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POVERTY LAW IN ONTARIO: THE YEAR IN REVIEW

Randall Ellsworth and Ian Morrison*

RÉSUMÉ

Cet article fait la revue des événements de l'année dernière dans certains domaines de la défense juridique des personnes à faible revenu, y compris l'aide sociale, les accidents du travail, l'assurance-chômage et le Régime de pensions du Canada. Nous nous concentrons sur la réforme de la loi, sur les litiges et sur la pertinence de ces activités aux yeux de ceux et celles qui pratiquent ce domaine du droit. Nous considérons les effets de la récession et les actes des gouvernements fédéral et provincial dans les secteurs sélectionnés. Nous font l'analyse de la jurisprudence de la Cour suprême du Canada au sujet du droit des tribunaux administratifs de statuer sur la *Charte canadienne des droits et libertés*. Nous examinons ce sujet dans le contexte des tribunaux et des secteurs juridiques sélectionnés.

INTRODUCTION

This article is intended to provide an overview of developments of the past year in some of the key areas of poverty law practice in Ontario. As always, it is difficult to draw the boundaries for an examination of this sort. The low income community is obviously not affected only by the areas of law usually meant when the phrase "poverty law" is invoked; indeed, the labels we use to divide our substantive law interests are generally more important for the bureaucratic structures of the system within which we practice than for clients.

* Copyright © 1991 Randall Ellsworth and Ian Morrison. Randall Ellsworth is a research lawyer with the Clinic Resource Office of the Ontario Legal Plan (CRO). Ian Morrison is a research lawyer and Executive Director of the CRO. The CRO has been in operation since January 1991; it provides legal research and resource and training materials to practitioners in Ontario community legal clinics. The CRO's mandate is currently restricted to income maintenance law as it applies to the low income community in Ontario served by community clinics. The authors would like to acknowledge the assistance of the many people both within and outside the clinic system who provided information for this article.

Nevertheless, time and space constraints have meant that some limits had to be placed on the scope of this project. The article will therefore focus specifically on advocacy issues in respect of the federal and provincial income maintenance programs—social assistance, workers' compensation, unemployment insurance and Canada Pensions—which make up the core of income maintenance practice in the Ontario community legal clinic system. While it must be admitted that the most important factor in this decision was the particular knowledge and expertise of the authors, we also think it appropriate, at a time when so many Ontario citizens are unemployed or facing unemployment due to the recession and the consequences of the so-called "restructuring" of the economy, to focus on the problems of income maintenance—and what advocates have done and may be able to do in this area.

We would also like to note that we have focussed on litigation issues, although we discuss important legislative developments and law reform issues as well. Again, we were compelled by time and space constraints to limit what could be covered here. We would not want to be taken as minimizing in any way the community development and organization work which is such an important part of the work of the mandate of the community clinic movement. We hope that if there are to be future articles on this topic in the *Journal*, it will be possible to cover this area more fully.

1. POVERTY LAW AND THE CHARTER

There have been a number of *Charter* cases of relevance to poverty law practice in the past year.¹ Substantive decisions in the areas covered by this article will be considered in the discussions of those areas. However, there have also been a number of cases with general practice implications. These are discussed in this section.

JURISDICTION OF ADMINISTRATIVE TRIBUNALS

In a trilogy of cases the Supreme Court of Canada was faced with delineating the scope of an administrative tribunal's jurisdiction to hear and determine *Charter* issues. In *Douglas/Kwantlen Faculty Assn. v. Douglas College*,² *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*³ and *Tetreault-*

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1. *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*].
 2. *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94 (S.C.C.).
 3. *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, (June 6, 1991), File No. 21675 (S.C.C.) [unreported].

*Gadoury v. Canada (Canada Employment And Immigration Commission)*⁴ the Court attempted (though never unanimously) to provide some general guidelines to what has been a perplexing problem. The resolution of some of these issues is of particular relevance to poverty law practitioners, much of whose practice consists of appearances before such administrative tribunals where *Charter* arguments can be raised.

At issue in *Douglas College*, the first of the cases decided by the Supreme Court, was whether a provision of a collective agreement between an agent of the Crown (the college) and the faculty association which required the employees to retire at age 65 violated the equality provisions of the *Charter*. A preliminary issue, and the one the Supreme Court was called upon to address, was the jurisdiction of an arbitration board appointed by the parties to resolve this grievance disputing the constitutionality of the provision. However, while the parties in *Douglas College* raised the jurisdictional issue in the terms of section 24(1) of the *Charter*,⁵ and section 52 of the *Constitution Act, 1982*,⁶ the Court only answered the question in the context of section 52(1).

Mr. Justice La Forest wrote for the majority⁷ and he drew a distinction between the exercise of the power conferred by section 24(1) of the *Charter* and the duty of a tribunal to apply the Constitution in the course of performing its statutory mandate. After having thoroughly reviewed the somewhat conflicting caselaw of the lower courts on this issue, he reasoned that where a tribunal “was engaged in performing what it was by law empowered to do ... it was entitled not only to construe the relevant legislation but to determine whether that legislation was validly enacted”.⁸ Noting that a tribunal must

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4. *Tetreault-Gadoury v. Canada (Canada Employment and Immigration Commission)*, (June 6, 1991), File No. 21222 (S.C.C.) [unreported].
 5. That section provides:
24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
 6. That section provides:
52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
 7. Dickson C.J.C. and Gonthier J. concurring, Sopinka J. and Cory J. concurring on this point.
 8. *Supra*, note 1 at 117.

respect the 'supreme law of the land', La Forest J. concluded that if a tribunal finds a law it is called upon to apply to be invalid, it is bound to treat it as having no force or effect.⁹

However, La Forest J. also noted that where a tribunal is called upon to determine whether *Charter* rights have been infringed or to grant a remedy under section 24(1) of the *Charter*, then the tribunal's power is limited to exercising its statutory mandate. He stated:

... the jurisdiction of a statutory tribunal must be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought. In the exercise of that jurisdiction, it can in the exercise of its mandate find a statute invalid under the *Charter*.¹⁰

In the result in *Douglas College*, La Forest J. found the arbitration board could, pursuant to its mandate, consider the constitutional validity of the provision in the collective agreement. It had jurisdiction over the parties by virtue of the collective agreement and the *Labour Code*.¹¹ As well, the board had jurisdiction over the subject matter because under section 98 of the *Labour Code*, the board was empowered to interpret and apply any Act intended to regulate employment, which La Forest J. concluded included the *Charter*. Finally, the *Labour Code* also provided the authority for the arbitrator to grant the appropriate remedies in the case.

To some extent, La Forest J. clarified his reasoning in *Douglas College* in the subsequent case of *Cuddy Chicks*. In that case the union had filed an application for certification with the Ontario Labour Relations Board. However, the company argued that the *Labour Relations Act*¹² specifically excluded the employees in question. In response the union argued that if the Act did not apply to the employees then the Act infringed their freedom of association and equality rights under the *Charter*. At the instance of the company the issue before the Supreme Court was whether the Board did have the jurisdiction to determine the constitutional validity of its enabling statute.

9. *Ibid.*

10. *Ibid.* at 118.

11. R.S.B.C. 1979, c. 212.

12. R.S.O. 1980, c. 228.

Two passages from Mr. Justice La Forest's majority judgment¹³ are sufficient to outline the analysis in such cases. He reiterated the Court's holding in *Douglas College* stating:

... this Court articulated the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid.¹⁴

He stated further,

... s. 52(1) does not specify which bodies may consider and rule on *Charter* questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought.¹⁵

In both *Douglas College* and *Cuddy Chicks* the court gave consideration to the reasons which have been expounded for and against imposing the jurisdiction to make *Charter* findings upon administrative tribunals.¹⁶ It was noted that to do so may actually be contrary to one of the prime reasons for the existence of such tribunals; speedy and inexpensive decision-making. As well, not all tribunals are of the same calibre (i.e., they include both lawyers and/or lay persons) and there is no guarantee of the independence of the decision-makers. More importantly it was feared that the surfeit of evidence which would be necessary in most *Charter* cases could not be marshalled by most litigants who appeared before administrative tribunals, resulting in an incomplete or deficient record before both the tribunal and the courts on review. Finally, the absence of any role for the Attorney-General before most tribunals was seen as an obstacle to any effective *Charter* resolution.

However, Mr. Justice La Forest noted that tribunals had in the past been involved in determining constitutional questions, especially in the context of their own jurisdictions, and he saw no reason why they should not be able to consider other constitutional issues. His primary concern was that the Con-

13. Lamer C.J.C., Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ, concurring.

14. *Supra*, note 2 at 9.

15. *Ibid.* at 9-10.

16. For the discussion of these issues see *Douglas College*, *supra*, note 1 at 121-126 and *Cuddy Chicks*, *supra*, note 2 at 11-13.

stitution must be respected and that tribunals should not be called upon to apply unconstitutional legislation. Tribunals which are called upon to make governmental decisions should focus upon the values enshrined in the *Charter*. He reasoned also that there could be an advantage in making use of the expertise of the various tribunals in compiling the record to be used in constitutional interpretation. As was stated in *Cuddy Chicks* "the ability of the decision-maker to analyze competing policy concerns is critical".¹⁷ Finally, he thought that it was an advantage to a person to have the matter raised at an early stage in the regulatory process, without having to resort to the more costly and time consuming court process.

Mr. Justice LaForest made two very important caveats to his reasoning in *Douglas College* and *Cuddy Chicks*. The first was that no curial deference would be displayed to a tribunal with respect to its constitutional decisions, as they are not there acting within the limits of their expertise.¹⁸ The second was that a tribunal could not give a formal declaration of invalidity. Instead the tribunal

... simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy only exercisable by the superior courts, the ruling of the Board on a *Charter* issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises.¹⁹

The final case of the Supreme Court's trilogy is *Tetreault-Gadoury*, a case which is of interest to poverty law advocates for several reasons. For present purposes, the focus will be on the Court's jurisdictional analysis²⁰ and its extension of the principles outlined in *Douglas College* and *Cuddy Chicks*.

In *Tetreault-Gadoury* the respondent had lost her job shortly after turning 65 years of age. She had applied for benefits under the *Unemployment Insurance Act*²¹ but, because the Act at that time prohibited the payment of benefits to persons over the age of 65, she had been denied. She appealed this decision to the Board of Referees arguing that the section of the Act which prohibited the payment of such benefits violated her equality rights under the *Charter*.

17. *Supra*, note 2 at 11.

18. *Supra*, note 1 at 126; *supra*, note 2 at 11.

19. *Supra*, note 2 at 12.

20. For a discussion of this case in the unemployment insurance context, see UNEMPLOYMENT INSURANCE—Caselaw Developments below.

21. S.C. 1970-71-72, c. 48 (now R.S.C. 1985, c. U-1).

The Board of Referees upheld the decision but did not make a decision on the constitutional question. The respondent elected to challenge this decision directly in the Federal Court of Appeal rather than appealing to an umpire. The Court of Appeal found that the Act did violate the *Charter* and that the Board of Referees had erred in not considering the constitutional arguments. The Employment and Immigration Commission appealed the Court's decision to the Supreme Court of Canada. The preliminary issue before the Supreme Court was whether the Board of Referees had jurisdiction to consider the constitutional validity of a section of the Act.

In *Tetreault-Gadoury* the Court for the first time was faced with deciding whether an administrative tribunal which had not been expressly provided with the power to consider all relevant law could apply the law. It was again simply examining the application of section 52(1) of the *Constitution Act, 1982*. As section 52(1) had been held not to specifically confer jurisdiction to make *Charter* findings, the Court was obliged to examine the mandate given to the Board of Referees by the legislature in order to determine whether they had the power to determine a legislative provision to be unconstitutional. Mr. Justice La Forest, writing again for the majority,²² noted that administrative tribunals are created by the state, and the state had the ability to confer or restrict the authority of the tribunal to consider constitutional matters. If the state had conferred the power, then that would be the end of the issue. If not then the Court would be obliged to consider "other factors" in order to make its determination.²³

The Court began its analysis by examining the Act, and La Forest J. observed that the power to consider all relevant law, including the power to declare a provision of the Act or Regulations *ultra vires*, had been expressly conferred upon the umpire. He found it significant that the Board of Referees had not been provided with this power and he concluded that it had not been an oversight on the part of the legislature. While noting that the Board of Referees was not without the practical capability to consider *Charter* issues, La Forest J. held that the scheme of the Act "contemplates that the constitutional question should more appropriately have been presented to the umpire, on appeal, rather than to the Board itself".²⁴ Therefore, applying the test

22. Lamer C.J.C., Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ concurring.

23. *Supra*, note 3 at 10.

24. *Ibid.* at 11-12.

outlined in *Douglas College* and *Cuddy Chicks* he found that while the Board had jurisdiction over the parties, it did not have jurisdiction over the subject matter (the determination of the respondent's eligibility for benefits and the constitutionality of the section of the Act) nor the remedy (which would have required the Board to ignore the section of the Act which it had found unconstitutional, a determination it had no jurisdiction to make).²⁵

Mr. Justice La Forest also considered some of the practical advantages which he had canvassed in *Douglas College* and *Cuddy Chicks*. He felt that many of these advantages were still present in the unemployment insurance context, even though the power to make *Charter* findings did not rest with the tribunal of original jurisdiction. Of particular importance to him was the ability of an applicant to appeal to the umpire, who possessed the requisite jurisdiction. An applicant was not required to seek redress in the regular court process; a constitutional challenge could still be made within a relatively accessible and inexpensive administrative proceeding. As such, the advantage of having the constitutional issue dealt with within the administrative process was preserved.²⁶

La Forest J. also believed that the unemployment insurance scheme still allowed for the specialized expertise of the administrative tribunal to be reflected in the consideration of *Charter* issues. The umpire's broad experience with the legislation would provide valuable insight to the determination of the *Charter* issue. As well, the fact that the umpire was further up the administrative decision-making ladder (and whose functions were more adjudicative in nature than the Commission's) would render him or her in a better position to resolve difficult constitutional questions.²⁷

While the relevance of *Tetreault-Gadoury* is obvious to poverty law practitioners, at least in the context of *Charter* challenges to the unemployment insurance scheme, there may also be important lessons to be gleaned from the entire trilogy. Most tribunals have rendered at least partial judgments on their jurisdiction to make *Charter* findings and these may need to be reconsidered in light of the Supreme Court's holdings.

25. *Ibid.* at 12.

26. *Ibid.* at 12-13.

27. *Ibid.* at 13.

Under section 84(1) of the *Canada Pension Plan*²⁸ the Review Committee and the Pension Appeals Board are provided with the authority to determine any question of law or fact as to whether any benefit is payable to a person. The Pension Appeals Board has long held that it has the jurisdiction to make *Charter* determinations. In *Minister of National Health and Welfare v. Kilpatrick* the Board concluded that it,

... must apply the law in its constituent statute: therein lies its mandate. It must, therefore, determine what the law is. In the course of that process of determination, the Board acquires the duty to decide whether that law was validly enacted or whether it may be inoperative as offending the *Charter*.²⁹

Under the test outlined in the trilogy it would seem that the Review Committee also has the authority to consider *Charter* issues. Clearly the Committee would have jurisdiction over the parties by virtue of the appeal procedures outlined in the Plan. It would also seem the Committee would have jurisdiction over the subject matter (which would be a determination of the applicant's eligibility and the determination of whether the section impugned violated the *Charter*) and the remedy (which would be to treat the section "as of no force or effect" if found to be unconstitutional).

The Worker's Compensation Appeals Tribunal (WCAT) has also had occasion to deal with the extent of its own jurisdiction to consider *Charter* issues, although this was also prior to any of the decisions in the Supreme Court of Canada's trilogy. In *Decision No. 534/90*³⁰ the WCAT was concerned with a bank teller who was appealing a decision of the Worker's Compensation Board denying her benefits for an accident. The Board had found that the teller was not employed in an industry covered by Part I of the *Worker's Compensation Act*.³¹ Part I only applied to industries mentioned in Schedules 1 and 2 of the Act, and banking was not mentioned in either Schedule. The teller argued that the exclusion of bank employees violated her right to security of the person and equality under the *Charter*. The preliminary issue was whether the Tribunal had the jurisdiction to determine the constitutional question.

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

29. (1989), Canadian Employment Benefits and Pension Guide Reports (C.E.B. & P.G.R.) # 8578 at 6073. For other cases in which the Pension Appeals Board has considered *Charter* issues, see the section on **THE CANADA PENSION PLAN**, below.

30. (1990), 17 W.C.A.T.R. 187.

31. R.S.O. 1980, c. 539, as amended.

Based on the weight of judicial authority and on the principles of statutory interpretation the Tribunal concluded that it was not a 'court of competent jurisdiction' for the purposes of section 24(1) of the *Charter*.³² It went on to conclude, based on what it considered the binding authority of the Ontario Court of Appeal's decision in *Cuddy Chicks*, that under the aegis of section 52(1) of the *Constitution Act, 1982* it could hear and determine constitutional issues and treat any provisions of the Act which are inconsistent with the Constitution as of no force or effect.³³

It would seem that under the test subsequently outlined in the trilogy, the jurisdictional issue may not be so clear. Under section 86g(1) of the Act the WCAT has the jurisdiction to determine any matter or issue expressly conferred upon it. Pursuant to section 86l(1) the WCAT may confirm, vary, reverse or uphold any decision of the Board. Under section 75(1) of the Act the Board has the jurisdiction to "determine all matters and questions arising under this Part". Arguably, this power would extend to deciding whether a section of the Act is unconstitutional. It would seem then that the Board itself would have the jurisdiction to determine *Charter* issues; it would have jurisdiction over the parties, the subject matter and the remedy.³⁴ The Tribunal's jurisdiction would then flow from the operation of sections 86g and 86l.

Finally, the Social Assistance Review Board of Ontario (SARB) has also considered its jurisdiction in constitutional matters. In *SARB # G-12-08-21*³⁵ the Board was considering whether a section of the Regulations under the *General Welfare Assistance Act*³⁶ violated the applicant's *Charter* rights and first had to decide whether it had the jurisdiction to make such a determina-

32. *Supra*, note 29 at 217.

33. *Ibid.* at 217-218.

34. Interestingly, the Tribunal in *Decision No. 534/90I* recognized that there might be a problem with the remedy requested in that case. The employee wanted the Tribunal to simply treat as "of no force and effect" that section of the Act which restricted the Act's application only to those industries mentioned in the Schedules. As the Tribunal noted, this would produce the anomalous situation of making the worker eligible for benefits, but would not provide a corresponding obligation on the part of the employer to contribute to the accident fund (*supra*, note 29 at 202). Advocates contemplating a *Charter* challenge to any poverty law scheme are well advised to examine the effect of the remedy requested upon the scheme as a whole to determine if it is in fact a feasible solution.

35. (January 14, 1991; McCormick, Douglas, Roy).

36. R.S.O. 1980, c. 188; R.R.O. 1980, Reg. 441.

tion. The Board concluded that it was not a “court of competent jurisdiction” under section 24(1) and went on to consider its section 52 jurisdiction.

SARB also felt bound to follow the reasoning in the Ontario Court of Appeal’s decision in *Cuddy Chicks*, where the majority of the Court had relied on the provision in the *Labour Relations Act* that the board was to consider all questions of law and fact. SARB recognized that it did not have the duty to determine all questions of fact or law before it but

... the Board in carrying out its review of decisions of the Director or an Administrator *must* necessarily determine all relevant questions of fact. Similarly, it must determine questions of law to interpret the statute. No tribunal can operate in a vacuum.³⁷

SARB concluded that it had jurisdiction under section 52 to decide whether sections of the Act or Regulations were inconsistent with the Constitution and were therefore of no force and effect.³⁸ It should be noted that as at the time of writing the Director of Income Maintenance had filed a Notice of Judicial Review in this case, but no date had been scheduled for the application to be heard.

Charter jurisdiction in the social assistance context may be the most difficult to resolve in terms of the Supreme Court’s trilogy. The Director or the Welfare Administrator are not given the express power to determine questions of fact and law, and SARB’s jurisdiction is limited to affirming or rescinding the decision, making any other decision which the Director or Welfare Administrator could have made or referring the matter back to the decision-maker for reconsideration in accordance with such directions as SARB considers proper.³⁹ It is arguable that SARB may lack jurisdiction over both the subject matter and the remedy (similar to the conclusion reached by the Supreme Court with respect to the Board of Referees in *Tetreault-Gadoury*). It may be that advocates in this area will be required to argue that “other factors” make it appropriate for SARB to have *Charter* jurisdiction. Arguments on this principle would likely be framed in the context of La Forest J.’s discussion of the practical advantages and disadvantages of having tribunals make constitutional decisions. As has been noted these factors include the speed and relative inexpense of an administrative proceeding, the

37. *Supra*, note 34 at 25.

38. *Ibid.* at 28.

39. *Family Benefits Act*, R.S.O. 1980, c. 151, s.14(6).

calibre of the tribunal's members, their ability to compile a complete evidentiary record, the relevance of their expertise in the substantive area of the law and, perhaps most importantly, the concern for imposing unconstitutional legislation upon applicants in the administrative process.

STANDING IN TEST CASE LITIGATION

The law of standing has come under renewed scrutiny due to the *Charter*. Because of the limited resources of both clients and their advocates in poverty law practice, issues of standing and the ability to bring test cases on behalf of representative groups is particularly important.

Judgment was rendered May 31, 1991, in an interesting standing case in this context. At issue in *Federated Anti-Poverty Groups of B.C. v. A.G.(B.C.)*⁴⁰ were provisions of the B.C. social assistance legislation⁴¹ which vested exclusively in the Crown the rights of an individual on assistance to claim maintenance on his or her own behalf. One of the plaintiffs in the action challenging these provisions was the Federated Anti-Poverty Groups of B.C., ("FAPG") an incorporated body whose members included both low income individuals and groups. They sought declarations that the legislation violated ss.7 and 15 of the *Charter*. Parrett J. held that FAPG was not capable of asserting claims under these sections on its own because as a corporation it was not capable of enjoying *Charter* rights. He nevertheless concluded that FAPG could bring its action as a public interest litigant, noting that:

In matters involving constitutional litigation it is necessary for the Court to obtain a full and complete presentation of the issues before it. A declaration by the Court with respect to this legislation has the possibility of impacting [*sic*] a large class of individuals who are subject to the legislation. Further, because of the particular concerns which FAPG has or represents, it is in an especially advantageous and perhaps unique position to illuminate some aspect or facet of the case which ought to be considered by the Court in reaching its decision but which, but for the intervention by the FAPG, might not receive any attention or prominence given the somewhat narrower interest of the immediate parties to the dispute.

The *Federated Anti-Poverty Groups* decision is not a radical departure from recent trends in the law of standing in *Charter* cases, but it is nevertheless an interesting application of these principles to the social assistance area. The problems of bringing and maintaining actions are particularly acute in this area

40. Vancouver Registry # A893060 (B.C.S.C.) [unreported].

41. Part 2 of the *Guaranteed Income for Need Act*, R.S.B.C. 1979, c.158.

and without organized support for individual litigants the likelihood of being able to carry major cases through to resolution often seems small indeed.

2. SOCIAL ASSISTANCE

It is appropriate to begin our review of substantive poverty law issues with social assistance, the social welfare program of last resort and an inescapable component of poverty law practice.

It has been an eventful year for social assistance advocacy in Ontario. The surprise September 1990 election victory of the New Democratic Party fuelled immediate hopes amongst advocates and other activists that improvements to social assistance would become a government priority; hopes bolstered by post-victory pledges of the new government. However, hope turned to alarm with the deepening of the recession and the federal government's determined efforts to slash social spending—or at least to transfer the burden of social spending to the provinces. It is against this background that the legal developments of the past year must be analyzed. Any discussion of social assistance advocacy must be seen in the context of the impact of the recession on social assistance delivery.

SOCIAL ASSISTANCE AND THE RECESSION

The past year saw increases in social assistance claims which staggered the system—at the time of writing roughly one million Ontario residents are social assistance beneficiaries.⁴² The largest growth in social assistance claims came from “unemployed employables”—people able to work but unable to find employment. In some municipalities the general welfare caseloads more than doubled in the space of a year.⁴³ People whose unemployment insurance benefits (UI) ended or who were denied UI under the changes to the UI program⁴⁴ joined those from the marginal labour force who had never been able to find sufficient employment to qualify for UI. Under Ontario's antiquated two-tier social assistance system, much of the burden

42. According to statistics released by the Ministry of Community and Social Services in the spring of 1991, the total combined number of FBA and GWA beneficiaries increased 37% between March 1990 and March 1991. (All social assistance statistics provided hereafter are from the Ministry of Community and Social Services unless otherwise noted.)

43. According to Ministry statistics, the caseload of “unemployed employables” rose 96% from March 1990 to March 1991. This is a provincial average; the figures vary considerably for individual municipalities depending on the local employment situation.

44. For further discussion of unemployment insurance, see Unemployment Insurance below.

of rising caseloads fell on local governments.⁴⁵ Although municipalities pay only a small portion of total social assistance costs,⁴⁶ these must be provided for out of limited municipal tax bases. Thus, the most economically depressed areas are likely to have both the highest welfare loads and the least ability to pay.

Increased social assistance costs were also a severe additional burden to the provincial treasury, already facing a record deficit to cover recession-fighting spending initiatives.⁴⁷ The province received a further blow from the Supreme Court of Canada decision in *Reference Re The Canada Assistance Plan (B.C.)*⁴⁸. That case was a challenge brought by British Columbia to the federal government's unilateral decision in 1990 to "cap" its previous 50-50 social assistance cost sharing arrangement under the *Canada Assistance Plan*⁴⁹ (CAP), an arrangement in existence since enactment of CAP in 1967.⁵⁰ Although the *Plan* itself provided that its terms could only be altered with provincial agreement or cancelled by prescribed notice, the Supreme Court unanimously held that Parliament was not constrained from altering its financial commitments and that the so-called doctrine of "legitimate expectations" could not be invoked to give a province an effective veto over valid federal legislation.

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45. The two main pieces of social assistance legislation in Ontario are the *Family Benefits Act*, R.S.O. 1980 c.151 [hereinafter FBA] and the *General Welfare Assistance Act*, R.S.O. 1980 c.188 [hereinafter GWA]. The FBA is administered by the Province and aimed at persons likely to require long term assistance (sole support parents, the disabled and the aged). The GWA is administered by municipalities and is aimed at those in temporary need (unemployed employables and people with time limited disabilities). GWA is also in effect a transition program for those awaiting eligibility decisions under the FBA.
 46. General welfare assistance paid by municipalities is subsidized 80% by the province (R.R.O. 1980, Reg. 441, s.11(6)); the subsidy becomes 90% where the number of persons on assistance exceeds 4% of the municipal population for four months (R.R.O. 1980, Reg. 441, s.9(6)). The Province pays 50% of welfare administration costs as well (R.R.O. 1980, Reg. 441 s.21).
 47. Total expenditures on both GWA and FBA (excluding municipal expenditures) increased by 39% from fiscal year 1989/90 to 1990/91 and were projected in March to increase an additional 41% to 1991/92.
 48. (15 August 1991) File# 22017 (S.C.C.) [unreported].
 49. R.S.C. 1985, c. C-1.
 50. *Government Expenditures Restraint Act*, S.C. 1991, c. 9.

The increased caseload and attendant costs has obviously had many consequences—none positive—for social assistance recipients and their advocates. Municipalities in particular have resorted to increasingly harsh measures to reduce social assistance cost. For example, provision of many essential items for recipients of assistance under both the FBA and GWA is discretionary.⁵¹ Many municipalities have cut back or abandoned discretionary spending altogether, leading to great hardship for recipients.⁵²

Social assistance administration has inevitably suffered as well.

Delays in processing FBA claims, which have always been unconscionable, increased. In some places the waiting period for welfare assistance, normally a matter of days or less, became weeks, even though the requirement for a home visit as a precondition to granting assistance was abandoned and additional provincial money was committed to enable new welfare intake workers to be hired. In other municipalities the additional pressures have merely compounded the problems of incompetent administration and abusive treatment of applicants and recipients with which social assistance advocates are unhappily all too familiar.⁵³

An ominous result of the recession and attendant costs has been the predictable but nevertheless disturbing backlash against social assistance recipients.

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51. These include such items as rent and utility deposits, special medical costs including special diets and pregnancy supplements, heating costs and personal needs allowances for residents of institutions (GWA s.7(2), 13; R.R.O. 1980, Reg.441 s.15). Unfortunately, special assistance is cost shared at a lower rate (50%) than general assistance (R.R.O. 1980, Reg.441 s.15(5)).
 52. Even the smallest cuts can cause great hardship to the destitute. For example, one municipality discontinued provision of bus passes to FB disability recipients, with the result that some psychiatric patients could no longer attend day programs at out-patient clinics.
 53. As general welfare assistance is municipally delivered, delivery standards vary widely across the province. While some municipalities provide model delivery services under difficult conditions, welfare delivery continues to be a disgrace in other areas: eg., see *SARB J-01-06-11* (May 23, 1991; Roy, Renault) [High school student arbitrarily terminated by local council two months before completion of year - Appellant required to appear before Council where she was reduced to tears by verbal attacks]; *SARB J-06-27-02* (January 21, 1991; Morrish, Rangan) [Assistance refused because of moral disapproval of appellant's living in motel with her boyfriend even though irrelevant to eligibility - Part-time welfare worker did not have time to learn "the rules"]; *SARB J-02-23-11* (March 1, 1991; Novac, Quenneville) [Welfare administrator refused to pay eligible recipient apparently on grounds that monthly entitlement was too small to bother with].

The past year saw a rise in the number of high profile media and political attacks on social assistance, including the usual claims that welfare recipients live "high on the hog" at the expense of "ordinary" working people, that abuse of the system was rampant and that social assistance undermined the competitiveness of the economy and threatened economic recovery.⁵⁴

At the time of writing an end to the recession is still not clearly in sight, nor have we seen all the consequences of the current "restructuring" of the Ontario economy. Even if the economy does start an upturn in the fall of 1991, this will not mean an immediate drop in social assistance caseloads and in fact caseloads will almost certainly continue to rise for some time - the best that can be hoped for in the short run is a decline in the rate of growth. Social assistance will continue to be a crucial component of poverty law practice in Ontario.

THE LAW REFORM PROCESS

A major focal point for social assistance advocacy in the past year was the law reform process. By the time of the New Democratic Party's election victory, many social assistance activists thought the law reform process envisaged in *Transitions*, the 1988 report of the Social Assistance Review Committee, to be moribund. However, the new government made several public statements of its commitment to social assistance reform. The year began with revitalized hopes for meaningful changes in social assistance administration.

The new government's initial actions regarding social assistance reform were encouraging. Steps had already been taken by the predecessor Liberal administration to establish a legislative review process including consultation with stakeholders outside the government. A Minister's Advisory Group on New Social Assistance had already been struck and several "project teams" instituted to consider different areas of law reform. The project teams included social assistance activists, advocates from community legal clinics and consumers. The government announced that the legislative review process would be "fast tracked" and expanded its commitment to community

54. The highest profile examples were a series of inflammatory articles published by columnist Diane Francis in the *Toronto Sun* and *Financial Post*. However, many more examples could be drawn from local and regional media around the province. Although some efforts were made by the Ministry of Community and Social Services to correct the serious factual inaccuracies of the Francis articles and there was some sympathetic press coverage in response, the damage done by such media activities which reinforce popular welfare mythology can probably never be undone.

consultation, including consultation with social assistance recipients throughout the province.

The first public results of the law reform process came in March 1991 with the release of *Back On Track*, the interim report of the Minister's Advisory Group. The Report—its title deliberately chosen to imply a return to the impetus for reform which began with *Transitions*—made some 88 recommendations for immediate change. The government responded to *Back On Track* in May 1991. Although the government declined to commit itself to the whole package, it did accept a significant number of the recommendations and two sets of changes were announced, with timetables of August 1, 1991 and October 1, 1991 respectively. While the reform package contained too many elements to be discussed in detail here, it is particularly interesting to note that the government specifically committed itself to establishing a "Council of Consumers" made up of social assistance recipients to monitor the system and provide advice to the government.⁵⁵ The government remains publicly committed to a complete overhaul of Ontario social assistance legislation, with the final report of the Advisory Group expected in early 1992.

Despite the apparently sincere commitment of the government to social assistance reform, the future of the reform process is still in question. Initially, the main concern of some of the non-governmental participants in the process was resistance from the social assistance bureaucracy—a group with no particular demonstrated commitment to fundamental change of the system—but the focus of concern has now shifted to the effects of the recession and the "cap on CAP". Major new spending initiatives are clearly out of the question in the near future, as further expansion of the provincial deficit seems politically impossible. Severe as the recession has been, however, the "cap on CAP" may ultimately have even more far-reaching consequences for social assistance in Ontario—indeed, rumours have circulated that Bill C-69 was in part a response by the federal government to Ontario's proposed expansion of social assistance spending. Since 1967, provincial social assistance planning has proceeded on the assumption that provincial expenditures would be cost-shared dollar for dollar by federal funds. This change in the rules of the game is likely to have some chilling effect on long term planning.

It is too soon to predict what this will all mean for the law reform process in the long run. New legislation is still at least a couple of years in the future, at which

55. Statement to the Ontario Legislature of Hon. Zanana Akande, Minister of Community and Social Services, May 21, 1991.

time both the Ontario economy and the federal political scene may look very different. We may close this section by noting that even if the federal attacks on social spending continue to affect the province's capacity to commit to major new social assistance expenditures, there is still much room for improvement to make the social assistance system operate more efficiently, humanely and fairly, and to show greater respect to those who must rely on it.

THE SOCIAL ASSISTANCE REVIEW BOARD

It has been a challenging year for the Social Assistance Review Board (SARB) and social assistance advocacy. The quality of the Board in all respects has improved dramatically over the past four years. However, the Board has been under considerable pressure recently. The combination of increased social assistance caseloads and better information to clients about appeal rights meant a substantial increase in appeals. The Board's capacity to deal with these pressures was affected by the fact that it was short-staffed for much of the year due to illnesses and resignations. Particularly important was the resignation in the fall of 1990 of the Chair, Joanne Campbell, who since her appointment in 1987 had presided over the dramatic changes at the Board. Apart from losing an experienced administrator, Ms. Campbell's departure meant that the hiring of new Board members could not be completed until a new Chair was appointed.

The most notable effect of the increased pressures on the Board has been increased delays in dealing with appeals. SARB has been plagued for some time with chronic backlogs and delays at almost all stages of the appeals process. Improvements were being made in these areas prior to this year but progress seems to have been halted and even reversed. Advocates have encountered ever-increasing delays at most stages of the process, including scheduling of hearings, release of decisions and—perhaps most troubling—in processing requests for interim assistance pending hearings. It hardly need be said that delay is perhaps the single greatest concern in the social benefit program of last resort.

Another disappointment specifically for advocates is that—despite repeated statements that publication of decisions and the hiring of a full time publications editor are imminent—SARB's decisions are still not publicly available. Without access to the Board's decisions, full analysis of SARB's jurisprudence and the trends of social assistance adjudication is still impossible.⁵⁶

56. The Clinic Resource Office has begun collecting and indexing SARB decisions to make them available to clinic practitioners (the largest group of social assistance advocates before the Board). Reference to SARB decisions in this article are from the

Hopefully the Board will soon be able to start making inroads on its problems. A new Chair has been appointed and took up her duties in July 1991. New board members have been appointed and will, when their training is complete (sometime in the fall of 1991) bring the Board back up to full strength. While the number of appeals obviously will not drop in the immediate future, this should leave the Board better equipped to handle its caseload. In the longer run it seems that the future directions of the Board will be closely tied to developments in the law reform process. It seems probable at this stage that SARB's jurisdiction will be significantly expanded under any new social assistance legislation, which will in turn inevitably have implications for the role of the Board in social assistance administration

PARTICULAR ISSUES

The rest of this review of social assistance will consider some issues in social assistance advocacy in Ontario and their developments over the past year, with a particular focus on the results of litigation activities or likely areas for future litigation.

Social Assistance and the Charter

Social assistance programs in Canada have for the most part still not been subject to serious *Charter* scrutiny. Despite speculation from the time of the *Charter's* enactment, there has still not been a judicial decision on the fundamental issue of whether the right to life, liberty and security of the person, protected by s.7 of the *Charter*, includes some degree of protection of the right to receive subsistence level benefits.⁵⁷ Furthermore, surprisingly few equality arguments have been made to date in this context. There have been no judicial decisions in Ontario at all dealing with s.15 of the *Charter*.⁵⁸

CRO collection. However, there are many decisions to which the CRO does not have access because the appellant was not represented by a clinic practitioner.

57. Although s.7 arguments have been raised in a number of social assistance cases of which we are aware, the cases have all been disposed of without decision on the point or are still pending. The situation with respect to s.7 has not changed significantly from that discussed in Morrison, "Poverty Law and The Charter: The Year In Review" (1990), 6 J.L. & Social Pol'y 1.
58. There have been no significant *Charter* decisions from SARB dealing with Ontario social assistance legislation, at least none that have become public knowledge, although the Board has given superficial consideration to *Charter* issues in a few cases. It is interesting to note, though, that the Board did in one decision use the *Charter* to overrule a Ministry policy. The Board held that in the peculiar circumstances of the case strict application of the policy would violate s.15: *SARB H-12-30-14* (December 24, 1990; Draper, Quenneville).

Indeed, the only *Charter* decision of any significance this year dealing with social assistance would appear to be the decision in the *Federated Anti-Poverty Groups of B.C.* case.⁵⁹ Although a final decision has not yet been rendered in the case, in the course of denying a motion to strike out the statement of claim as disclosing no significant cause of action, Parrett J. made the following comments about the plaintiffs' equality argument:

Applying the test under s.15 of the Charter, it is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s.15. It may be reasonably inferred that because recipients of public assistance generally lack substantial political influence, they comprise "those groups in society to whose needs and wishes elected officials have no apparent interest in attending".⁶⁰

The decision in the *FAPG* case is likely to spur more litigation activity around equality issues in social assistance. All social assistance schemes in Canada are built around distinctions based on age, sex, disability and a host of other grounds (such as marital and family status) which are arguably prohibited grounds of discrimination under s.15 of the *Charter*. In addition, the administration of almost all social assistance schemes results in adverse impact along lines of sex, disability and family status even where there is no express legislative distinction. Despite the many barriers to *Charter* litigation in the poverty law arena, it is unlikely that this state of affairs will continue unchallenged indefinitely.

Single Mothers and the Obligation to Pursue Support

Sole support parents, who are almost all women, make up the largest—and, due to women's particularly disadvantaged position in the economic order⁶¹—fastest growing category of FBA recipients.⁶² The rules governing assistance to sole

59. *Supra*, note 39.

60. *Ibid.* at 29-30 of the unreported judgment.

61. About 85% of all single parent families are headed by women. Nationally, some 75% of never-married single mothers live in poverty; while 52% of all other single mothers live in poverty. On average, single mothers live at 61% of the Statistics Canada poverty line. Source: National Council on Welfare, *Women and Poverty Revisited* (1990: Supply and Services Canada).

62. According to Ministry statistics, the number of sole support parents receiving FB assistance increased by 25.7% from March 1990 to March 1991, jumping ahead of disabled and permanently unemployable recipients, previously the largest recipient group. These figures count only recipients; the number of beneficiaries of sole support parent allowances (i.e., children) is much larger.

support parents have always been of concern to recipients and their advocates and have given rise to some of the most difficult legal problems in this area.

One such problem area is the notorious “man in the house” rule. Eligibility for sole support parent benefits requires that the recipient not live with a “spouse”. This was one of the most litigated issues under the FBA until the definition of spouse was amended in 1987 to exclude persons with no support obligation towards the applicant or her children. While the amendments have improved the situation somewhat, they have by no means eliminated all the problems in this area. Applicants have been disqualified because they continued to share a residence with a person deemed to be their spouse under the legislation, even though they lived separate and apart in the same premises and were unable to separate for economic reasons. More disturbingly, applicants have been disqualified because they were unable to rid themselves of an abusive spouse.⁶³ More problems are likely to arise now that an effective three-year moratorium on pursuit of “common law” relationships has ended.⁶⁴ It seems likely that various aspects of these rules will at some point be subject to challenge under the *Charter of Rights*.

Another problem area is the obligation imposed on sole support mothers to seek spousal and/or child support from the fathers of their children. Ontario’s FBA regulations require an applicant or recipient for assistance to make “reasonable efforts” to realize any financial resources to which she or her dependants might be entitled.⁶⁵ If she fails to do so, benefits may be refused altogether or her allowance may be reduced by the amount of income deemed to be available,⁶⁶ even though neither the mother nor her children receive any benefit from any such support actually obtained.⁶⁷

63. *SARBJ-06-06-03* (Nov. 29, 1990; Draper, Heath).

64. The social assistance definition of “spouse” excludes persons who cohabit in a conjugal relationship where there is no other support obligation for a period of three years: R.R.O. 1980, Reg. 318 s.1(1)(d)(iv), 1(1b). As a practical matter this rule, which came into effect November 1, 1987, meant that such relationships were granted a three year moratorium.

65. The same obligation exists for GWA recipients (R.R.O. 1980, Reg. 441 s.3(3)) but primarily affects FB recipients. The discussion here applies to both Acts.

66. R.R.O. 1980, Reg. 318 (FBA) s.8; R.R.O. 1980, Reg. 441 (GWA) s.3(3) imposes the same duty on welfare applicants and recipients.

67. Support payments are deducted dollar for dollar from any social assistance entitlement: R.R.O. 1980, Reg. 318 (FBA) s.13(2).

Women often have good reasons for not wanting to pursue support. In many cases they or their children have suffered physical, emotional or sexual abuse from the father. In some cases he may threaten to seek custody in response to a support application. In other cases the parties may have reached an agreement acceptable to themselves which the father threatens to repudiate if the woman reopens the support issue—some men have quit jobs rather than pay increased support. In yet other cases the circumstances of conception are such that it would be intensely embarrassing or traumatic for the woman to pursue support. Although the FBA administration has developed policies setting out when the obligation to seek support may be waived,⁶⁸ it is clear that the spirit of the policy is often not followed.⁶⁹ One study has suggested that racial bias has been a factor in the application of the policy.⁷⁰

It is also interesting to note that the FB Policy does not require applicants or recipients to pursue other forms of support to which they may be entitled under the *Family Law Act*. Furthermore, the policy does not contemplate exceptions in some of the fact situations described above.

SARB has generally been sensitive in recent years to these issues (at least to the extent the legislative framework allows) but the judicial response has been disappointing. In *Campbell v. Director of Income Maintenance*⁷¹, the first Ontario appellate decision to directly consider the application of s.8, the Divisional Court summarily dismissed an appeal without any real analysis of the obligation imposed by the section or the issues raised by its application. *Campbell* is, unfortunately, typical of judicial insensitivity to the complexity and sensitivity of the issues involved in the obligation to seek support.⁷²

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68. It is significant that the policy guidelines dealing with support issues is one of the longest sections of the FB Policy Manual.
69. For example, in one case a woman who left a relationship in which she had suffered verbal and physical abuse from a man who had also had serious outbursts of dangerous violence against other people, was told by a Family Benefits worker that the obligation to seek support would not be waived because her relationship did not exceed the “normal average level of abuse”: *SARB G-10-20-09* (May 1, 1989).
70. Kathleen Lawrence, “Systemic Discrimination: Regulation 8—Family Benefits Act: Policy of Reasonable Efforts To Obtain Financial Resources” (1990), 6 *Journal of Law and Social Pol’y* 57.
71. (1990), 71 D.L.R.(4th) 765 (Ont.Div.Ct.).
72. See also *S.v.K.*; *The Queen In Right of Ontario, Intervenant* (1986), 55 O.R.(2d) 111 (Dist.Ct.); *Re Clifton and Director of Income Maintenance* (1985), 53 O.R.(2d) 33 (Div.Ct.).

Ontario courts may be forced to pay closer attention to these issues in the future. In the *Federated Anti-Poverty Groups* case,⁷³ the British Columbia Supreme Court dismissed an application to strike out the statement of claim in a case challenging the constitutionality of that province's support obligation rules *Charter*. The plaintiffs are arguing in part that the support obligation rules discriminate against poor women, in violation of s.15 of the *Charter*, and that compelling pursuit of support in some cases deprives women of liberty and security of the person in contravention of s.7 of the *Charter*. While the specific legislative provisions under consideration in that action are different from s.8, success in that case would nevertheless be very important for the status of the obligation to seek support in Ontario law.

Disability Benefits and the FBA

The other main group of FBA recipients are people eligible as either "disabled" or "permanently unemployable" persons. Eligibility appeals on these issues make up more than half the FBA appeals to SARB. One reason for the high volume of appeals has been what is in effect a stand-off between SARB and the Ministry. SARB has ruled in many cases that the test for "permanently unemployable" status is not a purely medical test but involves a consideration of sociological factors as well; that is, the Board will not only consider the nature of the disability but its effect on employability in light of such factors as the applicant's age, education and work history.⁷⁴

Although the success rate of appeals from negative decisions has clearly indicated that the Ministry does not apply the same test, it was not until this year that the Ministry decided to challenge the Board in court. However (apparently in response to another *Back on Track* recommendation), the Ministry withdrew its appeal before hearing and announced that new eligibility guidelines would be formulated in this area. This development will potentially affect many people in Ontario—most social assistance advocates are aware of people who are effectively unemployable for all practical purposes but who have had to subsist for years on the lower general welfare rates because they were not accepted by the Ministry as eligible for FBA.

Trust Funds and Social Assistance Entitlement

After several years of litigation both at SARB and the Divisional Court, the Ministry appears finally to have accepted that a trust fund cannot be treated

73. *Supra*, note 39.

74. SARB G-02-12-06R (July 30, 1990; Draper, Nikias, Ching).

as a liquid asset in the hands of the recipient where payment out of the fund is wholly discretionary in the hands of the trustee. While this proposition was clearly judicially established in 1987,⁷⁵ the Ministry persisted in appealing matters involving discretionary trusts. However, the Ministry was defeated in a series of SARB and Divisional Court appeals this year and the law would appear to be settled.⁷⁶

Although this rule applies to both FBA and GWA recipients, it has a particular impact on those, especially disabled people, who will be on social assistance for lengthy periods. The families of such persons can now make at least some provision for special health, social and educational needs of such recipients without running the risk that the recipient will be disqualified from benefits or required to exhaust all the funds on day-to-day living expenses. At present, however, they can only do so by creating a wholly discretionary trust such that the recipient has no control over the decision to make payments out. It is interesting to note that *Back on Track* recommended that regulations be changed to allow disabled recipients to receive small or moderate estates without losing their allowances. The Ministry has announced that this recommendation will be implemented as of October 1, 1991.

Eligibility of Unemployed Employables

The largest category of general welfare recipients are the so-called "unemployed employables". There were some interesting developments with respect to this class in the past year.

The first development is with respect to the grounds for eligibility. The definition of "person in need" for the purposes of the GWA refers to a person whose need arises from an "inability to obtain regular employment".⁷⁷ Many municipalities have interpreted this to mean that a person who is self-employed or who is employed full time is categorically ineligible for welfare regardless of the level of their earnings. One consequence of this interpretation was that in about half the municipalities in Ontario, the so-called "working poor" have not been considered eligible for income supplementation from

75. *Re Director of Income Maintenance Branch and Henson* (1987), 26 O.A.C. 332 (Div.Ct.), aff'd by C.A. Sept. 22, 1989 without reasons.

76. See *Re Director of Income Maintenance Branch and Homan* (November 9, 1990) File # 959/88 (Ont.Div.Ct.) [unreported endorsement]; *Re Walker and Director of Income Maintenance Branch* (May 6, 1991) File # 116/89 (Ont.Div.Ct.) [unreported endorsement].

77. R.R.O. 1980, Reg. 441 s.1(2)(a).

general welfare, even though the regulatory scheme clearly contemplates this.⁷⁸ However, SARB ruled this year, in a case involving a self-employed commission salesperson, that the term “regular employment” in this context had to be interpreted consistently with the purpose of the Act, and meant that the employment must pay more than the basic welfare entitlement.⁷⁹ The Ministry has announced, again in response to a Back On Track recommendation, that GWA regulations will be amended October 1, 1991, to clarify that the working poor are eligible for income supplementation.

A second interesting development was with respect to the rule pursuant to which an employable applicant for general welfare may be disqualified if he or she has “any history of unemployment” for reasons within his or her control.⁸⁰ This rule received judicial attention this year in *Mario Laviolette v. United Counties of Prescott and Russell*.⁸¹ The appellant had been working in Quebec in a location about 200 km. from his home town but left his job to return to his home town when his girlfriend became pregnant. He had been promised a job upon his return but the job was not available on the date promised and the appellant was forced to apply for welfare. He was refused on the grounds that his unemployment was within his control. Southey J., for the majority of the Court, held that “the mere fact that the applicant left his last job voluntarily is not in itself a sufficient basis for finding him to be ineligible for assistance”. He held in effect that where an applicant’s decision to quit a job was reasonable under all the circumstances and was not for the purpose of obtaining welfare, the disqualification should not apply.

The Ministry has announced, as part of the *Back On Track* implementation, that the regulation relating to job search requirements and history of unemployment will be repealed and replaced soon. Whether *Laviolette* will have any ongoing impact will depend on whether these changes are in fact made and the precise wording of any new provisions.

Welfare and Students

As noted above, a consequence of the recession has been increasing pressure on discretionary programs administered by municipalities under the *General Welfare Assistance Act*. One major area of discretion is the provision of

78. R.R.O. 1980, Reg. 441 s.13(2)1.

79. *SARB J-05-03-08* (Jan. 14, 1991; Rangan, Rotter).

80. R.R.O. 1980, Reg. 441 s.3(1)(b)(iii).

81. (1991), 44 O.A.C. 255 (Div.Ct.).

welfare to students who, if employable, require the permission of the welfare administrator to attend school full time.

The issue in *Shelley Kerr v. Metropolitan Toronto*,⁸² as posed by Archie Campbell J. writing for the unanimous Court, was: "Do Ontario's welfare regulations prevent a twenty year old woman, who went back to school to finish grade 12, from getting welfare because she worked for a few months as a clerk?" In its decision in the case, SARB had taken a position put forward by neither of the parties and held that a person who was in fact able to find a job was not a "person in need" as defined in the legislation and was therefore categorically ineligible for consideration as a student. The Court reversed the Board's decision, finding that an applicant for student welfare needed only to be financially eligible for assistance and not necessarily unable to find any kind of employment.

Campbell J. began his reasons observing that the Social Assistance Review Board "was faced with the difficult task of interpreting a complex and confusing regulatory scheme" and concluded by expressing "the greatest sympathy for the Board in its attempt to interpret a Kafkaesque regulation so complex and ambiguous that it becomes a lawyer's nightmare". He noted in passing that the word "eligible"—interpretation of which was central to the case—was used in the regulation "in a circular, undefined, random, tautological and inconsistent sense".

The decision in *Kerr*—if it stands⁸³—is significant beyond the particular issue at stake. After stating that "The first principle of interpretation is that the social welfare regime established by the Act and regulations should be interpreted largely and liberally", Campbell J. went on to discuss the "social, economic and administrative context of the regulations", relying heavily on the description of the workings of the social assistance system in *Transitions*. He held that it made good economic sense to spend money now to reduce the likelihood of future long term welfare dependency, and held that the student welfare rules should be interpreted with this principle in mind.

82. (1991) 4 O.R. (3d) 430 (Div.Ct.). The Appellant was represented by Scarborough Community Legal Services, Toronto.

83. As of the date of writing an application for leave to appeal to the Ontario Court of Appeal has been made. However, the municipality has not yet made a final decision whether to pursue or drop the application for leave.

Kerr is one of the most important judicial attempts to analyze the nature and purpose of the GWA. As such, it is certain to be relied on heavily by advocates for its interpretive guidance. However, with respect to student welfare specifically, a much greater area of potential conflict is left untouched by the decision. *Kerr* says only that the welfare administrator *may* grant benefits to a would-be student, not that he *must* do so. There is a double discretion involved in deciding whether a student shall be granted welfare. The welfare administrator must approve both the course the student wishes to attend and the individual applicant's attendance at it. SARB may legally substitute its own opinion for that of the welfare administrator with respect to both aspects of this discretion.⁸⁴

SARB's power to overrule an administrator's discretion is relatively unproblematical with respect to a decision whether a given individual should be allowed to attend an approved course. However, it is a much more difficult question whether it is appropriate for a Board of this nature, which hears cases *de novo* and not as a review tribunal, to decide what courses should be authorized by a municipality when—for better or worse—the legislature has made this a matter of local judgment.⁸⁵ This goes to the fundamental issue, almost entirely avoided to date, of the Board's role in supervising the administration of social assistance in a two-tiered delivery system. This is just one of the many issues that will have to be addressed in planning the role of SARB under new social assistance legislation.

Fighting the Backlash

The final litigation issue to be considered here is also one of the most disturbing. As noted above, one development of the recession has been a political backlash against welfare recipients. This backlash has been translated into direct action in one municipality. On September 5, 1990, the Hastings County Council passed a resolution—accompanied by reiteration of all the usual tired myths of rampant welfare abuse and fraud⁸⁶—requiring their welfare administrator to provide the Council with the names of all welfare recipients in the municipality.

84. FBA s.14(6)(b); incorporated by reference to GW appeals, GWA s.11.

85. The Board itself has been inconsistent on this issue to date.

86. J. Evans, "Reeve complains about welfare system" [*Bancroft*] *Intelligencer* (9 June 1990); J. Evans, "County Councillors can get list of welfare recipients", *ibid.* (6 Sept. 1990); J. Rafter, "Councillors to personally check welfare roles" *The [Kingston] Whig-Standard* (17 Sept. 1990).

Before the list could be released to the Council an application was brought by a welfare recipient, to prevent the resolution being given effect.⁸⁷ It was argued in part that release of the names, in view of the proposed use of the list, would violate the *Charter* rights of all welfare recipients in the area. An interim injunction was granted to the applicant on November 21, 1990, prohibiting release of the names and the matter was adjourned *sine die*, the judge apparently believing that the issue would become moot upon the coming into force of the *Municipal Freedom of Information Act*⁸⁸ on January 1, 1991. This belief unfortunately proved wrong. On August 1, 1991, the Information and Privacy Commission gave its opinion that the Council was entitled to see the list.⁸⁹ The opinion relied on provisions of the legislation which provide that information may be disclosed within an institution to persons who needed the information to carry out their duties.⁹⁰ Disappointingly, in light of the comments attending the passing of the Council resolution, the Commission did not challenge or even question the Council's assertion that it did in fact have a "need to know" in respect of the information.

At the time of writing the Municipality has indicated its intention of carrying out the resolution and the judicial proceedings have been reinstated. This appears to be the first time in Ontario that the protection of the judicial system has been sought against this kind of attack on social assistance recipients and there is much at stake in the proceedings. Although the Ministry of Community and Social Services has expressed its unhappiness with the Council's decision, it has as yet made no attempt to impose a legislative solution. A number of groups have indicated their intention to seek intervenor status when the case next returns to court, including the National Anti-Poverty Organization, the Ontario Coalition Against Poverty and the Canadian Civil Liberties Association. If their challenge fails, it seems likely that other municipalities will quickly follow suit on what would clearly be a popular political measure in some parts of the province.

87. The applicant is represented by Hastings and Prince Edward Legal Services, Belleville.

88. S.O. 1989, c.63.

89. Information and Privacy Commission Investigation Report; Investigation Number 191-09M.

90. *Municipal Freedom of Information and Protection of Privacy Act, 1989*, s.32(d); O.Reg. 517/90, s.3(2).

3. WORKER'S COMPENSATION

Workers' compensation is consistently one of the largest areas of poverty law practice in Ontario and, in some ways, has been the most contentious. Most recently, the amendments to the *Worker's Compensation Act* (which became effective on January 1, 1990) have given rise to whole new areas of concern to advocates in this field. These amendments, and the policy development process and litigation which they have engendered, have been played out against the backdrop of an injured worker community and its advocates who have felt little but distrust for a Board which they feel rarely, if ever, is representative of their interests.

NEW APPOINTMENTS

There have been a few administrative changes at the Worker's Compensation Board which, it is hoped, will augur well for the future. Odoardo Di Santo (formerly Director of the Office of the Worker Advisor) was appointed the new Chairperson, replacing Dr. Robert Elgie. Brian King (past Chairman of the Saskatchewan WCB and Chairperson of the Manitoba WCB) was appointed Vice-Chairperson and Director of Administration, replacing Mr. Alan Wolfson. It is hoped that these appointments will lead to some important changes in the administration at the Board and will provide some opportunities for injured worker's advocates to have input into its policies and direction.

Two new vice-chairs have been created on the corporate Board, one representing employers and the other representing the labour side. The two new vice-chairs will sit on Board and staff committees and it is hoped they will play an influential role in the External Consultation process. It is anticipated that this will allow for greater participation by these two constituencies in policy decision-making and application and in the administration of the Act.

Perhaps most importantly, both from a symbolic and practical point of view, Steve Mantis has been appointed as a member of the Board of Directors. Mr. Mantis has been active in the Thunder Bay and District Injured Worker's Group and the March of Dimes and is the first injured worker to sit on the Board of Directors.

POLICY PROPOSALS

Two policy proposals which are of interest to the injured worker community and its advocates will be going through the public hearings process, beginning in the late fall of 1991.

*Entitlement in the Ontario Worker's Compensation System*⁹¹

This Proposal followed a somewhat tortuous route to its present stage, beginning with the Board's release of a discussion paper on "work-relatedness" in May of 1990. Subsequently, due to a number of different factors, the Board embarked on a full policy review of the entitlement issue. The Policy Proposal reviews each element of the entitlement issue and proposes a general approach to determining when a worker has suffered a work-related injury by accident for which he or she should be compensated under the *Worker's Compensation Act*. Section 3(1) of the Act provides:

3(1) Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the worker and the worker's dependants are entitled to benefits in the manner and to the extent provided under this Act.

The Proposal addresses each of the following subjects fairly thoroughly (though not always satisfactorily):

- the definition of "injury by accident";
- the operation of the presumption clause;
- the "in the course of employment" requirement;
- the "arising out of employment" requirement; and
- "serious and wilful misconduct" under the Act.

The Proposal does present some positive changes. It is recommended that the definition of "accident" in section 1(1)(a) of the Act should not be construed as an exhaustive definition, and that the general concept of accident should be conveyed by the term "accident" itself, with the enumerated types of accidents in the section to be considered special situations which would not otherwise fall within that meaning.⁹² This approach would include the 'unanticipated results of normal occurrences' within the general category of accidents, and would make the presumption clause applicable in such cases.

91. Ontario Worker's Compensation Board, *Entitlement in the Ontario Worker's Compensation System*, (Policy Proposal), May 8, 1991.

92. *Supra*, note 90 at 6. Section 1(1)(a) of the Act provides that the term "accident" includes (i) a wilful and intentional act, not being the act of the worker, (ii) a chance event occasioned by a physical or natural cause, and (iii) disablement arising out of and in the course of employment.

The Proposal also recommends some specific rules for dealing with some of the most difficult (though recurring) fact situations in the determination of whether an accident arose “in the course of employment”. Many of these rules involve a search for a ‘strong employment connection’ between the activity and the employment before a positive conclusion can be reached.⁹³

Some of the recommendations in the Proposal clearly have negative implications, and if adopted, could result in more litigation around these issues. One such recommendation concerns the use of “serious and wilful misconduct” on the part of the worker as a bar to the receipt of benefits under the Act, unless the injury results in death or serious impairment.⁹⁴ Presently the Board interprets ‘serious impairment’ as resulting in six weeks or more of temporary total disability or permanent disability. The recommendation suggests that ‘serious impairment’ (juxtaposed as it is with the term ‘death’) should “connote a physical or functional loss or abnormality that is very grave”.⁹⁵

Another point of concern in the Policy Proposal is the test recommended for determining the “arising out of the course of employment” requirement. The test requires the employment to be a ‘significant contributing factor’, which the Proposal suggests necessitates “both an employment connection and a medical connection between the injury and the employment”.⁹⁶ The employment connection would be established ‘if there was something about the work which contributed to the injury by accident’.⁹⁷ The medical connection will be established by first determining whether the injury sustained is ‘compatible’ with the employment contribution and, if so, ‘whether the evidence indicates that it is more likely than not that the injury would have developed or occurred in any event in more or less the same timeframe without the employment contribution’.⁹⁸ Even with ‘helpful’ Board guidelines, it is not hard to imagine that Board decision-makers will have a difficult time applying this test accurately or consistently, which will, of course be to the detriment of injured workers.

93. *Ibid.* note 90 at Appendix D.

94. *Supra*, note 30, s. 3(7).

95. *Supra*, note 90, Appendix G at 3.

96. *Supra*, note 90 at 9.

97. *Ibid.*

98. *Ibid.*

*Compensation for Disablements Arising from Workplace Stressors*⁹⁹

This Policy Proposal also followed an overland route before arriving at the public hearings stage. Policy development commenced in January of 1989 when the Board issued a discussion paper on the issue. An options paper was issued in July, 1989, a modified policy proposal followed in April, 1990 and finally this Policy Proposal in May of 1991.

Workplace stressors are generally viewed as employment conditions which span a period of time, and claims for compensation on this basis are adjudicated under the 'disablement' section of the definition of accident. In these cases it is necessary to determine whether the worker has a 'diagnosed psychological disorder' and whether that disorder arose out of and in the course of employment.

As evidence of this first point the Board recommends that the diagnosis be in terms similar to those used in the *DSM-III-R*.¹⁰⁰ However, in recognition of the worker community's view that a psychiatrist is not the only medical practitioner capable of making such a diagnosis, the Board accepted that "the actual process of diagnosis may be made by any qualified medical practitioner". However, in the Policy Proposal the "actual process of diagnosis" is not outlined.¹⁰¹

The Board also recommends that the test for causation be the same as the one proposed in the Proposal on Entitlement; that is, whether the employment was a 'significant contributing factor' to the development of the psychological disorder. Many of the concerns discussed above are therefore relevant to a discussion of this Proposal.

One further point for concern with this Proposal is the section dealing with "Non-work-related stressors". It is argued that evidence concerning non-work-related stressors may be relevant to establishing the medical connection between the disorder and the employment. Leaving aside the possible invasiveness of such an inquiry,¹⁰² there is no discussion as to how the evidence

99. Ontario Worker's Compensation Board, *Compensation for Disablements Arising from Workplace Stressors*, (Policy Proposal), May 8, 1991.

100. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed.), Washington D.C., 1987.

101. *Supra*, note 98 at 7.

102. The Board intends to "restrict its investigation to essential information and balance the worker's right to privacy with the necessities of adjudication". *Supra*, note 98 at 9.

of such non-work-related stressors is to be balanced. As one commentator has noted on this issue:

If the claim would have been allowed in the absence of personal stressors, because there were sufficient workplace stressors to cause the disability, why should it be denied just because there are additional personal stressors in a worker's life?¹⁰³

WORKER'S COMPENSATION APPEALS TRIBUNAL DECISIONS

Stress Claims

While the Board was engaged in its policy process with respect to stress claims, the Tribunal was involved in mapping out its own approach. In *Decision 684/89*¹⁰⁴ the Tribunal provided some indication of its thinking on some of the complex issues involved in stress claims. On the issue of the evidence necessary to establish a psychiatric disorder, it concluded that while a psychiatrist's report may be the most desirable, it was not a necessary prerequisite. Evidence was to be assessed on its reliability, content and analysis, and not on the arbitrary standard of who produced it.¹⁰⁵ The Tribunal however, did conclude that it was necessary to consider non-work-related stressors in order to determine entitlement, rejecting arguments that such an inquiry was an invasion of the worker's privacy.¹⁰⁶ Finally, the Tribunal recognized (but did not decide between) the two standards of proof which other panels had been applying in determining stress claims; whether the workplace stressor must be the 'predominant factor' in the development of the disability, or whether it need only be a 'significant contributing factor'.¹⁰⁷

103. D. Craig, "Compensating For Disablements Arising From Workplace Stressors' - A Review of the Policy Proposal of the Worker's Compensation Board", (December, 1990) *The I.A.V.G.O. Reporting Service*, Vol. 5, No. 1, 25 at 32.

104. (1990), 16 W.C.A.T.R. 132. This was the second successful stress claim at the WCAT. The first was *Decision No. 145/89* (1990), 14 W.C.A.T.R. 74.

105. *Supra*, note 103 at 148.

106. *Ibid.* at 148-149. In this regard the Tribunal considered the worker's financial status, the fact that she was entering menopause and the commencement of her new romantic relationship.

107. *Ibid.* at 149. The panel reasoned that as there were no significant non-work stressors in the worker's life, it was not necessary to decide what standard of proof to apply. This of course raises the issue as to what is a 'significant' non-work stressor.

The Tribunal allowed its third stress claim in *Decision No. 952/89*.¹⁰⁸ What is significant about this decision is that for the first time the Tribunal was considering an acute onset of disability rather than a gradual onset which had been at issue in other cases.

The worker had become extremely agitated and immediately left his place of employment after being confronted by his foreman about his work habits and his personal hygiene. He subsequently missed six weeks of work due to alleged acute depression for which he had sought medical attention. The panel noted that while the worker had a predisposition to being depressed he had overcome such episodes on his own without medical attention, and this non-work related factor should not be a bar to his entitlement. On the basis of the evidence provided only by the family doctor, a community health nurse and the worker the Tribunal concluded that the worker was disabled by a stress related condition which was related to his employment.¹⁰⁹

Precedent in Tribunal Proceedings

Of interest to all advocates appearing before the Tribunal is *Decision No. 1004/89*.¹¹⁰ In that case the panel had to consider the weight which should be attached to previous decisions on the same issue made by other panels of the Tribunal. The Tribunal concluded that the answer was largely dependent upon the facts and issues in the case at hand. Each panel had an obligation to consider every argument presented, but also to be advised of prior decisions of the Tribunal on the same or similar issues. In the context of jurisdictional issues, the Tribunal concluded that it was required to get the answer right so as to avoid deciding upon issues over which it had no jurisdiction. On issues concerning interpretation of the Act, it found that there was merit in following precedent so as to insure consistency in decision-making and predictability for the parties. Finally, the Tribunal added:

... whenever a subsequent panel substantially departs from the reasoning of a previous decision, there is an obligation to address and explain the reasons for such a departure.¹¹¹

108. (January 23, 1991; Bigras, Ronson, Cook).

109. *Ibid.* at 8-9.

110. (1990), 17 W.C.A.T.R. 64.

111. *Ibid.* at 76.

The "Whole Person" Approach

The Tribunal has on several occasions adopted the "whole person" approach as a method of overcoming the shortcomings of the Rating Schedule. The Schedule is used by the Board in permanent disability awards to assess the impairment of earning capacity due to the nature and degree of the worker's injury. The percentages set out in the Schedule represent the Board's estimate of the impairment of earning capacity in an average worker when the disability exists alone in a healthy body.¹¹² However, the Rating Schedule is sometimes not effective for assessing the impact of multiple disabilities upon a worker. In such cases the "whole person" approach may be useful for advocates in attempting to secure an award which most realistically reflects the level of disability of the worker.

Perhaps the clearest discussion of this principle is in *Decision No. 427/90*.¹¹³ There the panel noted that a combination of disabilities may impact upon the worker to a greater degree than the total awards for each individual disability would reflect, due to the interrelationship of the various disabilities. When "the additive approach fails to reflect the full extent of the worker's compensable disability *as a whole person*, then an enhancement factor is appropriate".¹¹⁴ In those cases the Tribunal should assess the total, whole person disability of the worker in the context of the 'benchmark injuries' set out in the Rating Schedule to determine where the worker's level of disability fits, and make the award accordingly.¹¹⁵

Obligation to Re-employ

This is the newest area of litigation for advocates working on behalf of injured worker's¹¹⁶ and the Tribunal has already given some consideration to the procedural aspects of this obligation. Section 54b of the Act sets out the

112. For a discussion of the Board's policy see *Decision No. 831/88F* (1990), 16 W.C.A.T.R. 26.

113. (March 27, 1991; Moore, Barbeau, Fox). The worker was represented by the Injured Worker's Consultants legal clinic.

114. *Ibid.* at 17.

115. *Ibid.* For other case where the Tribunal has considered the "whole person" approach, both positively and otherwise, see *Decision No. 495/90* (October 31, 1990; Starkman, Jago, McCombie), *Decision No. 565/89* (1990), 16 W.C.A.T.R. 121, *Decision No. 907/89* (March 27, 1991; Strachan, Ronson, Cook), *Decision No. 79/91* (May 9, 1991; Bigras, Seguin, Beattie) and *Decision No. 522/90* (May 13, 1991; Sigrononi, Jago, Cook).

116. In fact, the first decision of a Reinstatement Branch Officer is dated August 17, 1990.

employer's obligation to re-employ an injured worker.¹¹⁷ It provides, *inter alia*, that the Board must notify the employer of the worker's fitness to return to work, and having been notified, the employer must offer to reinstate the worker or face substantial financial penalties. In *Decision No. 372/91*,¹¹⁸ the Tribunal noted that the intent of the provisions is

... to accomplish swift and effective re-entry of an injured worker to his former work place. They are remedial—intended to address the significant social and economic dilemma of unemployability of injured workers.¹¹⁹

In all such cases the threshold question which must be answered is whether the obligation exists. In *Decision Number 968/90*¹²⁰ the Tribunal stated that section 54b(1) set out three prerequisites, which were:

- (i) the worker must have suffered an injury covered by the Act;
- (ii) the worker must have been unable to work as a result of the injury; and
- (iii) the worker must have been continuously employed by the employer for one year before the accident.¹²¹

If the obligation is found to exist, the Tribunal has stated that it only arises when the Board has *made* its determination regarding the fitness of the worker and *has notified* the employer of the results of that determination. It is not sufficient that the worker has simply returned to work with the accident employer for the obligation to arise.¹²² However, the Tribunal has also noted that the notice required to be given to the employer need not be a "technical, formal document" but should be a "practical and

117. Section 54b(1) provides:

54b(1) The employer of a worker who as a result of an injury has been unable to work and who, on the date of the injury, had been employed continuously for at least one year by the employer shall offer to re-employ the worker in accordance with this section.

118. (July 25, 1991; Newman, Meslin, Lebert). The worker was represented by the Brampton Community Legal Clinic.

119. *Ibid.* at 4.

120. (1991), 17 W.C.A.T.R. 334.

121. *Ibid.* at 346.

122. *Supra*, note 117 at 7-8. One of the issues in that case was whether the employer had terminated the worker before having fulfilled its reinstatement obligation; see section 54b(10).

effective method of communication".¹²³ Oral notice concerning the worker's fitness is suitable to give rise to the employer's obligation. Once the employer has received this notice of fitness, he is obliged to reinstate the worker immediately, even if he disagrees with the Board's determination or intends to appeal the reinstatement. The employer is obliged to 'comply now, appeal later'.¹²⁴

4. UNEMPLOYMENT INSURANCE

AMENDMENTS TO THE UNEMPLOYMENT INSURANCE ACT

Perhaps the single most important event in the unemployment insurance field is that the amendments proposed to the *Unemployment Insurance Act*¹²⁵ by Bill C-21 were finally passed. After a protracted struggle in the Senate most provisions came into effect on November 18, 1990.¹²⁶ The amendments were viewed by advocates as an attempt by the federal government to reduce its deficit, and it is feared that the effect of the amendments will be to increase the caseload of poverty law practitioners, both in the area of unemployment insurance and other poverty law areas.

Federal Government Withdrawal from Funding

The biggest change, and the one most probable to have long term effects, is the withdrawal of the federal government as a contributing partner.¹²⁷ Previously, unemployment insurance had been funded by employer and employee contributions and government contributions from general revenues. The amendments removed the government's funding responsibilities. This may effectively mean that the government will no longer have any vested interest in controlling the scheme. With the entire program funded by employer payrolls, there is a growing fear that employers will now request greater input into its design and greater control over the distribution of unemployment insurance funds, to the (probable?) detriment of those most dependent upon the program.

123. *Supra*, note 119 at 350.

124. *Supra*, note 117 at 9.

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

126. S.C. 1990, c. 40.

127. *Ibid.* s. 52 and 56(3).

Parental Leave Benefits

As a result of the successful arguments made in the *Schacter* case,¹²⁸ the parental leave benefits provided by the Act have been extended to parents of both new-born and adopted children.¹²⁹ However, the benefit period has been reduced from 15 weeks to 10 weeks. The benefit period may be extended to 15 weeks if the child is more than six months old at the time of arrival in the home and a medical practitioner certifies that the child suffers from physical, psychological or emotional conditions requiring an additional period of parental care. As well, the weeks of benefit may now be divided between the parents of the child.

Benefits Payable to Seniors

As a result of the *Tetreault-Gadoury* case¹³⁰ section 19 of the Act, which prohibited the payment of benefits to applicants over the age of 65, was repealed.¹³¹

Definition of "Just Cause" for Leaving Employment

The amendments provide some guidelines for determining whether "just cause" exists for voluntarily leaving an employment. Regard must be had to all the circumstances including the existence of sexual or other harassment, the obligation to follow a spouse or dependent child to another residence, the existence of discrimination under the *Canadian Human Rights Code*, working conditions which constitute a danger to health or safety and the obligation to care for a child.¹³²

Labour Dispute Disentitlement

Prior to the amendments, this section provided that a person was not entitled to benefits if he or she had lost their employment by reason of a stoppage of work until the termination of the stoppage of work.¹³³ To preempt the Federal Court of Appeal's decision in *Caron*¹³⁴ (and the Supreme Court's subsequent

128. *Schacter v. The Queen et al* (1988), 52 D.L.R. (4th) 525 (F.C.T.D.), aff'd., (1990), 66 D.L.R. (4th) 635 (F.C.A.).

129. *Supra*, note 125, s. 11 and 20.

130. *Supra*, note 3. For a discussion of this case, see below.

131. *Supra*, note 125, s. 13.

132. *Supra*, note 125, s. 21.

133. *Supra*, note 124, s. 31.

134. *Caron v. Canada (Employment and Immigration Commission)*, [1989] 1 F.C. 628 (F.C.A.), aff'd (1991), 47 Admin. L. R. 161 (S.C.C.). For a discussion of the Supreme Court of Canada's decision, see below.

affirmation of that decision) a regulation was enacted which deemed a labour dispute to have ended when the work-force and level of production attained 85% of their normal level¹³⁵.

Restricted Benefits Payouts

The new amendments also increase the 'variable entrance requirements', which is the number of weeks that claimants are required to work (based upon the regional rate of unemployment) in order to qualify for benefits. Under the old regime (and depending upon the regional rate of unemployment) a claimant needed 10 to 14 weeks of work to qualify, with the 10 week requirement applying where the regional rate of unemployment was over 9 per cent. Now a claimant will need between 10 and 20 weeks of insurable employment in order to qualify,¹³⁶ with the regional rate of unemployment to which the ten week requirement would apply greatly increased.

As well, the number of weeks for which benefits will be payable is decreased, again based on the number of weeks of insurable employment and the regional rate of unemployment.¹³⁷

Increased Penalties for Claimants

Before the amendments, if a claimant was deemed to have lost his or her job by reason of 'misconduct', or to have left his or her employment 'without just cause' or to have failed to accept 'suitable employment', he or she could be disqualified from receiving benefits for a period of from 1 to 6 weeks. Under the new scheme, the minimum period of disqualification for these same actions is 7 weeks and the maximum period is 12 weeks.¹³⁸ Further, once a disqualified claimant begins to finally receive benefits, the benefit level will be reduced to 50 per cent of his or her average weekly insurable earnings by reason of this disqualification, for a period of time which will be determined by the Commission.¹³⁹

IMPACT OF THE NEW AMENDMENTS

While not all the new amendments to the Act are unwelcome, it is clear they have had and will continue to have an impact on the work done by poverty

135. Unemployment Insurance Regulations Amendment, SOR/90-756, s. 13.

136. *Supra*, note 125, s. 5.

137. *Ibid.* s. 9.

138. *Supra*, note 125, s. 22.

139. *Ibid.*

law advocates and practitioners. The continuing recession has meant that more people have lost their jobs, resulting in a growing number of applicants for unemployment insurance. The stricter qualification criteria and harsher disqualification policies will likely lead to an increased amount of litigation in these areas, requiring an increased amount of advocacy on behalf of applicants. To the extent that this litigation is unsuccessful, it will mean that claimants will be forced to turn to other social benefit programs for assistance, with the most likely alternative being the provincial social assistance scheme. Finally, the financial hardship which the impact of these amendments will create for those most in need will require advocacy in other areas, including tenancy, mortgage and consumer matters, perhaps only to forestall the inevitable for a number of days or months.

CASELAW DEVELOPMENTS

While the legislative changes could certainly not be considered good news, there were some successes in the judicial arena. As already mentioned, the Supreme Court in *Tetreault-Gadoury* found the provision in the Act which prohibited the payment of UI benefits to those over the age of 65 to be a violation of the equality rights provision in the *Charter*.¹⁴⁰ The Court also reasoned that despite the alleged objectives put forward by the Commission for this prohibition, it could not be saved by section 1 of the *Charter*.¹⁴¹ One interesting point about the Court's decision, a point which may be useful in future constitutional challenges to the unemployment insurance scheme, is the observation that the overall objective of the Act "is to provide a temporary sanctuary for those wishing to remain in the active labour force, but who are unable for the moment, to find employment."¹⁴²

The other unemployment insurance case to reach the Supreme Court was *Caron*. At issue in that case was the entitlement to UI benefits of employees who had not yet returned to work after the settlement of a labour dispute. Section 44(1)(a) of the Act (as it then read) stated that such employees were

140. *Supra*, note 3 at 15. As it turned out the issue in this case became moot when the federal government revoked s. 19 retroactive to the date of the Federal Court of Appeal's decision in this case. However, the Supreme Court went on to consider the issue because the revocation of s. 19 did not affect the position of those who had turned 65 prior to this date.

141. Section 1 provides that the rights and freedoms guaranteed by the *Charter* are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

142. *Supra*, note 3 at 20.

not entitled to benefits until the “termination of the stoppage of work”. The Supreme Court observed that nothing in the language of the section supported the use of a particular level of production or the return to work of a certain number of employees as indicative of the “termination of the stoppage of work” and held that, in this case, such “termination” occurred with the signing of the new collective agreement.¹⁴³ However, as noted above, the Regulations now specifically set out when a “termination of the stoppage of work” occurs.

A final case of note in this area is *Canada (Attorney General) v. Enns*.¹⁴⁴ The applicant was a minister who continued to work for his congregation during time periods when they could not afford to pay him. The applicant had applied for unemployment insurance benefits during these times when he was paid no salary. The Federal Court of Appeal concluded that the applicant had a ‘continuing contract of service’ with the congregation (even though he was not paid) and thus he did not have an ‘interruption of earnings’ as required by the Act and Regulations¹⁴⁵ and was therefore disqualified from receiving benefits. The case is of importance because of the implications it has for unemployment insurance applicants and beneficiaries who may be providing unpaid, voluntary services to groups and organizations throughout the country, and whose eligibility for benefits may for this reason be in jeopardy.

4. THE CANADA PENSION PLAN

Although the *Canada Pension Plan*¹⁴⁶ is a lesser component of poverty law practice than such programs as social assistance, workers’ compensation and unemployment insurance, it nevertheless forms a significant part of the Canadian income security network. Certain aspects of the plan regularly raise issues of concern for poverty law advocates, especially those involving disability pensions and spousal entitlements under the plan.

143. *Supra*, note 133 at 167.

144. (September 17, 1990) Doc. No. A-559-89 (Federal Court of Appeal) [unreported]; leave to appeal to Supreme Court of Canada granted May 2, 1991. The applicant was represented by the Sudbury Community Legal Clinic.

145. An ‘interruption of earnings’ is defined in section 37 of the Regulations under the Act as “a period of seven or more consecutive days during which no work is performed ... and in respect of which no earnings ... are payable or allocated”.

146. R.S.C. 1985, c. C-8, as amended [hereinafter CPP].

AMENDMENTS TO THE APPEALS PROCESS

Amendments to the Act were passed in 1986, replacing the current "Review Committee"—the first level of appeal from a decision of the Minister—with a "Review Tribunal", panels of which would be drawn from a fixed roster and would always be chaired by a lawyer. However, although regulations have been gazetted for the implementation of this scheme, the amendments have yet to be proclaimed in force. Health and Welfare officials have suggested that with greater expertise at the review Tribunal level, decisions at that level will be taken more seriously and there will be fewer Departmental appeals to the Pension Appeals Board.

DISABILITY PENSIONS

The greatest volume of CPP work for poverty law advocates is with respect to the provision of pensions to disabled contributors.¹⁴⁷ One of the most contentious issues here is the limitation period for applying for benefits. Unlike retirement pensions and death benefits, eligibility for a disability pension depends on a contributor's having established the prescribed contributions within a certain time before the date of the onset of disability (the "recency" requirement).¹⁴⁸ Since the onset of disability cannot be deemed to have occurred more than 15 months prior to the date of an application for a disability pension (the "retroactivity" provision),¹⁴⁹ the legislation effectively provides a limitation period for claims. As a result of these rules many people who may at one time have qualified for disability pensions are denied because their applications are too late.

Advocates have long complained that these rules operate unfairly for many claimants. Many people spend years struggling to overcome their problems or to rehabilitate themselves before resigning themselves to accept the "disabled" label. There is a rather cruel irony that the limitation period effectively penalizes those who resist most strongly. For others, the failure to apply for benefits is directly related to the particular problem which would qualify them for benefits, especially in the case of mental disabilities. This does not count the many people who do not apply simply because they are not aware of the existence of the poorly publicized disability pensions.

147. CPP s.44(1)(b) allows for provision of a pension to a person with the requisite contributory period who is determined to be suffering from a "severe and prolonged mental or physical disability".

148. CPP. s.44(2).

149. CPP. s.42(2)(b).

There were two unsuccessful *Charter* challenges to the disability pension limitation period in the past year. In *Moses-Brown*¹⁵⁰ the Pension Appeals Board (P.A.B.) refused to consider a *Charter* argument where the appellant had become mentally disabled prior to the coming into force of the *Charter* and who did not meet the contributory period requirements at that time. Although the contributory period requirements had subsequently changed the new provisions could not be applied retroactively and nothing in the *Charter* affected this.

In *Kartisch*,¹⁵¹ the claimant would have qualified for a disability pension in 1981 but did not become aware of the availability of disability benefits until 1985. The P.A.B. summarily dismissed a s.15 argument on the grounds that this would have involved a retrospective application of the *Charter*. The Board went on to reject an argument based on s.7 of the *Charter*, holding that the right to a pension was a purely economic right which did not fall within the scope of "life, liberty and security of the person, protected by s.7, a point on which s.7 jurisprudence to date is virtually unanimous".¹⁵²

On May 24, 1991, Health and Welfare Canada released a study of the recency and retroactivity rules which recommended that an exception to the recency and retroactivity rules should be made for persons whose disability itself prevented them from making a timely application for benefits. It also recommended that Health and Welfare undertake a public information campaign to better publicize pension availability. However, it concluded that the recency and retroactivity rules of the plan should otherwise be maintained.

The recommendations of the Departmental study will probably not satisfy the advocacy community. Many still question the justification of recency requirements for disability pensions when there are none for other kinds of pensions under the same legislation. While challenges to these rules were unsuccessful in *Moses-Brown* and *Kartisch*, this was because the Board refused to apply the *Charter* retroactively; the main s.15 issues have still not been judicially considered. However, it may be significant for future litigation activities in this area that in *Kartisch* the majority of the Board went on

150. *Deborah Moses-Brown v. Minister of National Health and Welfare* (1990), C.E.B. & P.G.R. # 8615.

151. *Minister of National Health and Welfare v. Edward Kartisch* (1991), C.E.B. & P.G.R. # 8625.

152. For further discussion of this issue, see Ian Morrison, "Poverty Law and the Charter: The Year In Review" (1990), 6 J.L. & Social Pol'y 1.

to find, although this was not necessary to its decision, that the effective limitation period for making claims was reasonable and fair, stating that to give effect to the claimant's arguments "might well result in having benefits paid without any real relation in time and volume to the contributions made". Thus, even if a s.15 violation can be established in relation to these rules, it seems that the Board has already outlined the s.1 issues that must be confronted.

SPOUSAL BENEFITS

Another problem area of the Canada Pension Plan is the set of issues arising around spousal entitlements, such as division of unadjusted pensionable earnings and survivor's benefits. Because women generally make less money than men and therefore have lower contributory rates, or have no contributions because they have been occupied as homemakers for all or part of their marriages, the rules governing access to spouses' or former spouses' pension entitlements are particularly important for poor women. Unfortunately, these rules are also complicated, confusing and difficult to apply.

Division of Pension Credits

The CPP Act provides that upon dissolution of marriage the pension credits earned by the contributions of one spouse can be split between the spouses. This provision is particularly important for women who were occupied as homemakers during the marriage and thus did not make contributions to the Plan.

For several years Health and Welfare advised the legal profession and the public that the right to apply for a division of unadjusted pensionable earnings was not affected by separation agreements or divorce unless specifically mentioned in the agreement or order. Unfortunately for the many people who relied on this advice, the P.A.B. in 1983 held that a general release of all property claims in a property settlement would operate to release all claims to division of CPP credits as well.¹⁵³ While the Act was subsequently amended to reinstate the old rule for settlements entered into after June 4, 1986, this amendment did not operate retroactively. This year the government—apparently responding to media pressure and threats of litigation¹⁵⁴—finally amended the CPP Act¹⁵⁵ to give the Minister the power to rectify a

153. *Minister of National Health and Welfare v. Lawrence Preece* (1983), C.E.B. & P.G.R. # 8914.

154. E.g., see L. Shifrin, "Ottawa's bungling cheats divorcees" *The Toronto Star* (29 October 1990) A21.

155. Bill C-260, Royal Assent Feb. 1, 1991; in force March 15, 1991.

denial of benefits or division of unadjusted pensionable earnings resulting from the *Preece* ruling, for separation agreements or judicial orders prior to June 4, 1986.

On another credit-splitting issue, the P.A.B. dismissed a *Charter* s.15 challenge to the Act's requirement that an application for division of unadjusted pensionable earnings must be made within 36 months of the date of a decree absolute of divorce,¹⁵⁶ holding that even if the application of the limitation period disproportionately affected women—which was not shown in evidence—the rule was not discriminatory.¹⁵⁷

Common Law Spouses, the Charter and the CPP

In its attempts to define relationship outside of marriage as "spousal" relationship for various purposes, the CPP Act gives rise to many problems and often unfair results. Not surprisingly, some advocates have tried to challenge these spousal definitions, but with only limited success to date.

In *Mosher*¹⁵⁸ the P.A.B. rejected s.15 challenge to the definition of spouse contained in the then s.64(2)(b) of the Plan. The claimant had an intimate relationship with a CPP contributor for almost three years but did not move in with him until her son, who had been living with her, left home. The contributor died ten months later. The claimant's application for survivor's benefits was rejected because they had not cohabited for at least one year, as required by the section. McQuaid J.A., for the majority, held that marital status was not a personal characteristic analogous to those enumerated in s.15, as required by the *Andrews*¹⁵⁹ test. He held that marital status was "voluntarily assumed"¹⁶⁰ and that s.15 did not bar discrimination on the basis of such characteristics—it seems the claimant was out of luck for not having demanded that the contributor "make an honest woman of her". Macintosh J., in a strong dissent, noted that marital status had been accepted as a prohibited ground of discrimination in a number of cases. With respect to the claimant's "choice" to remain unmarried to the contributor, he stated: "Such

156. CPP s.55.

157. *Minister of National Health and Welfare v. Ivadell Cornell* (Apr. 18, 1991), Appeal: CP2108 (Pension Appeals Board) [unreported].

158. *Minister of National Health and Welfare v. Linda Mosher* (1990), C.E.B. & P.G.R. # 8616.

159. *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.).

160. See Morrison, "Poverty Law and The Charter: The Year in Review", *supra*, note 151 at 24 for further discussion of "voluntary status" in social welfare *Charter* litigation.

a choice is perfectly lawful and affects no one but themselves. Surely there is a right in a free and democratic society to exercise such a choice without penalty". In view of the clear intention expressed by the contributor in his will to provide for the claimant, he would have in effect granted a constitutional exemption to the one year cohabitation requirement.

Although *Mosher* is the only P.A.B. decision on this issue, it may be noted that the *Charter* has been used successfully in at least one case involving the Plan's spousal definition. In a case which arose prior to the coming into force of s.15 of the *Charter*, a Review Committee held that the Act violated s.2(b) of the *Charter* (freedom of expression) by its requirement that the claimant was "publicly represented" to be the spouse of the deceased contributor.¹⁶¹ After a considerable amount of media attention to the case, the government abandoned an appeal to the P.A.B.¹⁶²

DISABLED CONTRIBUTORS' CHILDREN'S BENEFITS

One final litigation victory is worth noting here, although on an issue of less overall importance to the low income community than disability pensions and pension splitting.

The Plan provides for a special benefit to be paid to the children of disabled contributors.¹⁶³ This benefit is available to both legally and factually adopted children where the adoption took place before the onset of disability. However, the benefit is not available in respect of factually adopted children where the adoption takes place after the onset of disability.¹⁶⁴ In *Blais*¹⁶⁵ the PAB held this year that this rule violated s.15 of the *Charter*. It is interesting to note that McQuaid J.A. and Macintosh J., who wrote the majority and dissenting judgments respectively in *Mosher*, supra, were again on the panel. This time however McQuaid J.A. was left in dissent (again arguing that family status is not an analogous ground for the purposes of s.15 because it

161. *Ibid.*, at 9.

162. Decision of Pension Appeals Board Nov. 13, 1990 (Consent). See also Slinger, "Ottawa gives up on persecuting Olive" *The Toronto Star* (11 November 1990) A2. The claimant was represented by Kensington Bellwoods Community Legal Services, Toronto.

163. CPP s.44(1)(e).

164. CPP s.74(4).

165. *Minister of National Health and Welfare v. Armand Blais* (April 26, 1991), Appeal: CP1982 (Pension Appeals Board) [unreported]. The claimant was represented by Kinna-aweya Legal Clinic, Thunder Bay.

is a legal status voluntarily chosen). Smith J., writing for himself and Macintosh J., expressly rejected McQuaid J.A.'s approach and declined to follow *Mosher*.

CONCLUSION

While the areas of poverty law practice which this article has focused on are diverse, containing a myriad of administrative and legislative requirements, some themes common to them all have arisen. The most positive event was the election of a New Democratic government in Ontario, in light of that party's longstanding support of social benefit programs. Less fortunately, but no less important, the effects of the recession on people of low income (and their advocates) have been disastrous. An equally disastrous occurrence has been the federal government's implicit and explicit attacks on social spending in this country.

Each of these issues has had important consequences for the work of advocates in the poverty law area. As was noted above, the most positive was the election result in Ontario. The new government moved quickly and with increased urgency on issues such as social assistance reform. There were administrative changes also, such as the new appointments at the Worker's Compensation Board, intended to make the social welfare bureaucracy somewhat more responsive to the needs and concerns of those it was meant to assist. In some measure, this impetus was also reflected in the decision-making process under the income maintenance programs reviewed.

However, many of the advances hoped for were forestalled by the ravaging effects of the recession. The economic downturn resulted in an increase in the number of jobs lost and forced more people than ever to seek aid from the unemployment insurance program. The number of people on social assistance also skyrocketed as the recession deepened and a growing number of people either exhausted their UI entitlement or did not qualify at all. This placed an immense strain on the budgets of the provinces and the municipalities who were responsible for the delivery of these programs. In some cases the focus became stemming the tide.

These events occurred at a time when, as we have observed, the federal government was intent on reducing the size of its own deficit in part by reneging on its past commitment to the funding of social welfare schemes. While its 'tightening up' of the unemployment insurance program forced more people in need to seek social assistance, the federal government also

reduced the amount of money available to the provinces and municipalities to fund the social welfare schemes through its 'cap on CAP'.

It is against the background of these events that our review of the past year's developments in some of the key areas of poverty law must be viewed. Advocates for the low income community have played a commendable role, both in litigation and law reform, in attempting to prevent a bad situation from getting worse. It would seem that in the present economic and political climate poverty law practitioners will be forced to continue to advocate, not for improvements in the income maintenance programs so vital to their clients, but simply to protect the status quo. To do so, it will be necessary to use all the weapons at our disposal, including the *Charter of Rights*. It is hoped that this article has served to highlight some of the previous successes in this regard and to indicate what may lay ahead.