' Compensation Act violates the equality rights section of the Canadian Charter of Rights and Freedoms. Section 43 of the WCA provides that workers who have suffered compensable injuries are entitled to compensation for future loss of earnings. However, section 43(2) states that the eligibility for such compensation ceases when the worker turns sixty five years of age. In Yolkowski the applicant was sixty six years of age at the time of his injury. He therefore did not even qualify for a future loss of earnings award. He intends to argue that this prohibition constitutes discrimination on the basis of age. It is anticipated that this case will not be heard until sometime in 1995.

(ii) Judicial Review of WCAT's application of the Presumption Clause

In *Decision No.* 82/93¹²⁰ the worker had suffered a heart attack while driving a truck on a remote road in Northern Ontario. There were no witnesses to the accident. The Workers' Compensation Appeals Tribunal accepted that the worker had suffered a "personal injury by accident" and that the accident had occurred "in the course of his employment". The panel was then required to

^{118.} The application of the Friedland formula to Future Economic Loss awards highlighted the most egregious aspects of the indexing formula. This point was made forcefully by injured workers and advocates during the public hearings. The amendments introduced by the government appeared to be an attempt to remedy this situation. However, the improvement will only be slight.

^{119.} Court File # 7324/93, Ontario Court (General Division). The applicant is represented by the Renfrew County Legal Clinic.

^{120. (20} May 1993; Cook, Thompson, Apsey). The applicant in this case is actually the widow of the deceased worker, who is seeking survivor's benefits under the WCA. The applicant is represented by the Kinna-Aweya Legal Clinic in Thunder Bay.

apply section 4(3) of the WCA (the presumption clause) which stated that, where an accident occurred in the course of a worker's employment, it was to be presumed that the accident arose out of his employment "unless the contrary is shown".¹²¹ The panel stated that "(t)he available evidence does not, in our view, establish either clearly or convincingly, what happened".¹²² On its face this statement demonstrates that the panel did not view the evidence as establishing on a balance of probabilities that there was some other reason for the worker's heart attack. Therefore, they should have concluded that the presumption in section 4(3) had not been rebutted.

Inexplicably, the panel went on to consider the evidence which was available and appear to have concluded that it was not probable that the accident arose out of the worker's employment. However, this is exactly what the presumption clause tells them they should conclude "unless the contrary is shown". This aspect of the decision is the subject of a judicial review in *Tempelman and the Workers' Compensation Appeals Tribunal*. ¹²³

The result in this decision is of importance for two reasons. First, the court may be called upon to decide what standard of proof is applicable in rebutting the presumption. In the past there have been numerous attempts by the WCAT to articulate this standard, ranging from a "balance of probabilities" to "beyond a reasonable doubt", with no clear standard emerging.¹²⁴ Second, and more importantly, the court will have to decide what must be "shown" in order to rebut the presumption. The applicant is arguing that it is necessary to establish a specific cause of the injury which is not work-related before the contrary can be shown. The panel in *Decision No. 82/93* concluded that, as there was no reasonable possibility that the accident arose out of the worker's employment, it had been "shown" that the accident did not arise out of employment. Whatever the outcome of this decision, it will definitely have an impact on workers' compensation casework.

^{121.} As a general rule an accident must arise out of and in the course of employment in order for it to be compensable. There were also many other issues in the case. However, the focus here is on the issue which has given rise to the judicial review.

^{122.} Supra, note 120 at 21.

^{123.} Court File # 63/94, Ontario Court (General Division) Divisional Court. The applicant is again represented by the Kinna-Aweya Legal Clinic in Thunder Bay.

^{124.} For a discussion of this issue see Dee, McCombie & Newhouse, Butterworths Workers' Compensation In Ontario Service (Toronto, 1993) at 7.2-7.4.

(iii) Mandamus Granted against Workers' Compensation Board

In Furac v. Ontario (Workers' Compensation Board)¹²⁵ the Divisional Court granted the mandamus application of a worker which compelled the Workers' Compensation Board (WCB) to implement a decision of its Decision Review Branch (DRB). Pursuant to a DRB decision made in September of 1990, the worker had been granted benefits for a period from March 1986 until September of 1989. Despite this decision the WCB only paid the worker benefits for the period up to October, 1986. The worker spent three years trying to get the WCB to implement its own decision before successfully applying for mandamus.

The decision in *Furac* is apparently the first time that mandamus has been ordered against the WCB. People with little familiarity with the WCB might wonder how the WCB could refuse to implement its own decision. Injured workers and their advocates will not find this difficult to comprehend at all, and for this reason the decision in *Furac* may have some positive effect. The court's decision also seems to imply that mandamus is available "to enforce a duty created by an agency's own policies and procedures".¹²⁶ Thus the decision may also have some impact outside the workers compensation context.

(iv) WCAT's First Non-Economic Loss (NEL) Award Decision

Decision No. 269/93¹²⁷ was the WCAT's first decision on non-economic loss awards. While the reasons in that decision are somewhat factually specific, the panel made some interesting observations about the WCB's use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*¹²⁸ in the NEL assessment process.

Essentially, NEL awards are meant to compensate for any permanent impairment that the worker suffers from a compensable injury. A combination of the worker's age and the degree of his or her permanent impairment are used to determine the worker's entitlement. Section 42(5) of the WCA states that the WCB shall determine the degree of a worker's permanent impairment in

^{125. (16} November 1993) Court File # 344/93 Ontario Court (General Division) Divisional Court [unreported].

^{126. 3} R.A.L. 79. As advocates will know, the WCB's appeal system is entirely administrative in design (see Workers' Compensation Board Operational Policy Manual Document No. 01-01-05). It is not derived from the WCA.

^{127. (28} April 1994; McIntosh-Janis, Apsey, Thompson).

^{128.} The full title is American Medical Association's *Guides to the Evaluation of Permanent Impairment* (3rd ed., revised). Hereinafter AMA Guides.

accordance with the prescribed "rating schedule". Section 15(1) of *Regulation* 1102^{129} sets out the AMA Guides as the "rating schedule" to be used.

The panel in *Decision No. 269/93* noted that the Board medical consultants and co-ordinators do not seem to take a consistent approach in applying the AMA Guides. Correspondence provided to the panel by the WCB outlined several examples of how the Board reads and applies the Guides. The panel stated that these examples (and as many others as possible) should be made available to the public. The panel also recommended that a simple step-by-step guide should be made available, for use by the medical consultants and co-ordinators and by the public, which would make it easier to assess the accuracy of the Board's NEL awards.¹³⁰

Finally, the panel held that where the AMA Guides covered a specific "type of impairment", the WCB had no discretion to exercise in applying them. The worker had argued that the WCB did not correctly compare the findings which were made in the NEL assessment process with the criteria outlined in the AMA Guides. The worker's type of impairment was listed in the AMA Guides, although his degree of impairment fell in between the range of impairment ratings provided in the AMA Guides. The WCB attempted to "amend" the AMA Guides by adopting a range of impairment rating which was in between the ranges listed in the Guides. The panel concluded that the WCB was statutorily prohibited from doing this, as such a determination of the worker's impairment would not be "in accordance with" the AMA Guides.¹³¹

3. Unemployment Insurance

(a) Legislative Changes in 1994

As in 1993, amendments to the *Unemployment Insurance Act*¹³² were announced as part of fiscal restraint legislation rather than as part of comprehensive social legislation.¹³³ These amendments made a further reduction

129. R.R.O. 1990, as amended.

^{130.} Supra, note 127 at 6-7.

^{131.} Supra, note 127 at 15. The panel also noted several other instances where the WCB's practices were not in accordance with the AMA Guides. It seems apparent that injured workers and advocates will be required to scrutinize Board assessments in NEL cases to insure that the Board has in fact applied the AMA Guides properly.

^{132.} R.S.C. 1985, Chap. U-1, as amended. Hereinafter UIA.

^{133.} Budget Implementation Act, 1994, S.C. 1994, c.18, assented to on June 15, 1994. Part V of the Act which addresses the amendments to the UIA, came into force on July 3, 1994 by Proclamation: SI/94-82, Canada Gazette, Part II, Vol. 128, No. 14, p. 2776 (July 13, 1994). With the exception of s. 15, the rest of the Act came into force on the date of

in the basic benefit rate from 57% to 55%. However, the amendments also introduced a second tier of benefits for claimants with low earnings and dependants. This second tier will be an "enhanced rate", where the benefit rate will be 60% of earnings. This needs-based assessment is more consistent with social assistance legislation than with legislation that is supposed to be an insurance scheme paid for with significant contributions by the claimant.¹³⁴

The amendments will also make it more difficult to qualify for UI. The minimum entrance requirement is increased to 12 weeks from 10.¹³⁵ Although the maximum number of weeks of benefit remains 50, a further amendment makes a significant reduction in the number of people who will qualify to receive this maximum.¹³⁶ As well, there are significant reductions in the numbers of weeks of entitlement throughout this new amendment.

Given the harsh effects of the current sections 28 and 30 of the *UIA*,¹³⁷ the 1994 amendments can (at least in part) be seen as remedial. First, the "benefit of the doubt" in favour of claimants is now to be legislated with respect to determinations made under s. 28. Second, a claimant suspended from employment due to misconduct will no longer be disentitled for the entire period of the claim. The claimant will only be temporarily disqualified while the period of suspension is in effect. Third, a claimant who takes an employer-approved voluntary leave of absence will only be disqualified from receiving benefits during the period of the leave. Previously the claimant would have been considered to have voluntarily left employment without just cause and would have been entirely disentitled from receiving UI benefits otherwise arising from the employment. A fourth change affects claimants who quit or are fired in a three week period prior to layoff. The claimant will be disqualified from receiving benefits until the date the layoff would have taken effect. Previously the claimant would not have been

Royal Assent.

- 135. Table 1, UIA.
- 136. Table 2, UIA.
- 137. These harsh results were effected by the 1993 amendments which deny benefits to claimants who have quit or been fired. Previous to the 1993 changes, there was a 7 to 12 week disqualification imposed on claimants. After the period of disqualification, claimants were eligible to receive their regular benefits, albeit at a reduced rate of 50%. This penalty had not existed prior to 1990. Moreover, prior to 1990 the period of disqualification was from 1 to 6 weeks. The issue of the reduced benefit rate is discussed later in the discussion of the UI jurisprudence. For a further discussion of the 1993 amendments see *Review 1993* at 331-32.

^{134.} Some have suggested that this signals the demise of the UI system as we know it. It is feared that there will be greater reliance on means testing and that the insurance element will be eliminated.

entitled to benefits at all. In each of these situations, despite the existence of disqualifying factors, a claimant who is otherwise entitled to benefits for sickness, maternity or parental leave, will receive benefits.

(b) Litigation Developments

(i) Jurisdictional Issues

There were a number of important decisions relating to jurisdictional issues affecting the powers of boards of referees and umpires on appeal. In *Canada v Read*¹³⁸ the umpire had determined that the claimant should have had his claim antedated, even though the Commission had not rendered a determination on this issue. The Federal Court of Appeal ruled that the board and the umpire do not possess jurisdiction to rule on a matter which has not been raised by the Commission. Relying on an earlier decision,¹³⁹ the Court held that the jurisdiction on appeal was to deal only with a decision that was made by the Commission, "...not that which it might and perhaps, in the exercise of common sense, should have made."¹⁴⁰

A similar jurisdictional issue was considered by the Federal Court of Appeal in *Canada v Kolish*.¹⁴¹ In that case the Court ruled that only the Commission had the jurisdiction to determine the duration of the reduction of benefits under s. 30(7) of the *UIA*.¹⁴² As the Commission had not done so, the Court concluded that the umpire was wrong to determine this issue on appeal.¹⁴³

- 141. (1994), 167 N.R. 107 (Fed. C.A.).
- 142. Section 30(7) states that the rate of benefit shall be reduced to 50% where a claimant is disqualified under s. 27 of the UIA. Prior to the 1993 amendments, this section had also applied to claimants who were subject to disqualifications imposed under s. 28 of the UIA: i.e., misconduct and voluntary leaving of employment without just cause.
- 143. The absurdity of the result in *Kolish* is that the Court referred the matter back to the umpire, to refer the matter back to the board, to refer the matter back to the Commission. What remains unclear is whether there is a right of appeal to a board and the umpire once the Commission has exercised that discretion. The appeal provisions of the *UIA* provide that there is a right of appeal from "a decision" of the Commission: s. 79 and s. 80, *UIA*. One would think that this would apply to any decision the Commission

^{138. [1994]} F.C.J. No. 359 (Fed. C.A.) [unreported], Appeal No. A-371-93.

^{139.} Hamilton v Canada (1988), 91 N.R. 145 (Fed. C.A.).

^{140.} Ibid., at 145. However, in Canada v Easson (1994), 167 N.R. 232 (Fed. C.A.), the court held that a board of referees was justified in determining that there was no misconduct under the UIA s. 28, and substituting a determination that there had been a voluntary leaving of employment without just cause under s. 28. Despite the fact that the Commission decision under appeal related to a disqualification for losing employment due to misconduct, the Federal Court of Appeal held that the two grounds are "linked". The court stated: "Legally speaking, the subject matter of the appeal...was a disqualification under s. 28", Easson at 234.

The Commission had also always taken the position that the reduction of benefits under section 30(7) applied automatically for the duration of the full claim period. The Federal Court of Appeal in *Archambault v Canada*¹⁴⁴ disagreed. The Court held that the clear wording of s. 30(7) required the Commission to determine the duration of the reduced benefit period. The Commission had to exercise this discretion and had not done so.

The issue of a board's and an umpire's jurisdiction with respect to penalties imposed by the Commission under s. 33(1) of the UIA has also been open to dispute among umpires.¹⁴⁵ A recent Federal Court of Appeal decision seems to have settled this matter, although in a manner unfavourable for claimants. The Court's reasons in *Canada v Smith*¹⁴⁶ are unfortunately terse and do not examine the issue in any depth. The Court simply applies the rationale developed in earlier decisions which dealt with a different section of the Act¹⁴⁷ and held that an umpire has no jurisdiction to substitute "his own point of view for that of the Commission" under s. 33(1).¹⁴⁸

Consistency in these decisions is difficult to determine. All that can be said with certainty is that a board and umpire may not make a decision that has not been

- 144. (1993), 166 N.R. 299 (Fed. C.A.).
- 145. Section 33(1) deals with false or misleading statements or misrepresentation by claimants. For a discussion of this point see *Review 1993* at 37, footnote 144.
- 146. (1994), 167 N.R. 105 (Fed. C.A.).
- 147. The reasoning applied is that contained in decisions with respect to the jurisdiction of boards and umpires under s. 41(10). These other decisions, merely cited in a footnote to the decision, are *Canada v Desjardins*, [1981] 1 F.C. 220 (Fed. C.A.); *Findenigg*, *supra*, note 143, and *Harbour v. UIC* (1986), 64 N.R. 267 (Fed. C.A.). The Court held that, at best, an umpire can refer the matter back to the board with "...reasons why the decision of the Commission should be made anew", at 107. This would seem to imply that the board can make that decision "anew": i.e., the board is a hearing *de novo*.
- 148. Supra, note 146, at 107. In a more recent and equally terse judgment, the Federal Court of Appeal has held that an Umpire cannot alter the penalty imposed when s/he has not found any error on the part of the Board of Referees: Canada v Frew, [1994] F.C.J. No. 988 (Fed. C.A.) [unreported]; (Appeal #A-512-93 & #A-693-93). It is unclear from the decision whether the Court of Appeal meant that the Umpire can only alter the penalty if there is an error in the determination of misrepresentation, or whether it meant that the Umpire can alter the penalty only when s/he makes a finding that the Board did not consider mitigating factors. In view of Canada v Smith, it is probably the former meaning which is applicable to this decision.

is required to make. For some reason the Federal Court has held that this is not the case for certain decisions which are based on the "opinion" of the Commission: e.g., see *Canada v Von Findenigg*, [1984] 1 F.C. 65 (Fed. C.A.), at 71. This case dealt with what is now s. 41(10) of the UIA and is distinguishable for that reason. The two sections contain different wording and serve two very different functions.

made by the Commission. What the appellate body must do is refer the matter back for a decision by the Commission. Indeed, $Smith^{149}$ has muddied the waters, by suggesting that a board can make a decision as a *de novo* tribunal which the Commission ought to have made, but an umpire cannot.

A final jurisdictional issue was raised in *Canada v Maughan*.¹⁵⁰ This case dealt with the issue of voluntary leaving of employment. On appeal the Board had reduced the period of disqualification below the statutory minimum of 7 weeks.¹⁵¹ The Commission appealed and the Umpire then determined that there was just cause for leaving and that no disqualification was mandated.

The Federal Court of Appeal held that the umpire had exceeded his jurisdiction by overturning the findings of fact of the Board without ruling that the Board's decision was "perverse".¹⁵²

(ii) Moving to a Place of Fewer Employment Opportunities

The Federal Court of Appeal released four decisions at the same time dealing with the issue of claimants who moved to an area with fewer employment opportunities. These decisions were *Canada v Blondahl*,¹⁵³ *DeVos v Canada*,¹⁵⁴ *Canada v Higgett*,¹⁵⁵ and *Canada v Whiffen*.¹⁵⁶ The issue in these decisions was whether the Commission had the power to make a policy for determining "availability for employment" in such cases. Essentially, the Commission's policy was designed to ensure that a claimant did not act to diminish his or her opportunities for re-employment.¹⁵⁷

- 150. (1994), 164 N.R. 237 (Fed. C.A.).
- 151. This matter arose before the 1993 amendments. After 1993, the claimant would not have been eligible at all.
- 152. Section 80 of the UIA provides three ground for an appeal to the umpire. One ground contained in s. 80(c) is where the board has made "...an erroneous finding of fact that it made in a perverse or capricious manner...". However that subsection goes on to state "or without regard to the material before it". The Court did not address this second and distinct aspect to this ground. Further, section 80(b) provides for an appeal where a board has erred in law. A determination of just cause is a mixed question of law and fact: Tanguay v Unemployment Insurance Commission (1985), 68 N.R. 154 (Fed. C.A.). Unfortunately the decision is sparse in its reasons. The Court appears to have neglected these other grounds which are much more likely to have been the basis for the umpire's determination as to "just cause".
- 153. (1994), 165 N.R. 154 (Fed C.A.).
- 154. (1994), 165 N.R. 152 (Fed. C.A.).
- 155. (1994), 165 N.R. 156 (Fed. C.A.).
- 156. (1994), 165 N.R. 145 (Fed. C.A.).
- 157. The policy required that after a reasonable period of time the claimant would have to expand the geographical area of job search or become disentitled to benefits. The deci-

^{149.} Supra, note 146.

The Federal Court held that the policy was valid but that it could not be applied automatically without regard to the circumstances of each individual case.¹⁵⁸ In *Higgett*, the Court held that the policy should not have been applied to an injured worker who had moved to an area of less employment, where it was unlikely that his job prospects were any better in the larger centre in which he had previously resided. In *Whiffen*, the Court held that this policy could not be applied where the claimant followed her husband to the new area, as s. 28(4) of the *UIA* specifically sanctions this action by a claimant.¹⁵⁹ Therefore, the restriction on employment could not be viewed as self-imposed. The Court stated that the policy should only be applied where there is no such justification for the relocation.¹⁶⁰

sion in *Whiffen, supra*, note 156, contains a good discussion of "availability" in the context of s. 14 of the *UIA*. At 146, the Court states that "Availability is usually described ... either as a sincere desire to work demonstrated by attitude and conduct and accompanied by reasonable efforts to find a job, or a willingness to reintegrate into the labour force under normal conditions without unduly limiting one's chances of obtaining employment." At 150, the Court adds that "... availability is to be assessed on the basis of attitude and conduct and taking into account all the circumstances...".

- 158. In this regard, see especially Blondahl, supra, note 153 and Higgett, supra, note 155.
- 159. The same reasoning was applied in the case of a claimant who had followed her spouse, in the subsequent decision of *Canada v Kuntz*, [1994] F.C.J. No. 298 (Fed. C.A.) [unreported] (#A-1485-92).
- 160. Supra, note 156 at 151. The same reasoning was applied in DeVos, supra, note 154 and in *Higgett*, supra, note 155.

There is no good reason why the same rationale could not be applied to unmarried persons such as common law couples or same-sex couples. In *CUB-21349* (May 22, 1992; Dubé, J.) held that a fiancée who followed her fiancé had just cause for leaving employment. The Umpire reviewed the meaning of "conjoint" (spouse) in the French language version of the statute and concluded they were spouses. A contrary ruling was made in *CUB-22033* (October 30, 1992; Teitelbaum, J.) wherein a common law spouse was held not to be a "spouse" for the purpose of s. 28(4). Teitelbaum, J. did, however, suggest that the *UIA* be expressly amended to include common law spouses.

In at least one board of referees decision, the board concluded that a claimant had just cause for leaving employment in order to follow her same-sex partner. However, the reason was not based on a determination that they were "spouses" but on the basis that s. 28(4) was an open-ended list and following a same-sex spouse to a new location was sufficiently analogous to be considered as another ground for just cause: L.J. v UIC (10 November 1993), Case No. 403-93 (Bd. of Ref.), (the claimant was represented by Bloor Information & Legal Services). However, in CUB-23117 (October 12, 1993; Walsh, J.), the Umpire impliedly accepted the Board's position that same-sex partners were not "spouses". This was not a case of leaving work to follow a "spouse" but rather it was a case of leaving work to provided medical care for an ill same-sex spouse and the Umpire held that this would not have been just cause even for a claimant in a heterosexual spousal relationship. This decision is now questionable, even if it was once justified. Prior to 1993, s. 28(4)(e) of the UIA, to which the Umpire referred, made reference only to an "obligation to care for a child,". This was amended in 1993 to further state "...or a member of the immediate family". Arguably, prior to 1993 the obligation

(iii) Misconduct

The Federal Court of Appeal's hard line approach to misconduct cases has again been reaffirmed in *Canada v Brissette*.¹⁶¹ That case involved a truck driver who had lost his licence as a result of a conviction for impaired driving. The incident had occurred off the job and was unrelated to his employment. However, the driver was dismissed from his employment. The Federal Court of Appeal held that the misconduct must be committed by the employee while he or she was employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment, but that it was not necessary that the misconduct be committed at work, in the workplace or in the course of the employment relationship with the employer.¹⁶²

Brissette involved a consideration of the *UIA* as it read after the 1990 amendments and prior to the 1993 amendments. It will be interesting to see if there is a softening of the court's position in its post-1993 decisions concerning just cause or misconduct. The ramifications of such decisions are now much more detrimental for the claimant.¹⁶³

(iv) Just Cause For Leaving Employment

Some recent "just cause" decisions imply that where the reason for leaving falls under one of the listed categories in s. 28(4) of the *UIA*, there is no requirement to seek reasonable alternatives to leaving the employment. However, in *Canada*

to care for a "family" member was sufficiently similar to be covered by s. 28(4). After 1994, a same-sex partner, if not "family" is sufficiently similar to be included as an analogous situation covered by s. 28(4). Despite acknowledging that s. 28(4) is not a closed list, Walsh, J. treats it as closed. *CUB-23117* is the subject of a judicial review application to the Federal Court of Appeal.

- 161. (1993), 168 N.R. 60 (Fed. C.A.), (Appeal No. A-1342-92). There have been at least two distinct views among Umpires as to how closely connected the conduct must be to the performance of the job. Dubinsky, J. has defined misconduct, in CUB-5579 (June 1979; Dubinsky, J.) and numerous other decisions, as malfeasance "connected with the work itself". However, Cattanach, J., in CUB-6666 (June 1981; Cattanach, J.) and other decisions, has criticized the Dubinsky view of misconduct as too narrow, preferring a wider definition more akin to the common-law definition of just cause for dismissal. The Federal Court of Appeal had not expressly adopted either position. However, the fact that it overturned a misconduct decision by Dubinsky J in Canada v Bedell (1984), 60 N.R. 115 (F.C.A.), suggested that the court favoured a broader view of misconduct.
- 162. This should leave no doubt that the Court favours the Cattanach, J. approach to misconduct.
- 163. The 1990 provisions changed the law by creating a non-exclusive list of circumstances where just cause may exist and also increased the period of disqualification. In 1993, more items were added to this list, but the disqualification period became an absolute disentitlement.

v Landry,¹⁶⁴ the Federal Court of Appeal sent a matter back to the Umpire where the Umpire had determined that there was just cause for leaving, but had not determined the issue of "no reasonable alternative to leaving immediately".

4. Canada Pension Plan

(a) Restructuring

Responsibility for the administration of the *Canada Pension Plan*¹⁶⁵ has changed hands in the past year—at least in practice. Federal Income Security Programs are now run by Human Resources Development Canada, a new federal super-department which amalgamated the departments of National Health and Welfare, Employment and Immigration, and Labour. This has had little impact on general policy and procedure. However, the federal restructuring may result in some confusion as to the appropriate respondent to be named in any *CPP* appeals or judicial reviews. In July 1993, control and supervision of the Income Security Programs Branch was transferred from the Minister of National Health and Welfare to the Minister of Employment and Immigration.¹⁶⁶ As of the date this article was written, responsibility for the Income Security Programs had not yet been legally transferred to the Minister of Human Resources Development, although legislation implementing the super-department is anticipated.

(b) Vocational rehabilitation

The federal government has launched a nation-wide trial program aimed at encouraging *CPP* disability pensioners to attempt to return to the workforce. The National Vocational Rehabilitation Project (NVRP), which has relatively limited funding to date,¹⁶⁷ offers rehabilitation services to selected disability pensioners, in particular, persons who are:

- 164. (24 November 1993), # A-1210-92 (Fed. C.A.) [unreported].
- 165. R.S.C. 1985, c C-8. Hereinafter the Plan or CPP.

167. The program is funded under the National Strategy for the Integration of Persons with Disabilities, and has been allotted \$6 million over 5 years: See H. Beatty, "Disability Income Programs Update" (1994) 12 ARCH•TYPE (2/3) 49 at 56-58 for further discussion of the NVRP; see also *Review 1992* at 35. Rehabilitation services in general are authorized under the *Canada Pension Plan Regulations*, C.R.C. 1978, c. 385, s. 69(2) which provides that:

Where the Director is of the opinion that a person who has been determined to be disabled within the meaning of the Act may benefit vocationally from reasonable rehabilitation measures, he may, from time to time, require that person to undergo such reasonable rehabilitation measures as he may specify.

^{166.} Order In Council, P.C. 1993-1488 (25 June 1993), Registration SI/93-142 (14 July 1993).

- under age 50;
- not terminally ill;
- medically stable; and
- motivated and willing to participate.¹⁶⁸

The *CPP* contacts pensioners who meet the above criteria and are considered to have "rehabilitation potential" and asks them if they are interested in taking part in the program. The implication is that participation in the NVRP is strictly voluntary, although pensioners will in all likelihood feel some pressure to give their consent. The actual rehabilitation services are carried out by private consultants under contract to *CPP*. These services include an initial assessment, and may include funding for other expenses related to the pensioner's rehabilitation "plan", including the costs of tuition, books and additional assessments. *CPP* is unlikely to pay for services through the NVRP if they can be funded by provincial rehabilitation programs, insurers or workers' compensation. The downside to the NVRP is that anyone who takes part in the program will stop receiving a disability pension three months after his or her rehabilitation plan is completed, whether or not he or she has found a job. This makes the NVRP a very risky venture for most disability pensioners.¹⁶⁹

(c) Auditor General's Report – Poor Service

The Auditor General of Canada, in his annual report to the House of Commons this past year, denounced the quality and level of client service provided by the *CPP* as "unacceptable".¹⁷⁰ The *CPP* has indicated that service with respect to disability appeals is unlikely to improve until current backlogs have been eliminated.¹⁷¹ At the end of the 1993-94 fiscal year, the backlog of first-level appeals exceeded 17,000 cases, with an average waiting time of almost a

171. Ibid. at 18.35.

^{168.} Ibid. at 57. These criteria are also set out in a pamphlet entitled "Canada Pension Plan National Vocational Rehabilitation Project" which is available at Income Security Programs Client Service Centres.

^{169.} Such a denial of benefits would still be appealable. However, an appeal in these circumstances could prove to be an uphill battle because of the absence of express statutory protection for workers participating in rehabilitation programs. See Beatty, *ibid.* at 58.

^{170.} Canada, Report of the Auditor General of Canada to the House of Commons for 1993 (Minister of Supply and Services Canada, 1993) [hereinafter Report of the Auditor General] at 18.6, 18.31-18.40. The Report was particularly critical of the telephone service. The Auditor General also criticized the CPP for inadequate overpayment collection and recovery procedures, an ineffective disability reassessment process, an unstructured management framework and a failure to provide the public with complete and timely information on Plan administration.

year. As noted by the Auditor General, current efforts to clear that backlog will probably just shift the backlog to the Review Tribunal level.¹⁷²

(d) Financial Reports - Poor Health

There were more gloomy prognoses this year as to the long-term health of the *CPP*. For the first time in its history, the *Plan* was required to draw on its surplus fund to meet its costs for the 1993-94 fiscal year. *Plan* officials reported a 17% increase in disability pension payouts. While the government continues to insist the *Plan* is not in jeopardy, analysts say the price of survival will be soaring contribution rates.¹⁷³ Various reforms to the *Plan* have been proposed, including:

- raising the retirement age;¹⁷⁴
- eliminating the basic exemption for contributions on earnings;¹⁷⁵
- ending automatic indexation of pensions in payment;¹⁷⁶
- changing the low-earnings drop-out provisions;¹⁷⁷ and
- reducing survivor's benefits.¹⁷⁸

173. See A. Freeman, "CPP dips into surplus fund", *The Globe and Mail* (21 April 1994) B1. The *Report of the Auditor General, supra*, predicts that the aging of the Canadian population will double the cost of the Plan by 2021, with the increased cost to be borne by contributors. It states, at 18.57:

As a result, today's combined (employer and employee) contribution rate of 5 percent will double by 2016 and climb to 13 percent by 2030.

- 174. D.I. Brown & J.A. Collins, "Strategies for the Long Term Survival of the Canada Pension Plan" (Board of Trade of Metropolitan Toronto, 1993) [unpublished], a letter reporting to the Minister-Designate of Human Resources and Labour, at 2; Canadian Institute of Actuaries, "Canadian Retirement Income Social Security Programs: Report of the Task Force on Social Security Financing" (Ottawa, 1993), at 17-19.
- 175. Brown & Collins, *ibid* at 2; Canadian Institute of Actuaries, *ibid* at 15-16. Currently, no contributions are made on earnings up to a basic exemption amount for the year (\$3,400 in 1994). Pensions are, however, calculated on the basis of full earnings up to the year's maximum pensionable earnings (\$34,400 in 1994). Eliminating the basic exemption would allow more workers to earn *CPP* benefits, and would permit a reduction in the contribution rate, but would also increase the contribution burden on low income earners.
- 176. Brown & Collins, *ibid.* at 2.
- 177. Canadian Institute of Actuaries, *supra* at 16-17. Currently, up to 15% of low-earning months may be dropped out from a contributor's contributory period in calculating his or her average monthly pensionable earnings.
- 178. Ibid. at 17.

^{172.} *Ibid.* at 18.83-18.88.

The federal government has stated that pensions are not part of the review of social programs which it is undertaking. However, it is difficult not to see eerie similarities between what financial commentators are suggesting for reforming *CPP* and the proposals which have been discussed above, for reforming social assistance, workers' compensation and unemployment insurance.

(e) Administrative Error - Overpayments

The federal government decided this year not to pursue collection of overpayments made to about 8,000 recipients of *CPP* survivor's benefits. The overpayments, the average amount of which was \$1,750, resulted from a computer error.¹⁷⁹ Section 66(3)(d) of the *Plan* permits remission of an overpayment in the event of "erroneous advice or administrative error".

(f) Litigation Developments

(i) Jurisdictional issues

The Federal Court of Appeal ruled this year that the Federal Court, Trial Division did not have jurisdiction to judicially review decisions of the Pension Appeals Board (PAB). In *Mosher v. Canada*,¹⁸⁰ the court reversed a Trial Division decision which had dismissed an application to strike the applicant's claim for an order in the nature of *certiorari* to set aside a PAB decision.¹⁸¹ The court held that "it is beyond debate that the Pension Appeals Board is required to act in a judicial manner", and that therefore the Federal Court of Appeal had exclusive jurisdiction to hear applications for judicial review of PAB decisions, by virtue of subsections 28(1) and 28(3) of the *Federal Court Act*, as they then read.¹⁸² This ruling effectively deprived the applicant of the opportunity to have the PAB decision judicially reviewed, since section 28(6) of the *FCA*, as it then read, specifically precluded proceedings before the FCA in respect of decisions of the PAB. The

Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision.

^{179. &}quot;Pensioners to keep overpayments", The Globe and Mail (25 April 1994) A7.

^{180. [1994]} F.C.J. No. 948 (F.C.A.) [unreported]; rev'g (1993), 62 F.T.R. 50 (F.C.T.D.).

^{181.} *Minister of National Health and Welfare v. Mosher* (1990), C.E.B. & P.G.R. 8616. In that case, the PAB had found that the requirement that a common law spouse have resided with a deceased contributor for one year before his or her death in order to be eligible for a survivor's pension did not violate section 15 of the *Charter See Review* 1993 at 42-43.

^{182.} R.S.C. 1985, c. F-7, hereinafter the FCA. Section 28(1) provided that the Court of Appeal had jurisdiction to hear an application to review a decision made by a federal board "other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". Section 28(3) provided that:

applicant is expected to pursue an appeal of the *Mosher* decision to the Supreme Court of Canada,¹⁸³ and that could produce some welcome jurisprudence as to the jurisdiction of the Federal Courts. It must be noted, however, that, as a result of recent amendments to the *FCA*, the Federal Court of Appeal now has express jurisdiction to judicially review decisions of the PAB.¹⁸⁴ The jurisdiction of the Federal Court, Trial Division under section 18 of the *FCA* would now appear to be limited to judicial review of determinations which are not subject to appeal.

(ii) Survivor's benefits – Charter challenges

An application for judicial review, now pending before the Federal Court of Appeal in a case involving survivor's benefits, promises to raise some interesting Charter issues. In Storto v. The Minister of National Health and Welfare, 185 the deceased contributor had become disabled in 1969 but was ineligible for a CPP disability pension at that time because of insufficient contributions. He began receiving a retirement pension in 1988. His widow was denied survivor's and death benefits because the contributor had insufficient contributions during his contributory period, which ran from 1966 to 1988. The PAB held that the entire period from 1969 to 1988 could be excluded from the contributory period as months during which the contributor was disabled, under the disability dropout provisions in section 49(c) of the Plan.¹⁸⁶ On this basis, the contributory requirements for survivor's benefits were met. The federal Attorney General has applied for judicial review of the PAB decision.¹⁸⁷ One of the arguments which is expected to be made on behalf of the contributor's widow is that to deny her benefits would constitute discrimination on the basis of disability under section 15 of the *Charter*. While previous section 15 challenges to disability pension provisions in the Plan have focussed on the differing eligibility requirements for disability pensions (and have been, to date, unsuccessful¹⁸⁸), this case could shift the focus of argument to the underlying right of disabled persons to make contributions to the Plan.

There was another equality rights challenge to the provisions governing eligibility for survivor's benefits this past year. In *McLeod v Canada*,¹⁸⁹ the Alberta

- 184. Amendments made by S.C. 1990, c. 8, s. 8, proclaimed in force February 1, 1992.
- 185. (30 December 1993), Appeal: CP 2690 (Pension Appeals Board) [unreported].
- 186. An identical disability dropout provision is contained in section 44(2)(b)(iii) of the *Plan*.
- 187. The Attorney General of Canada v. Storto, Application No. A-54-94 (F.C.A.).
- 188. See Review 1993 at 43.
- 189. [1994] 4 W.W.R. 293 (Alta. Q.B.). See the discussion of this case below, under D. The

^{183.} Conversation with office of Mr. Alan Germain, counsel for the applicant, July 25, 1994.

Court of Queen's Bench held that the denial of benefits to a legal spouse where the deceased contributor was living in a conjugal relationship with another person at the time of his death did not violate section 15 of the *Charter*.

(iii) Pension credit splitting

A *Charter* challenge to the provisions governing the splitting of pension credits between divorced spouses was struck out this past year before it reached trial. In *Murray v. Canada (Minister of Health and Welfare)*,¹⁹⁰ the plaintiff, who had been divorced in 1974, sought a division of her former spouse's pension credits. Her application had been denied on the grounds that the pension splitting provisions applied only to spouses who had divorced on or after January 1, 1978. The plaintiff argued that this constituted discrimination on the basis of marital status, age and sex. The Federal Court, Trial Division dismissed the discrimination claim on the basis that it would require a retrospective application of the *Charter*.

(iv) Late application rule

The convoluted "late application" rule in section 44(1)(b)(iv) of the *Plan* continues to cause confusion. Section 44(1)(b)(iv) provides that a disability pension is payable to:

...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.¹⁹¹

The PAB has not yet directly considered the application of this provision. However, it has indirectly approved of the ministerial practice of determining eligibility under section 44(1)(b)(iv) by deciding when an applicant last met contribution requirements and then deciding whether he or she was disabled on that date.¹⁹² In *Minister of National Health and Welfare v. Petrollini*,¹⁹³ the applicant had applied for disability benefits in August of 1991, before section 44(1)(b)(iv) came into effect. The Minister had rejected her application on the basis that she was one year short of contributions, and a Review Tribunal had reversed that decision. The PAB held that she was not eligible but on the grounds that she

Constitution, Human Rights and Poverty Law.

^{190. [1993]} F.C.J. No. 1176 (F.C.T.D.) [unreported].

^{191.} Section 44(1)(b)(iv) came into effect on June 26, 1992. For a discussion of this amendment see *Review 1992* at 36-37.

^{192.} Last year, we argued that this approach was inconsistent with the wording of the section and did not always produce the best result for the applicant; see *Review 1993* at 40-41.

^{193. (1993),} C.E.B. & P.G.R. 8517.

was not disabled, not on the issue of sufficiency of contributions. Significantly, however, the PAB prefaced its discussion of the disability issue with the following summary of how section 44(1)(b)(iv) might impact on the applicant's eligibility:

Applying the retrospective effect of [section 44(1)(b)(iv)], the applicant could have satisfied the minimum qualifying period had she made an application earlier in time, such as in March 1991. Going back 15 months from this notional date of application [section 42(2)(b)] fixes December 1989 as the earliest possible onset date, if the Respondent is to qualify from a contributory period stand point [*sic*]. Counsel for the Minister informed the Board that it was ministerial policy to apply Section 44(1)(b)(iv) to all applications not yet finally determined, where disqualification arose by reason only of untimely application. Hence, the application of said Section 44(1)(b)(iv) is not in question on this appeal.¹⁹⁴

(v) Chronic pain

Last year we reported on three PAB decisions recognizing that persons suffering from chronic pain may be eligible for CPP disability benefits.¹⁹⁵ The PAB has since released two more decisions on chronic pain, which confirm that the key hurdle in establishing a chronic pain disability is proving that the disability is "severe". In *Burns v. Minister of National Health and Welfare*,¹⁹⁶ the PAB stated that, while chronic pain syndrome can justify entitlement, it "does however involve a very heavy onus on a pension applicant to establish that entitlement".¹⁹⁷ In *Burns*, the PAB found that the applicant could not meet that onus. A significant fact, in the eyes of the Board, was that there was no indication of any mental depression or any other psychological problems. By contrast, in *Bennett v. Minister of National Health and Welfare*,¹⁹⁸ the PAB did find that a chronic pain sufferer was entitled to disability benefits. However, the applicant in that case also had a learning disability, and the Board clearly based its decision on the cumulative effect of the two disabilities. It is evident that the PAB is reluctant to base a finding of disability on chronic pain alone.

- 195. See Review 1993 at 43-44.
- 196. (1993), C.E.B. & P.G.R. 8522.
- 197. Ibid. at 5993.
- 198. (1993), C.E.B. & P.G.R. 8520.

^{194.} Ibid. at 5986.

C. DEVELOPMENTS IN HOUSING LAW

(a) Legislative Developments

(i) Bill 115

The first piece of legislation to pass which affected residential tenancies was Bill 115, the *Revised Statutes Confirmation and Corrections Act.*¹⁹⁹ This was a house-keeping Bill intended to fix clerical or unintended mistakes made in the revision of statutes for the 1990 consolidation of Ontario statutes.

The R.S.O. 1990 consolidation removed references in the Landlord and Tenant Act^{200} to "summary application" and also deleted the direction that proceedings are to be heard in the "county or district in which the premises are located".²⁰¹

Bill 115 amends s.114(1), of the *LTA* by reinserting a reference to the "county or district in which the premises are located". The Bill also adds a new s. 117.1 to Part IV which states:

117.1(1) An application under this Part shall be made, heard and determined in the county or district in which the premises are located.

(2) An application under this Part shall be heard and determined in a summary way.

Bill 115 also amends s. 129^{202} of the *LTA* to delete the reference to the *Residential Tenancies Act*²⁰³ and to add a reference to the *Residential Rent Regulation Act*²⁰⁴ and restores a deletion of the reference to a judge in s. 97(1)(d)(ii) of the *LTA*. The latter correction makes the provision consistent with the R.S.O. 1980 consolidation, as amended.

(ii) Bill 120 – Residents' Rights Act, 1994²⁰⁵

Perhaps the main piece of legislation affecting residential tenancies can be considered the *Residents' Rights Act, 1994*. This was really a combination of

- 200. R.S.O. 1990, c. L-7 as amended. Hereinafter the LTA.
- 201. This problem was addressed hastily through a revision to Rule 38, O. Reg. 175/92.
- 202. This section deals with the notice of rent increase requirements under the LTA.
- 203. R.S.O. 1980, c. 452, repealed in part.
- 204. R.S.O. 1990, c. R-29, hereinafter the RRRA, (now repealed). Pursuant to s. 15(b) of the *Interpretation Act* R.S.O. 1990, c. I-11, the reference to the RRRA may be construed as being a reference to the *Rent Control Act*, S.O. 1992. c. 11, hereinafter the RCA.
- 205. S.O. 1994, c. 2. The Bill received Royal Assent on May 31, 1994.

^{199.} S.O. 1993, c. 27. The Bill received Royal Assent on December 2, 1993. The Bill is retroactively in force as of December 1991.

two legislative initiatives. One of these dealt with the issue of "garden suites" (or "granny flats") and illegal basement apartments.²⁰⁶ The other dealt with the separate issue of residents in unregulated "care homes".²⁰⁷

As enacted, the new legislation extends coverage of the *RCA* and the *LTA* to residents living in residential premises where they receive care, whether or not the receiving of care is the primary purpose of occupancy.²⁰⁸ There is a limited exemption for premises which provide short-term rehabilitation or therapy.²⁰⁹ Further, there is an exemption from the definition of rent of charges for "care services or meals".²¹⁰ The legislation also makes it legal

Legislation in the form of amendments to the *Planning Act* and the *Municipal Act* was first introduced in October 29, 1992, in Bill 90. The legislation was not proceeded with. Some courts had taken the position that units which violate zoning by-laws or the *Planning Act* were not governed by the *LTA*. Others took the position that landlord's could evict tenants under the "illegal act" provisions of the *LTA* (s. 107(1)(b)). The law on whether the violation of zoning by-laws is sufficient to constitute an "illegal act" is far from settled, however.

There is also a statutory interpretation argument which can be made with respect to the scope of termination for an "illegal act". It is a principle of interpretation that provisions in a statute are not to be given an interpretation that renders them superfluous. It can be expressed also as: general provisions can be limited in scope by specific provisions. If the "illegal act" provision is read to include zoning by-laws and other housing standard laws, then the provision in s. 107(1)(e) for overcrowding would have been legislated for no purpose.

- 207. The care home provisions of Bill 120 were proclaimed in force August 22, 1994. Bill 120 was the result of the report arising from a government inquiry into unregulated residential housing: E.S. Lightman, "A Community of Interests: The Report of the Commission of Inquiry into Unregulated Residential Accommodation" (Toronto: Queen's Printer, 1992). The Commission was formed as a result of the death of a resident in an unregulated boarding home. The 330 page report recommended among other things that the *Landlord and Tenant Act* and the *Rent Control Act* be applicable to residential premises providing care to vulnerable adults. Prior to the enactment of Bill 120 the *LTA* and the *RCA* contained an exemption for residential premises "for penal, correctional, rehabilitative or therapeutic purposes, of for the purpose of receiving care".
- 208. Previously, there was conflicting jurisprudence as to whether the "rehabilitation, therapy, and care" exemptions applied only when these were a "primary purpose" or whether they needed only to be "a purpose". The Divisional Court held that the RRRA (now superseded by the RCA) applied to premises were the provision of care was not a primary purpose: Re Tenants of the Grenadier And We-Care Retirement Homes (1993), 63 .O.A.C 387 (Div. Ct.). The relevant exemption provision is worded similarly to the LTA provision. In Keith Whitney Homes Society v Payne (1992), 9 O.R. (3d) 186 (O.C.J.), the Court held that all that was required under the parallel LTA provision was that the provision of care be a purpose. Both of these decisions are presently under appeal to the Ontario Court of Appeal.
- 209. Usually a maximum of six months, although a lesser period may be specified by regulation.
- 210. This will be subject to regulation under the RCA. The Divisional Court had held that

^{206.} The part of the legislation dealing with apartments in houses and garden suites was proclaimed in force as of July 3, 1994.

for homes to have more than one unit, including basement apartments and garden suites. This has removed the uncertainty concerning whether tenants in such units were to be given the full protection of the *LTA* and the *RCA*.²¹¹

(iii) Bill 21 – Land Lease Statute Law Amendment Act, 1994²¹²

Another major housing reform was Bill 21, the Land Lease Statute Law Amendment Act, 1994. While this was a private members bill, the legislation as amended appeared to have the full and active support of the Minister of Housing. The Bill as originally introduced contained major flaws and it was quietly and significantly amended even before the public hearings commenced.²¹³ The legislation extended the protection of the *LTA* to land lease community homes.²¹⁴

Bill 21 also amended the *Planning Act*²¹⁵ and the *Rental Housing Protection* Act^{216} to extend protection of the latter Act to mobile home parks and land lease communities in municipally unorganized territories. The changes validated existing use as a mobile home park or land lease community at the date of the enactment of the Bill and will help to prevent wholesale conversion of these complexes to a use other than residential rental accommodation. The conversion

meals were included in rent in *Re Tenants of the Grenadier*, *supra*, note 208. The exclusion of meals was strongly resisted by tenant advocates who felt this took away existing benefits from the tenants. For example, s. 121(4) contemplates that the provision of food may be considered a vital service and a contractual obligation of the land-lord under some tenancy agreements. Accordingly, it would have been included in the pre-Bill 121 definition of "rent".

- 211. The legislation has not entirely solved the problem of uncertainty surrounding tenancies which may contravene zoning or planning laws. There are other zoning and planning violations which may occur in relation to residential units.
- 212. S.O. 1994, c. 4. This Bill received Royal Assent on June 23, 1994 and came into force on that date.
- 213. The Bill created special rights for a sub-class of mobile home park which was a yearround mobile home park. The original Bill did not extend protection to mobile home parks and land lease communities outside areas of municipal organization. This denied the benefit of the legislation to a large number of tenants in Northern Ontario. There was also a problematic provision requiring the creation of a reserve fund. All of these aspects of the Bill were eventually dropped from the legislation.
- 214. A "land lease community home" is a structure which is fixed permanently to the land but where the owner of the home leases the land. Usually these are modular homes. The definition does not include a mobile home. The existing definitions of "residential premises" and "residential complex" in the *RCA* was already broad enough to include these homes under the scope of that Act.
- 215. R.S.O. 1990, c. P-13
- 216. R.S.O. 1990, c. R-24

of this land to other uses would result in a massive reduction in the supply of affordable housing. 217

(iv) Bill 104 – Municipal Amendment Act, (Vital Services), 1994.²¹⁸

This legislation permits municipalities to pass by-laws requiring landlords to provide vital services and prohibiting suppliers from cutting off vital services to tenants when a landlord fails to pay his or her account.²¹⁹ If a landlord who is required to provide such services does not do so, then municipality may take steps to arrange for the continued provision of the service.

(v) Bill 20 – The Tenants and Landlords Protection Act, 1993²²⁰

One disturbing piece of private member's legislation was Bill 20. The Bill provided for the eviction of tenants convicted of certain narcotics offenses. This was to be part of the criminal proceedings against the accused tenant.

The Bill was disturbing for a number of different reasons, not the least of which was the moral righteousness with which several members of all parties defended it. The Bill was unnecessary given the existing provisions of the LTA.²²¹ Moreover, it is more than likely unconstitutional as it purported to give the power of eviction to a provincial court judge²²² and to effect a form of double

- 220. Bill 20 was introduced by Mr. Runciman (PC, Leeds-Grenville) on May 18, 1993.
- 221. Section 107(1)(b) permits a landlord to seek early termination of a tenancy where the tenant has committed an illegal act on the premises. An illegal act which does not affect the nature of the premises or the interests of other tenants does not, and should not, give rise to cause for early termination of a tenancy. Under s. 107, the landlord need only establish on the balance of probabilities that the tenant committed the impugned act. It is not necessary that the tenant have been convicted on a charge relating to the act. Under the *LTA* a landlord can proceed with an application on this ground after 20 days from the date on which notice of termination is given whether or not the tenant has been charged or convicted. As such, there is no effective purpose to Bill 20 other than to satisfy mean-spirited legislators.
- 222. As such it is contrary to the Supreme Court of Canada ruling in *Reference re Residen tial Tenancies Act, 1979*, [1981] 1 S.C.R. 714. The Supreme Court struck down provisions of that Act which purported to give the powers of eviction to a provincially appointed administrative tribunal.

^{217.} The courts had already ruled that landlords could convert these premises to other uses, including vacant use; see *Re Cove Mobilehome Park & Sales Ltd. and Welch* (1979), 27 O.R. (2d) 65 (Div. Ct.) and *Re Kingsway Villa Ltd. and Ethier*, [1992] O.J. No. 632 (O.C.J.) [unreported].

^{218.} S.O. 1994, c. 7.

^{219.} Special legislation was already in existence permitting the municipalities of London, Toronto, and Ottawa to exercise these powers.

punishment. The Bill passed second reading but did not proceed further before the end of the provincial legislative session on June 23, 1994.

(b) Litigation Developments

(i) Res Judicata in Rent Review Proceedings

The Ontario Court of Appeal released an extremely important decision in *Re Rent Review Hearings Board and Prajs.*²²³ The decision appears to have cleared up the misunderstanding over rent review procedures and jurisdiction and their implications for the principle of *res judicata* in subsequent proceedings. The courts have generally not taken care to understand the fine distinctions in the remedies available in the different types of rent review and landlord and tenant applications.²²⁴

In *RRHB and Prajs* the landlord had filed a whole building rent review application under section 74 of the *RRRA*, in October, 1987. Over the course of the next two years the landlord had served notices of rent increase on the tenants and had entered into yearly lease renewal agreements at the same time as the proposed rent increases were to take effect. However, the lease agreements specified that the rent payable during the lease term was to be at a rate which was less than the proposed new maximum rent.

During the second renewal period, an Order of the Minister issued under s. 83(1) of the *RRRA* and set the new maximum rent. The new rent was to be effective February 1, 1988. The landlord demanded a lump sum payment of the back rent due from the tenants, which was based upon the difference between the rent actually paid and the maximum rent allowed under the Order. The dispute eventually ended up before the Court of Appeal.

In the decision under appeal, the Divisional Court had relied on an earlier decision *Re Prajs and Booty*.²²⁵ In that earlier case another tenant from the same building had been granted an order against the same landlord for the return of excess rent. The Divisional Court had set aside the order on the grounds of the perceived bias of the administrator, and also declared that the tenant was barred from bringing the s. 95 rebate application because the landlord's whole building review application (and the Minister's subsequent order) had rendered the issue *res judicata*.

225. Ibid.

^{223. (1993), 16} O.R. (3d) 97 (C.A.). Hereinafter RRHB and Prajis.

^{224.} For example see Re Prajs and Booty (1992), 55 O.A.C. 359 (Div. Ct.).

In *RRHB and Prajs* the Divisional Court held that *Re Prajs and Booty* had determined the matter and that the issue was therefore *res judicata*.

On the appeal of *RRHB and Prajs* the Court of Appeal held that the Divisional Court erred in its interpretation of s. 83 [maximum rent orders] and s. 95 [rebate applications].²²⁶ Section 83 was held to be permissive, allowing the Minister to set the maximum rent that *may* be charged and when that maximum rent *may* take effect. The Court stated that the section could never operate where the parties have agreed to a lesser rent.²²⁷ Further, the facts under consideration in s. 74 applications and s. 95 applications were not the same. Therefore the Divisional Court's conclusion that the matter in *Re Praj and Booty* was *res judicata* was incorrect. The Court of Appeal stated that the Divisional Court should have considered the merits of the case in *RRHB and Prajs*.²²⁸

In considering the merits, the Court of Appeal held that the *RRRA* permitted a catch-up payment of rent where rent lower than the "maximum rent" had been charged. However the Act in no way purported to limit the right of the parties to enter into a binding agreement setting a rent lower than that permitted.²²⁹ The landlord's right to "catch-up" is "subject to the appropriate notice having been given, and can be abrogated by an intervening agreement between the parties".²³⁰

(ii) Repair and Maintenance Obligations

In Mortimer v Cameron²³¹ the plaintiff attended a party at the apartment of a class mate, Hunt. The apartment was on the second floor of a home owned by Stingray Investments. The plaintiff was engaged in some friendly horseplay with another classmate, Cameron. The plaintiff tripped over the raised threshold to the apartment, pulled Cameron towards him and together they tumbled onto an exterior landing, through its exterior wall and plunged to the ground 10 feet below.

- 230. Ibid. at 100.
- 231. (1994), 17 O.R. (3d) 1 (C.A.).

^{226.} Supra, note 223 at 101.

^{227.} Ibid. at 102.

^{228.} *Ibid.* at 103. The result of this case and its overruling of *Re Prajs and Booty* produces a fair interpretation of the statute. Otherwise, any tenant with a lease for rent which is less than the maximum rent would be required to go to Court to seek recovery of rent paid in excess of that set out in the lease and this would undermine the process for summary resolution of rent related disputes under the *RRRA*.

^{229.} Ibid. at 99.

The injuries sustained by the plaintiff rendered him a complete quadriplegic. An action was commenced against Cameron, Hunt, Stingray and the City of London.²³² The Court of Appeal held that while there was no requirement that the city enact by-laws with respect to the inspection of residential premises for compliance with building standards, once the city had done so there was a duty to use due care in giving effect to them.²³³

The Court held that incidental third party users who are injured on private property are a class of persons to whom a duty is owed by the city.²³⁴ The fact that the tenant and the plaintiff were engaged in horseplay did not render the use of the premises "so unreasonable or rare or unexpected as to fall outside the reasonable contemplation of the city".²³⁵ The structure did not comply with the building code and it did not comply with its intended purpose to prevent accidental falls.

The Court of Appeal held that the trial judge had correctly determined that the landlord, as owner and occupier of the premises, was under an ongoing duty to inspect the enclosed exterior stairway irrespective of any notification from its tenants of any problem relating thereto.²³⁶ The landlord has the primary burden of repair and responsibility for maintaining the premises.

The case is very significant to *LTA* proceedings for a couple of reasons. It finds that a landlord has the ongoing duty to inspect and that the liability is imposed regardless of an absence of prior notification of a problem by a tenant. This colours earlier Court of Appeal jurisprudence about liability for latent and patent defects. If there is an ongoing duty to inspect and that duty is as high as is imposed here, then rarely would a defect be truly latent. Further, the potential

- 233. Supra, note 231 at 8-9.
- 234. *Ibid.* at 10-11. The duty of care is "a duty to exercise reasonable care both in inspecting the plans which were submitted for the proposed enclosure of the exterior stairway ... and in inspecting the construction authorized by the building permit" (at 8).
- 235. Ibid. at 10.
- 236. *Ibid.* at 12. The inspection must be a "reasonable inspection". The structure had deteriorated and should have warned a reasonable occupier of the need to retain a knowledgeable person to assess the soundness of the entire structure. The failure to have the structure properly inspected was an actionable breach of s. 3(1) of the Occupiers' Liability Act.

^{232.} The plaintiff advanced numerous grounds of liability including negligence, assault, battery, trespass, violations of the *Building Code* and breach of the provisions of the *Occupiers' Liability Act*, R.S.O. 1980, c. 322, (now R.S.O. 1990, c. O-2), hereinafter the *Occupiers' Liability Act*. As well, the plaintiff maintained that there was an independent cause of action against Stingray for breach of its statutory duty under what is now s. 94 of the *LTA*.

liability of a municipality for negligent inspection or enforcement of by-laws relating to housing standards, may be used to encourage more active participation by municipalities in patrolling standards complaints.

The Court of Appeal does not comment expressly on the trial judge's partial reliance on what is now s. 94 of the *LTA*. However, the finding of an ongoing duty to inspect and maintain premises is based on the trial judge's reliance on s. 94. So too is the finding that no notification is required. While the decision seems to be based on the *Occupiers' Liability Act*, there is no reason the principles would not apply to s. 94 repairs applications.

(iii) Arrears Payments

A third Court of Appeal decision of note is *Re Malva Enterprises Inc. and Rosgate Holdings*.²³⁷ This involved a commercial tenancy proceeding under the *LTA*. The tenant had been in arrears and the landlord had proceeded in court and obtained a judgment for the arrears. The landlord continued to treat the lease as subsisting and the tenant paid the current rent as due. The landlord appropriated this money toward the arrears and considered that the tenant was in arrears for the current month's rental payments. The landlord proceeded for forfeiture of the lease.

The Court of Appeal held that the application of rental payments may be controlled by the direction of the tenant or the contract or the custom of the parties. The landlord had elected to allow the lease to continue by continuing to claim the rent falling due. A breach of the covenant to pay rent is not a continuing breach. The landlord did not have an "ever-recurring new right of election" to forfeit the lease for the past breaches.²³⁸

The same principle should apply in residential tenancy situations where the tenant owes a security deposit which had been used up to pay arrears. Frequently landlords argue that they have a right to apply current rent to the deposit. This means that the tenant remains in arrears and that the landlord allegedly has the right to seek termination based on arrears of the current month's rent. The tenant ought to be able to direct that current payments go to current rent rather than to reimburse the deposit. This decision supports that conclusion.²³⁹

^{237. (1993), 104} D.L.R. (4th) 167 (Ont. C.A.).

^{238.} Ibid. at 176-8.

^{239.} Arguably, the principle of *res judicata* should estop the landlord from claiming forfeiture for the same arrears to which it had obtained judgement. The Court does not address this principle.

(iv) Res Judicata and Summary Judgments

Two other decisions deserving of particular attention are $MacPherson v Sing^{240}$ and Shaw v Kelly.²⁴¹ These were both motions for summary judgment under Rule 20 of the *Rules of Civil Procedure*²⁴² based on Residential Rent Hearings Board (the RRHB) determinations as to excess rent which were above the monetary jurisdiction under the *Residential Rent Regulation Act*. These conflicting cases also deal with the issue of *res judicata* and the interplay between different residential tenancy related proceedings.

In *MacPherson v Sing*, the tenant obtained an order from the RRHB that her maximum rent was \$721. Excess rent was owing in the amount of \$24,000 but the tenant did not waive the amount over the then \$3,000 limit of the RRHB jurisdiction. The tenant commenced a claim in court for the full amount and brought a motion for summary judgment in reliance on the order of the RRHB.

On the motion, the master held that the court could not accept the order of the Board as "sacrosanct and conclusive" when nothing in the Act permitted the court to accept the Board's decision as proof of the claim.

In Shaw v Kelly, the court expressly disagreed with the master's reasons in *MacPherson*. The matters of maximum rent, rent paid by the tenant, and excess rent which were determined by the Minister were held to be *res judicata*.²⁴³

Another issue raised in the *Shaw v Kelly* proceeding was whether the limitation period had expired on those parts of the excess rent paid more than six years previously. The Court held it had not expired. The cause of action did not arise (and the limitation period did not begin) until the final determination of the appropriate rent and the amount of the overpayment. The tenant, having contractually agreed to pay the rent actually paid, was not entitled to claim for the overpayment until it had been determined that such an overpayment had been made.²⁴⁴

- 240. [1993] O.J. No. 2330 (O.C.J.) [unreported].
- 241. (1994), 17 O.R. (3d) 255 (O.C.J.). The tenant was represented by the Kingston Community Legal Clinic.
- 242. R.R.O. 1990, Reg. 194, as amended.
- 243. *Supra*, note 241 at 257. The only triable issue would have been whether or not some of the monies had been re-paid by the landlord but that issue was not raised in the proceedings before the Court.
- 244. *Ibid.* at 58. While the result with respect to the limitation period issue benefitted the tenant, it is questionable whether this is indeed correct for all purposes. It should be correct with respect to the proceeding to court under rent review. However, it may not be correct in the context of civil proceedings for restitution of illegal rents. The analysis of this issue is complex. Under the *LTA*, tenants cannot contract out of their rights under

(v) Abatements

The courts have treated abatement claims very inconsistently. In some cases the courts have seemed to view them more as in the nature of damages in tort, with the requirement of negligence or at least due diligence. However, the Divisional Court in *Re Offredi and 75168 Ontario Ltd.*²⁴⁵ has held that the remedy of abatement is a contractual remedy for reduced rent during any time period in which the tenant receives less than they were entitled to. This decision should clarify that a tenancy is a contractual agreement subject to contractual principles.

This was one s. 94 abatement application brought by many tenants in an apartment complex. The Divisional Court held that the fact that the landlord had acted reasonably was irrelevant in a contractual claim. Further, the fact that the interference with the tenants' enjoyment of the premises was caused by under-taking repairs that were necessary to maintain the structural integrity of the building was irrelevant. The s. 94 obligation was the landlord's burden and not the tenants'. The obligation to maintain the premises in accordance with building standards did not diminish the contractual obligation to give the tenants what they had bargained for; quiet enjoyment and premises that were in a good state of repair.

(vi) Costs in Landlord and Tenant Proceedings

One final decision of note is *Re Lacey and Shaughnessy Brothers Investments Ltd.*²⁴⁶ The issue in that case concerned costs in landlord and tenant proceedings.

- 245. [1994] O.J. No. 1204 (Div. Ct.) [unreported]; aff'g (1991), 27 A.C.W.S. (3d) 1051 (O.C.J.) [unreported]
- 246. (13 October 1993), Peterborough #9001/93 (O.C.J.) [unreported]. The tenants in this case were represented by the Peterborough Community Legal Centre. This was a mobile home park repairs case under the *LTA*. The case also has important substantive worth, as the court ordered 100% abatement despite the fact that tenants had some minor services provided. Another significant mobile home park abatement case was Re

the Act, and any agreement that does is void. The *RRRA* and *RCA* contain similar provisions in s.2 of both Acts. If payment of legal rent is a right under Part IV, and the *RCA*, then the contractual provision is void and not binding on the tenant, contrary to the determination of Rosenberg, J. It is not clear that "rent' under Part IV is tied to "rent" under the *RCA* except in the context of rent review/control. Indeed, the Court in *Re Black and Martineau* (14 September 1994), Cobourg #3741/94 (O.C.J.) [unreported], expressly chose to side-step that issue. Nevertheless, section 129 of the *LTA* deals with rent increases and that section cross-references the rent control legislation. We suggest that "rent" under the *LTA* is necessarily tied to "rent' under the *RCA/RRRA* by this section. Both the rent control legislation and the *LTA* provide that where notice is improper, the notice of increase is "void". One would think that where a notice of increase is void and any increase is therefore illegal, that the contract term is void for illegality. It is void *ab initio* (i.e., from the beginning). There is disagreement on this point. It is suggested that all the rent review process does is determine the existence of that fact (that rent was overpaid)—it doesn't create the existence of the fact.

At the end of the proceedings the Court addressed the issues of costs. Counsel for the tenants had asked for \$500 costs but had not otherwise addressed her mind to the issue. The Court felt that \$500 was too low and awarded \$1500 costs.²⁴⁷ The Court stated that the next time counsel came to court she should have figures with respect to the number of hours spent on preparation and concerning any disbursements. A "guesstimate" was not good enough. The Court pointed to a "new rule" with respect to costs and indicated that it was quite clear that both counsel overlooked this rule and should not do so in the future.²⁴⁸

D. THE CONSTITUTION, HUMAN RIGHTS AND POVERTY LAW

1. Charter Jurisprudence – General Developments

(a) Section 15²⁴⁹ – Enumerated Grounds of Discrimination

(i) Age and Disability

Charter challenges to tax legislation continued this year. In Kasvand v MNR,²⁵⁰ the unrepresented taxpayer's income consisted entirely of CPP, other pension and superannuation payments, family allowance, and interest and investment income. Her RRSP deductions were disallowed, based on the definition of "earned income" contained in the *Income Tax Act*. She challenged the disallowance, arguing that, in excluding these types of income from the definition.

Plachta and Minnie (23 June 1994) Cobourg (O.C.J.) [unreported]. The tenants were successful in obtaining significant abatement for disrepair. However, the landlord has appealed this decision. The tenants are represented by the Northumberland Community Legal Centre.

- 247. The Court ordered solicitor-client costs against the landlord as it indicated the litigation was unnecessary and also awarded punitive damages for the flagrant disregard by the landlord for the rights of the tenants.
- 248. It is to be hoped that this decision does not reflect a trend. The new "rules" referred to are new practice directions in the Central East Region of Ontario. These establish new guidelines for costs in motions and applications. The costs are quite high and could have the practical effect of rendering *LTA* proceedings "un-summary" and out of the reach of most tenants. It is possible that these Practice Directions never contemplated summary proceedings under the *LTA* or other statutes. Landlord and tenant proceedings are more akin to small claims actions which are also summary in nature and have the same evidentiary requirements. Costs in Small Claims Court are considerably lower than those in regular civil proceedings.

249. Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

^{250. (1994), 167} N.R. 63 (F.C.A.).

tion of "earned income", the *Income Tax Act* discriminated on the grounds of age and disability. The Federal Court of Appeal dismissed the argument in one short paragraph, evading the issue by holding that the distinction at issue was not on the basis of age or disability but on source of income. The Federal Court of Appeal avoided serious consideration of the possibility that differentiating on the ground of the categories of income at issue might constitute constructive, or "adverse effect" discrimination on the ground of age or disability and so offend s.15, absent a valid s.1 defence.²⁵¹

(b) Section 15 – Unenumerated Grounds of Discrimination

(i) Poverty

In last year's article, we reviewed the decision in *Sparks v Dartmouth/Halifax County Regional Housing Authority*,²⁵² in which the Nova Scotia Court of Appeal recognized that single mothers who were subsidised housing tenants formed an identifiable group in society, characterized by, among other factors, poverty. The court therefore found that such tenants were an unenumerated group for the purpose of s.15 of the *Charter*.

As mentioned above, in R v Rehberg,²⁵³ the Nova Scotia Supreme Court extended the Sparks reasoning and expressly found that poverty was analogous to the grounds enumerated in section 15. The court went on to find that the "man-in-the-house" rule in Nova Scotia social assistance legislation violated section 15 as it discriminated against single mothers on family benefits, a group characterized by both poverty and sex.

There are two applications pending in the Ontario Court (General Division) in which s. 15 has been invoked to protect vulnerable tenants. The first is *Batten et al v Community Lifecare et al (Rubidge Hall Retirement Home)*.²⁵⁴ This is an application under Rule 14.05 of the *Rules of Civil Procedure* for an injunction prohibiting the eviction of tenants and for a declaration concerning their rights.

- 252. (1992), 112 N.S.R. (2d) 389, (Co. Ct.); rev'd (1993), 101 D.L.R. (4th) 224 (N.S.C.A.). For a discussion of this case see *Review 1993* at 52-53.
- 253. Supra, note 25.
- 254. Ont. Ct. Gen. Div. File No. 9780/93. The tenants are represented by the Peterborough Community Legal Centre.

^{251.} This approach provides a sharp contrast to the decision of the same court in *Thibaudeau* v Canada (MNR) (1994), 167 N.R. 161 (F.C.A.) and to the decision of the Supreme Court of Canada in Symes v. MNR (1993), 161 N.R. 243 (S.C.C.). The latter case poses a particular contrast, since the Federal Court of Appeal acknowledged a nexus in Kasvand, as the Supreme Court did not in Symes, between the type of payment at issue and the ground of discrimination claimed. Thus, there is a clear possibility that the Supreme Court of Canada would have decided Kasvand differently.

The applicants are people with psychiatric or developmental disabilities, whom their landlord was seeking to evict. There is at present an interim injunction in force. The continuation of the action is in some doubt, since the passage of *Residents' Rights Act*, 1994 has provided some legislative response to the plight of the tenants.²⁵⁵

The second application is *Clarke and Baker v Peterborough Utilities Commission et al.*²⁵⁶ The applicants are social assistance recipients who are required to pay substantial deposits before utilities will be provided for them. At issue is whether the utilities' deposit policy, which provides that deposits will be required from "residential tenants who cannot demonstrate satisfactory payment histories or otherwise reasonably ensure payment of future charges", infringes sections 7 or 15 of the *Charter* or the authorizing statute, which provides for "reasonable" deposits. Also at issue is whether the absence of the ground of receipt of social assistance from s.1 of the *Human Rights Code* offends s.15 of the *Charter*.

(ii) Marital/Family Status

In Schachtschneider v Minister of National Revenue,²⁵⁷ the majority of the Federal Court of Appeal found that a tax provision which was disadvantageous to the applicant because she was married and living with her spouse did not discriminate because of marital status. Mahoney JA, for the majority, stated:

[T]he group now in issue is composed of married persons with a child of the marriage, living together and not supporting each other. In my opinion, that is not a group that can be described as being disadvantaged in the context of its place in the entire social, political and legal fabric of our society. It follows that it is not a distinct and insular minority within the contemplation of s. 15.258

In *Thibaudeau v Canada (MNR)*,²⁵⁹ the context dictated a different result. A divorced mother with custody of her two children challenged the tax treatment of maintenance payments. Under the current tax laws, maintenance payments are included in the recipient spouse's income and are deducted from the payor spouse's income. The majority of the Federal Court of Appeal struck down this inclusion provision as being discrimination on the basis of "family status". The

- 257. (1993), 154 N.R. 321 (Fed. C.A.).
- 258. Ibid., at 329.
- 259. Supra, note 251.

^{255.} See the discussion of this Act above, under section C. DEVELOPMENTS IN HOUS-ING LAW.

^{256.} Ont. Ct. Gen. Div. File Nos. 6605/91 and 6900/91. The applicants are represented by the Peterborough Community Legal Centre.

court observed that separated custodial parents could readily be seen as "a discrete and insular minority which has historically suffered prejudice and has need of protection".²⁶⁰

(c) Section 15 – Adverse Effect Discrimination

Discrimination is divisible into two types. The first is differentiation according to membership in a group listed in human rights legislation or covered by s.15 of the *Charter*. An example is a rule limiting access to a benefit to persons of one sex, or imposing a disadvantage upon people younger than a specified age.

The second type of discrimination, most often referred to as "adverse effect" discrimination, manifests itself by its effect, rather than by differentiation on prohibited grounds. An example is a requirement by an employer that all employees work on Saturdays. Such a requirement disadvantages persons whose religious obligations fall on Saturdays, and thus can constitute religious discrimination. Adverse effect discrimination has been accepted as part of the definition of discrimination for the purpose of the *Charter*,²⁶¹ as well as under human rights legislation. Adverse effect discrimination is more likely to affect poor people than direct differentiation on the basis of poverty, and therefore this jurisprudence is particularly important to poverty law.²⁶²

There has been a rather disturbing development in the adverse effect jurisprudence under the *Charter*. The problem is illustrated in the reasoning of the Federal Court of Appeal in *Thibaudeau v. Canada*, which in turn is based on *obiter* from the judgment of Iacobucci J in *Symes v. MNR*.²⁶³

In Symes, the appellant claimed that the income tax rule that disallowed child care expenses as a business expense had an adverse effect on women. The

^{260.} Ibid. at 184.

^{261.} The idea that identical treatment can have discriminatory effects was accepted for the purpose of discrimination analysis under the *Charter* in *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1. However, to date the only adverse effect judgements of the Supreme Court in the context of the *Charter* have been *Symes v. MNR, supra*, note 251, and *Rodriguez v British Columbia (Attorney General)* (1993), 158 N.R. 1 (S.C.C.).

^{262.} Aside from being a reason for discrimination in itself, poverty is a result of discrimination. The interrelationship is obvious: discrimination often results in unemployment, which in turn causes poverty, which in turn engenders more discrimination. Demographic evidence indicates that women as a group, for example, have lower incomes than men, and that women are represented among poor people disproportionately to their presence in the population. Thus discrimination against women can be demonstrated to have a disproportionate impact on poor people.

^{263.} Supra, note 251.

Supreme Court of Canada dismissed the appeal in a split decision. Mr. Justice Iacobucci wrote for the majority and his concluding remarks contained some conjecture about how a similar s.15 challenge might be successful. The aspect of *Symes* that was evidently most difficult for the majority was that the appellant was a member of a "sub-group" of women; the provision in question did not affect all women. Mr. Justice Iacobucci acknowledged that "an adverse effect felt by a sub-group of women can still constitute sex-based discrimination".²⁶⁴ However, he expressed the view that it was possible, and appropriate, to distinguish between

...being able to point to *individuals negatively affected* by a provision, and being able to prove that a *group or sub-group* is suffering an *adverse effect* in law by virtue of an impugned provision...If a group or sub-group of women could prove the adverse effect required, the proof would come in comparison with the relevant body of men. Accordingly, although individual men might be adversely affected by an impugned provision, those men would not belong to a group or sub-group of men able to prove the required adverse effect.

...if s.63 creates an adverse effect upon women (or a sub-group) in comparison with men (or a sub-group), the initial s.15(1) inquiry would be satisfied; a distinction would have been found based upon the personal characteristic of sex. In the second s.15(1) inquiry, however, the sex-based distinction could only be discriminatory with respect to *either* women or men, not both. The claimant would have to establish that the distinction had "the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others"...The burden or benefit could not...as a logical proposition, fall upon both sexes. Likewise, to the extent that a court might undertake a broader search for "disadvantage that exists apart from and independent of the particular legal disadvantage being challenged"...I cannot imagine how such disadvantage could be located for both men and women at the same time.²⁶⁵

In *Thidaudeau*, while the Federal Court of Appeal found the provision of the *Income Tax Act* in question to be discriminatory on the basis of "family status", it dismissed the applicant's claim of sex discrimination. Essentially, they concluded that the presence of even a few men as custodial parents receiving support, among the much larger pool of women, could foreclose a claim of sex discrimination. In Hugessen J.A.'s view

"...it surely cannot be the case that legislation that adversely affects both men and women is discriminatory on the grounds of sex solely because the women (or men) in question are more numerous...it is not because more women than men are adversely affected, but rather because some women, no matter how

^{264.} Ibid. at 328.

^{265.} Ibid. at 330-331.

small the group, are more adversely affected than the equivalent group of men, that a provision can be said to discriminate on the grounds of sex".²⁶⁶

In essence, what the court is saying is that it is not enough to show that a disproportionate number of women (as compared to men) suffered an adverse effect from the legislative provision. In order to succeed in such a case it must be shown that women are more adversely affected (than men) by the provision.

It is this latter aspect of the judgement that is problematical. There is no authority for Justice Hugesson's proposition that the focus in deciding that adverse effect discrimination exists must be confined to the "nature of the effect; on quality rather than quantity", as opposed to the numbers of the group that are affected. A view more congruent with the purpose of s.15 would be that it can exist where the nature of the effect of an impugned policy is more onerous on women than on men **or** where the rule affects women in numbers disproportionate to men.

The decision in *Thibaudeau* is under appeal. It is to be hoped that the Supreme Court of Canada will take the opportunity to address the "perceived" problem raised by the *Symes* decision. Disproportionality of effect in terms of numbers was the linchpin of the Supreme Court of Canada's first consideration of adverse effect discrimination in *O'Malley v Simpson-Sears*.²⁶⁷ Clearly, this point needs to be restated.

2. Social Welfare Programs and the Charter

Last year we discussed the trial court's decision in *Conrad v The Municipality* of the County of Halifax,²⁶⁸ in which a welfare recipient claimed that the termination of her benefits without a hearing constituted a violation of her rights under section 7 of the *Charter*. The court denied the claim, holding that the right to social assistance was a right of an economic nature which was not protected by section 7. *Conrad* was appealed without success.²⁶⁹ The section 7 argument was not made before the Court of Appeal, and therefore the appeal decision

^{266.} Supra, note 251 at 174-175.

^{267. [1985] 2} S.C.R. 536, 7 C.H.R.R. D/3102. In fact, in O'Malley, the court stated that adverse effect discrimination can occur if a rule "affects a person or group of persons differently from others to whom it may apply" (at D/3106 C.H.R.R., emphasis added). In Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) [1987] 1 S.C.R. 1114, 8 C.H.R.R. D/4210 (the Action Travail case), Justice Dickson spoke of a rule which "has a disproportionately negative effect on an individual or group" (at D/4226 C.H.R.R., emphasis added).

^{268. (1994), 124} N.S.R. (2d) 251 (N.S.S.C). For the discussion of this case see *Review 1993* at 55.

^{269. (}April 1994), C.A. No. 02923 (N.S.C.A.) [unreported].

makes no finding with respect to this issue. The Supreme Court of Canada has refused leave to appeal on September 15, 1994.

Along with *R. v Rehberg*, several other decisions considered the impact of section 15 on social welfare programs. The appeal in *Egan and Nesbit v Canada*,²⁷⁰ in which the appellants sought a declaration that the definition of "spouse" contained in the *Old Age Security Act*²⁷¹ offends section 15 of the *Charter* because it excludes same-sex spouses from spousal benefits, is expected to be heard by the Supreme Court of Canada in its 1994-95 sittings.

The rules for eligibility for a surviving spouse's pension under the Canada Pension Plan contain numerous differentiations based on marital status, as well as other circumstances. The Federal Court of Appeal's decision in Mosher v Canada²⁷² negated one Charter challenge to the definition of "spouse" contained in the CPP. However, In McLeod v Canada²⁷³ the wife of a deceased person was refused a pension because the couple had not been cohabiting for eleven years prior to his death. She challenged the refusal under s.15, alleging that the CPP definition of "spouse" effects discrimination on the ground of marital status. The Alberta Court of Oueen's Bench denied the claim for two reasons. The first was that it was the action of her spouse and another person "which led to the denial to her of survivor's benefits"²⁷⁴ rather than her marital status. The second was that marital status was not a "personal characteristic", because "the actions of two other people (were) necessary to place one within a particular group". No authority was cited for this reasoning. It is clearly at odds with the views of the Federal Court of Appeal in Thibaudeau v. Canada (MNR), and with the obiter of Justice Iacobucci in Symes v. MNR.

3. Developments in Human Rights Law

(a) Same-sex spouses and marital status

In *Clinton v Ontario Blue Cross*²⁷⁵ the complainant had successfully applied to have her same-sex partner recognised as a common law spouse for the purposes of her employment insurance benefits. The Divisional Court overturned the

^{270. (1993), 153} N.R. 161 (F.C.A.).

^{271.} R.S.C. 1985, c. O-9, as amended.

^{272.} See the discussion above under section B.4 The Canada Pension Plan.

^{273. [1994] 4} W.W.R. 293 (Alta. Q.B.)

^{274.} Ibid. at 300.

^{275. (1993), 18} C.H.R.R. D/377. For a discussion of this case see Review 1993 at 56-57.

decision of the board of inquiry.²⁷⁶ The court's reasoning was that section 25(2) of the *Ontario Human Rights Code* provided an exception that allowed the Ontario government to refuse pension benefits to same-sex spouses.²⁷⁷ The court held that the complainant's only recourse was a *Charter* challenge to that provision. Because adequate notice of the Constitutional question had not been given the Crown, the court did not permit counsel to address the applicability of s.15 of the *Charter*.

(b) Special Programs/Affirmative Action

The Court of Appeal has released an important decision in *Ontario Human Rights Commission v Ontario*.²⁷⁸ The appellant, Mr. Roberts, had been denied funding for a prosthetic device under the Ministry of Health's Assistive Devices Program. The program was limited to those under 23 years of age. Mr. Roberts was 73 years old. A board of inquiry found that the age restriction did constitute *prima facie* discrimination under s. 1 of the *Human Rights Code*. However, the board held that it was saved by section 14(1) of the *Code* which exempted "special programs" from scrutiny under the *Code*.²⁷⁹ The board held that "special programs" which are protected by s. 14, do not have to incorporate all disadvantaged groups equally within their terms of reference.

The Divisional Court upheld this decision in a terse ruling.²⁸⁰ In reversing the decision of the Divisional Court the majority of the Court of Appeal held that s.14 was designed to protect affirmative action programs and had two purposes: "to assist disadvantaged persons to achieve or attempt to achieve equal opportunity (reduce disadvantage) and to contribute to the elimination of the infringement of rights under Part I (eliminate disadvantage)".²⁸¹ The majority also

277. Section 25(2) provides:

- 278. (1994), 19 O.R. (3d) 387 (C.A.).
- 279. Section 14 states:

14 (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

- 280. (1991), 14 C.H.R.R., D/1 (Ont. Div. Ct.).
- 281. Supra, note 278 at 398.

^{276.} Ontario Blue Cross v Ontario (Human Rights Commission) [1994] O.J. No. 903, Crt File No. 543/93 (unreported).

²⁵⁽²⁾ The right under section 5 to equal treatment with respect to employment without discrimination because of age, sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act* and the regulations thereunder.

referred to the "dual purpose" of s.14 as "protection of affirmative action programs and promotion of substantive equality".²⁸²

The Ministry of Health had argued that, once the criteria of *bona fides* and design were met, a special program was protected from any further review under the *Code*. The majority held that to promote substantive equality special programs should be immunized against review on the basis of formal equality, and that this was the purpose of the provision. However, to interpret the provision as exempting special programs from review in all circumstances would not be in accord with the promotion of substantive equality. Thus

...exclusion of an individual from a program designed to respond to needs that individual does not have, does not constitute reviewable discrimination. This case does not involve a challenge to the...ADP program by a member from a historically privileged group or from a disadvantaged person whose disability the program was not designed to benefit. Consequently, the exemptive purpose of s. 14(1) is not invoked.

We are concerned in this case with a discriminatory refusal of assistance to a person with the specific disability that special program was designed to assist.²⁸³

The court also rejected the Ministry's argument that special programs implemented by the Crown are exempt from review, by reason of section 14(5) of the *Code*.²⁸⁴ The court pointed out that this provision only prevented the Commission from inquiring into and making a declaratory order in respect of the Crown's special programs, a process which it may undertake in respect of private sector programs. There was no prohibition against the Commission appointing a board of inquiry in respect of a Crown special program.²⁸⁵

The court also adopted the appellant's argument on the standard of review: that "there must be a rational connection between the enumerated ground of discrimination and the purpose of a special program in order for the discrimination to be tolerated".²⁸⁶ The evidence showed, and the respondent conceded, that there was no rational connection between the age restriction in the Assistive Devices Program and the disadvantage the program seeks to alleviate. The Court issued

- 285. Supra, note 278 at 403-404.
- 286. Ibid. at 404, 406.

^{282.} Ibid. at 400.

^{283.} Ibid. at 401.

^{284.} Section 14(5) of the *Code* provides:
14(5) Subsection (2) does not apply to a special program implemented by the
S Crown or an agency of the Crown.

an order striking out the age restriction, and allowing the matter to be remitted to the board of inquiry in respect of any other remedies requested.²⁸⁷

(c) Use of the Human Rights Code in Civil Actions

In last year's article, we noted that advocates who are considering a Charter discrimination argument in a particular poverty law case should also consider making a discrimination argument under federal or provincial human rights legislation. Such an argument was successful in Re Mercedes Homes Inc. and Grace.288 In that case, the Ontario Court (General Division) proceeded with a landlord and tenant application based on the Code. The tenants had been harassed by a guest of another tenant because they were gay. They gave notice of early termination and moved out before the expiry of their lease, and commenced an application for an abatement. The application was based on a breach of the implied covenant of quiet enjoyment and an express covenant in the lease. They also based their claim on the landlord's obligations under the Ontario Human Rights Code. Since the tenants had also filed a complaint under the Code, there was an application to stay the landlord and tenant action until the human rights complaint was dealt with. The application was refused, with the court taking judicial notice that human rights complaints are now subject to lengthy delays. There court found that there was a breach of both the express covenant in the lease and of the tenants' rights under the Code. The court also held that there was no provision in the Landlord and Tenant Act that exempted that statute from the primacy of the Code.

(d) The Employment Equity Act, 1993²⁸⁹

Although this Act received Royal Assent on 14 December, 1993, it has not yet been proclaimed.

The Act will impose an obligation on affected employers to do a systematic review of their employment practices for the purposes specified in the Act. The purpose of the Act is to promote the representation of qualified aboriginal people, people with disabilities, members of racial minorities and women in the workplace to a level that is consistent with their presence in the population of the geographic area. The focus of the Act is on barrier removal and the identification of the need for positive measures. The Act will be "phased in" in a way similar to the schedule that obtained under the Pay Equity Act.

^{287.} Ibid. at 408.

^{288. [1993]} O.J. No. 2610 (O.C.J.) [unreported].

^{289.} S.O. 1993, ch.35

To date, no employers have been given information on the nature or demographics of their geographic areas, and therefore they lack essential information needed to formulate employment equity goals. Once the government has provided this information, employers will be expected to do the type of survey of staff composition mandated by the *Act*, and to compare the results of that survey to the demographic data for the area. The next steps are a review of employment systems to identify barriers that currently discourage the employment or promotion of those groups that are underrepresented, and the identification of positive measures that will make the workforce more representative. A valid employment equity plan cannot be created without consultation with employees. The Regulation under the *Act*, which sets out the definition of geographical areas and the requirements for how staff surveys, employment systems reviews, and plan creation are to be done, is still in draft form.

(e) The Ontarians with Disabilities Act

On May 31, 1994, NDP MPP Gary Malkowski tabled Bill 168, the *Ontarians* with Disabilities Act, as a Private Member's Bill. The Bill states that persons with disabilities should have equal access to post-secondary education, transportation, access to government publications, communication with government, and training programs. With respect to post-secondary education and transportation, the Bill requires institutions and municipalities to implement plans for increased access. The Bill further provides for regulations to deal with subjects including goals and timetables for improved access. Enforcement of the rights set out in Bill 168 is to be by complaints to the Human Rights Commission.

(f) The Equality Rights Statute Law Amendment Act, 1994

Bill 167, the *Equality Rights Statute Law Amendment Act, 1994* was introduced in the Ontario Legislature in May of 1994. The Bill was meant to ensure that "all common-law couples, regardless of their sex, will enjoy equal rights in Ontario".²⁹⁰ The Bill amended, directly or indirectly, over 70 statutes, addressing *inter alia* family support obligations, the ability to create contracts for the sharing of domestic property, wills, employment benefits, adoption of children by same-sex couples and substitute decision-making. However, despite clear indications from our higher courts that discrimination on the ground of sexual orientation offends the *Charter*,²⁹¹ the Bill was defeated on second reading.

^{290.} Ontario, Legislative Assembly, Official Report of Debates (Hansard), (19 May 1994) at 6453-6454.

^{291.} See for example *Haig and Birch v A.G. Canada* (1992), 9 O.R. (3d) 495 (Ont. C.A.), and the remarks of the Chief Justice and Justice La Forest in *Canada (Attorney General) v. Mossop* (1993), 149 N.R. 1 (S.C.C.).

E. CONCLUSION

At the close of this year's article, we are reminded of the saying (whether it be a blessing or a curse) "may you live in interesting times". Clearly 1995 will be a watershed year for social policy in this country. With so many of the programs discussed above under review, advocates and the people they assist will have an opportunity to bring their experiences to bear on the reform process.

In this sense, the coming year holds out the promise of hope; hope that the policy which evolves from this process will truly serve the needs of the growing number of low income people in this country. However, the year also holds out the prospect of fear; fear that it is fiscal and economic policy which will ultimately be the trump card in the social policy debate.

It is likely that this may be the last article of this type which we write. The conclusion of the social policy debate could result in an entirely new (and improved?) unemployment insurance system, different funding and eligibility criteria for social assistance and universal disability insurance for the province of Ontario. We may no longer be able write about distinct poverty law programs. It will require continued dedication and effort on the part of poverty law advocates, both in the province and nationwide, to ensure that what replaces the *ancien régime* is not the Reign of Terror.