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## Poverty Law in Ontario: The Year in Review

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# **POVERTY LAW IN ONTARIO: The Year In Review**

**RANDALL ELLSWORTH, IAN MORRISON,  
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## **RÉSUMÉ**

Cet article fait la revue des événements de l'année dernière dans certains domaines de la défense juridique des personnes à faible revenu, notamment de l'aide sociale, des accidents du travail, de l'assurance-chômage et du Régime de pensions du Canada. Nous mettons l'accent sur la réforme de la loi, les litiges et la pertinence de ces activités aux yeux de ceux et celles qui pratiquent ces domaines du droit. Nous considérons également les effets de la récession et les mesures prises par les gouvernements fédéral et provincial dans les secteurs mentionnés.

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\* Copyright © 1993, Randall Ellsworth, Ian Morrison, Judith Keene and Paul Rapsey. Randall Ellsworth, Judith Keene and Paul Rapsey are research lawyers with the Clinic Resource Office of the Ontario Legal Aid Plan (CRO). Ian Morrison is a research lawyer and Executive Director of the CRO. The CRO provides legal research and resource and training materials to practitioners in Ontario community legal clinics. The authors would like to thank the many clinic caseworkers who have provided us with ideas and information for this article. Any opinions expressed herein are those of the authors and not necessarily those of the Ontario Legal Aid Plan.

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## A. INTRODUCTION

This is the third of such articles which we have written for the *Journal of Law and Social Policy*<sup>1</sup> and it covers the period from September 1992 to September 1993. Each year the task seems to become more daunting. Events in the areas of poverty law which we regularly survey have moved so quickly that what at one time seemed an issue of great importance is likely to have been displaced by two other issues of equal importance. While poverty law advocates struggle to contain each such brush fire, the inferno rages all around.

The article will again focus on the income maintenance programs and related issues most familiar to advocates in Ontario's community legal clinics.<sup>2</sup> It has also been expanded in scope to include an examination of housing issues as they impact on the low income community. While every effort has been made to be as inclusive as possible, limitations of space, time and our own expertise mean that not every issue can receive the attention it might deserve. Omission of any single item from the discussion below is no reflection upon its relative importance.

In past years we have placed our analysis in the context of the economic "restructuring" taking place, most notably in Ontario, but throughout the rest of the country as well. This "restructuring" has invariably meant an increase in unemployment for individuals and a corresponding increase in the numbers of people living in poverty. The unemployment rate for 1992 was 11.3% (a 1% increase over the previous year), and showed no signs of any decrease in the near future.<sup>3</sup> The number of families experiencing unemployment rose by over 8%.<sup>4</sup> These figures have obvious implications for all social welfare programs.<sup>5</sup> Most alarming is the continued incidence of child poverty. For example, it is now estimated that one-third of the children living in Metropolitan Toronto

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1. See R. Ellsworth and I. Morrison, "Poverty Law in Ontario: The Year in Review" (1991), 7 *J.L. & Social Pol'y* 1 [hereinafter Ellsworth & Morrison (1991)], and R. Ellsworth and I. Morrison, "Poverty Law in Ontario: The Year in Review" (1992), 8 *J.L. & Social Pol'y* 1 [hereinafter Ellsworth & Morrison (1992)].
  2. These include social assistance, worker's compensation, unemployment insurance and Canada Pension Plan benefits. Issues under the *Charter of Rights* and the *Human Rights Code* which are relevant to poverty law practitioners will also be canvassed. See Section E. *The Constitution, Human Rights and Poverty Law, infra*.
  3. Statistics Canada, "Social Indicators" *Canada Social Trends*, Autumn 1993 at 35. In fact, popular political rhetoric has unemployment remaining unchanged for the rest of the millennium.
  4. *Ibid.*
  5. For example, see the discussion of social assistance caseloads, *infra*.

are living on welfare.<sup>6</sup> These figures put the “debate” on social policy in this country in a somewhat different perspective.

Unfortunately, the analysis must also take on political overtones. In the spring of 1993, the Ontario government raised the income tax level and made it retroactive to January 1, 1993. This meant that those Ontarians lucky enough to have a job were required to pay the full year’s tax increase over just six months. Further, the government instituted its Expenditure Control Plan, the effect of which was to reduce funding to many agencies serving the low income community. Finally, the *Social Contract Act, 1993*<sup>7</sup> was passed in July of 1993. The purpose of this Act was to reduce expenditures in the broader public sector. This three-pronged initiative was meant to demonstrate the government’s serious efforts to reduce its deficit and its debt, while ensuring, in good social democratic fashion, that the “burden” was shared by everyone.<sup>8</sup> It would seem to weigh heavier on some than on others.

Our article must be viewed in this light, with reference to the law reform, legislative and jurisprudential developments in the foreground, but against a backdrop of continued economic insecurity for the poor and growing financial pressure on poverty law activists and advocates.

## B. POVERTY—DRAWING LINES, DRAWING CONCLUSIONS

Two reports on the state of poverty in Canada were released within a month of one another. These were *Towards 2000: Eliminating Child Poverty*<sup>9</sup> and the United Nations’ Committee on Economic, Social and Cultural Rights report on Canada.<sup>10</sup>

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6. Social Planning Council of Metropolitan Toronto, “Child Poverty Crisis” (September 30, 1993).

7. S.O. 1993, c. 5.

8. While the legal clinic system was not affected by the Expenditure Control Plan, legal clinic staff had to pay the increased income tax and were faced with a funding cut imposed by the *Social Contract Act, 1993*. All this while dealing with an ever-increasing demand on their services.

9. Canada, Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women; Sub-Committee on Poverty, (June, 1993). [hereinafter “*Towards 2000*”].

10. United Nations Committee on Economic, Social and Cultural Rights, consideration of the Report submitted by Canada in accordance with articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, “Concluding observations of the Committee” (May 27, 1993) [hereinafter “UN Report”].

The premise of *Towards 2000* was that "a major obstacle to eliminating poverty lay with the lack of appropriate tools to correctly identify the problems that make up poverty".<sup>11</sup> The report criticised the use of Statistics Canada's Low Income Cut-Offs (LICO) as a poverty measure for many reasons; because they do not represent a consistent measure of economic well-being, they obscure the progress which has been made in reducing income inadequacy in Canada and they do not properly take into account the effect of such things as in-kind benefits or income taxes on poverty.<sup>12</sup> In essence, *Towards 2000* revisits the debate over absolute and relative poverty lines, and couches it in the language of income inadequacy (absolute poverty) versus income inequality (relative poverty). Not surprisingly,<sup>13</sup> the sub-committee comes down in favour of developing some absolute measure of poverty.<sup>14</sup> It concludes that the inability to properly identify those Canadians in need of assistance has reduced the effectiveness of programs and initiatives designed to eliminate poverty in Canada.

The UN Report provides a much starker (and perhaps more relevant) picture of poverty in Canada. The Report expressed concern about the persistence of poverty, stating that "there seems to have been no measurable progress in alleviating poverty in the last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups", such as single mothers and children.<sup>15</sup> As well, the UN committee was disturbed to learn that there was no procedure to ensure that welfare payments provided an adequate level of income, that the federal government had reduced its contributions under cost-sharing agreements for social assistance, that the problems of hunger and homelessness did not seem to be receiving appropriate government attention and that the courts in Canada have held the right to security of the person contained in the *Canadian Charter of Rights and Freedoms* did not protect people from social and economic deprivation or from infringements of their rights to adequate food, clothing and housing.<sup>16</sup>

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11. *Supra*, note 9 at 1.

12. *Ibid.* at 2.

13. Opposition members of Parliament refused to participate in the proceedings of the sub-committee, as did many policy groups and anti-poverty activists. *Ibid.*, Appendix C.

14. The sub-committee's recommendations are contained in Chapter V of *Towards 2000*, complete with numerical examples. A full critique of the approach outlined is not possible in the context of this article.

15. *Supra*, note 10 at 3.

At best, both these reports will probably serve as little other than rhetorical ammunition. In truth, no matter how poverty is measured or defined, it does exist in Canada. Its very existence means that the social welfare policies designed to combat it have failed to achieve even a modest level of success. For caseworkers dealing with this fact daily, the academic debate is meaningless.

## C. DEVELOPMENTS IN INCOME MAINTENANCE LAW

### 1. Social Assistance

Once again, there was little good news for the increasing numbers of people who have had to rely on social assistance for basic subsistence in Ontario.<sup>17</sup> While General Welfare caseloads finally appear to have peaked—a small decline over the summer months of 1993 marked the first month over month decline since July 1989<sup>18</sup> — they remain at record highs and Ontario continued to be hard pressed by federal downloading of the costs of social assistance.<sup>19</sup>

In brief, the past year saw a wide range of cuts and restrictions to social assistance programs, few advances for the poor in the courts and proposed welfare reforms which have made many activists and advocates very nervous about the future of the “program of last resort”, all of which has taken place in the context of growing public hostility towards social spending generally and social assistance specifically.

#### (a) Legislative Developments: The Expenditure Control Plan

In April 1993 Treasurer Floyd Laughren announced an “Expenditure Control Plan”, imposing budget cuts on almost all provincial Ministries and provincially

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16. *Ibid.* at 3-4. For a discussion of the most recent court rulings on the *Charter* and their implications for poor people, see Section E. *The Constitution, Human Rights and Poverty Law, infra.*
  17. According to provincial statistics, the total number of FB beneficiaries increased from July 1992 to July 1993 by 8.1%; the increase for the same period last year was 17.2%. The 1991-1992 GWA increase was 22.8%, for 1992-1993 it was 8.9%. In July 1993 there were 1,298,370 individual social assistance beneficiaries in Ontario. In five years provincial spending on social assistance has increased from \$2.1B (1988-89) to \$6.1B (1992-93).
  18. From statistics provided by the Ministry of Community And Social Services (MCSS).
  19. The Ontario government claims that the “cap on CAP” has cost the province a total of \$3.3B since it was unilaterally imposed in 1990: Ontario, *Turning Point: New Support Programs For People With Low Incomes* (July, 1993) at 9 [hereafter *Turning Point*].

funded agencies. Since that time, MCSS has released a steady stream of new regulations and policies aimed at restricting access to social assistance.

The scope and direction of the cuts was influenced by the 1992 provincial Auditor's Report.<sup>20</sup> The Report claimed that the Ministry of Community and Social Services (MCSS) had lost hundreds of millions of dollars in improper payments, due to inadequate controls over fraud, failure to make recipients pursue other financial resources such as CPP and child support vigorously enough, and insufficient measures to recover outstanding overpayments. Although the Report's calculations of estimated losses were methodologically questionable,<sup>21</sup> the Report contributed to widespread perceptions that social assistance spending was out of control and that programs were easily defrauded.<sup>22</sup>

The Expenditure Control Plan continued some of the government's responses to the Auditor's report and announced numerous new cost-cutting initiatives, including eligibility reviews of all recipients, restrictions on retroactive payments, significantly tightening up financial eligibility by including formerly exempt assets in budgetary calculations (although the province seems to have backed down on a plan to charge recipients who own homes for the equity in their homes) and restricting income exemptions. Following last year's lead, the government cut further into the STEP program, increasing the tax back rate on recipients entering the work force.<sup>23</sup> Numerous other changes affect particular classes of recipients. These are discussed below. The government also saved money by delaying regular rate increases for several months.

Social assistance recipients were also affected by cuts to other Ministries, including substantial cuts to provincial transfer payments to municipalities. As municipalities faced their own budget crunches, more and more discretionary programs of importance to welfare recipients—child care, employment support programs, etc.—felt the axe.

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20. Office of the Provincial Auditor, *1992 Annual Report* (Queen's Printer For Ontario).
  21. For example, the Report implied losses in cases where eligibility had not been adequately documented, although there is no reason to suppose that all such recipients were ineligible.
  22. Although the Report alleged waste in numerous areas of government, the allegations of welfare overspending got the bulk of front-page media coverage in Ontario.
  23. STEP is a work incentive program which provides a flow through of a percentage of employment income, according to a complicated formula, to reduce the very high marginal tax rates on welfare recipients. The government first cut STEP in August 1992 by delaying access to it; it made further cuts in August 1993 by reducing the income flow-through by \$55.00 per month.

Bad as these cuts were, they could have been worse. Although the changes made life more difficult for many recipients and excluded some people altogether, there were no actual rate decreases and the overall savings expected from MCSS were less than from some Ministries. However, the fact that the government was prepared to take as much as it did from the poorest section of Ontario society left many people increasingly nervous about its longer term intentions around welfare reform. We will return to that issue after a review of litigation developments and other current issues.

### **(b) Litigation Developments And Other Current Issues**

This section reviews significant litigation developments (including some important decisions from other jurisdictions) and some of the main issues facing Ontario social assistance advocates in the past year.

#### *(i) Social Assistance And The Charter*

Social assistance programs and the Charter can intersect in a couple of ways. First, it has been argued in several cases that poverty as signified by receipt of social assistance, or receipt of social assistance per se, represents a prohibited ground of discrimination under s.15 of the Charter. Arguments of this kind have met with at least some success in Canadian courts. These cases are discussed more fully elsewhere in this article.<sup>24</sup>

Second, there are the cases in which the Charter has been used directly to challenge aspects of social assistance programs. These kinds of challenges have not fared as well.<sup>25</sup> Once again, attempts to use s.7 to gain additional protections for social assistance recipients were unsuccessful. In *Conrad v. County of Halifax*<sup>26</sup>, the Nova Scotia Supreme Court held that the Charter did not prevent termination of welfare benefits without a pre-termination hearing or other safeguards.<sup>27</sup> *Conrad* seems in line with the trend of most Canadian judges to adopt the narrowest possible vision of the scope of the interests protected in s.7.

The Supreme Court of Canada has shown no interest to date in examining this issue, having refused leave to appeal in at least one case in

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24. See Section E. The Constitution, Human Rights and Poverty Law, *infra*.

25. See generally Ellsworth & Morrison (1992) for a review of the status of Charter litigation involving social assistance programs up to September 1992.

26. (August 11, 1993) C.H. No. 70286 (N.S.S.C.T.D) [unreported].

27. For a fuller discussion of the case and its implications, see Section E. The Constitution, Human Rights and Poverty Law, *infra*.

which the application of s.7 to social assistance programs was directly raised.<sup>28</sup>

There has still been no direct Charter challenge to social assistance in an Ontario court, although the Ontario Divisional Court has affirmed that SARB has limited Charter jurisdiction under s.52 of the *Constitution Act, 1982*.<sup>29</sup> SARB has exercised this power in at least one case. In *K-10-13-22*<sup>30</sup> the Board held that a rule which rendered categorically ineligible any employable person under age 21 living with his or her parents, violated s.15 of the Charter. However, the Ministry in *K-10-13-22* conceded that the Charter was violated in the particular circumstances of that case (the appellant had already been determined in previous proceedings not to be a "dependant" of her parents) and that the violation was not "saved" by s.1 of the Charter. It remains to be seen how SARB will deal with a fully contested Charter challenge.<sup>31</sup>

(ii) *Social Assistance and the Canada Assistance Plan*

After almost two decades in the courts, the long awaited Supreme Court decision in *Finlay v. Canada* was rendered this year.<sup>32</sup> Mr. Finlay had challenged a provincial practice of recovering social assistance overpayments by making deductions from allowances, thus reducing allowances below the amounts determined necessary for basic needs. He also challenged the practice in Manitoba of allowing municipalities to establish their own welfare rates.

The Court agreed unanimously that CAP did not prohibit a province from allowing municipalities to set welfare rates, as long as the municipalities took into account the factors required by the Plan. The more difficult question was the issue of overpayment recovery. With the balance on the Court tipped by Major J., the Court's most recent appointee, a 5-4 majority ruled that overpayment recovery did not violate the Plan.<sup>33</sup>

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28. The Supreme Court of Canada refused leave to appeal in *Fernandes v. Winnipeg* (1993), 10 Admin. L.R. (2d) 56. This case was discussed in last year's article: see Ellsworth and Morrison (1992) at 12-13.

29. *Director of Income Maintenance Branch, Ministry of Community and Social Services v. Mohamed* (28 October 1992) File No. 338/91 (Divisional Court) [unreported]. [See Ellsworth & Morrison (1992) 13 n.44.]

30. (April 21, 1993; Bradbury). The applicant was represented by the Peterborough Community Legal Centre.

31. More cases on this issue are currently before the Board. It is not yet clear whether the Ministry will continue to concede individual cases and amend the regulation, or will begin to contest them.

32. *Finlay v. Canada (Minister of Finance)* (1993), 150 N.R. 81 (S.C.C.).

Sopinka J., for the majority, agreed that CAP required assistance to be provided in an amount consistent with basic requirements, but held that this was not violated by recovering overpayments from allowances because, "once...recovery is completed the individual will, if her payments over the entire duration are considered, have received exactly that to which she is entitled."<sup>34</sup> He concluded that this was compatible with the cost-sharing goals of CAP, using the commonly advanced but specious argument that "There are only limited resources to go around. If there are overpayments to some that cannot be recovered, in the long term others will suffer".<sup>35</sup>

A full analysis of the majority decision is not possible here. The "long term accounting argument" was rejected by McLachlin J., dissenting, who reasoned:

The long-term accounting approach overlooks the human reality of persons in need. They have no savings, no reserves. To deny them their monthly allocation for basic needs is in fact to deny them their food shelter and other basic necessities, an approach directly at odds with the philosophy behind CAP. It is moreover, a fallacy that the overpayment was available for basic living requirements, the assumption on which the long-term accounting argument rests.<sup>36</sup>

McLachlin J. also rejected the "limited resources" argument, arguing that it was irrelevant to the CAP scheme.<sup>37</sup>

From a legal perspective, *Finlay* could have been worse, even though the majority rejected the argument of the intervenor National Anti-Poverty Organization that CAP established clear national standards with which provinces had to comply. They held that CAP was strictly a cost-sharing program, in which the federal government's authority was limited to the parameters of its constitutional authority for involvement in provincial social assistance, pursuant to the spending power. However, the majority did affirm that provinces

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33. The case was initially argued before a seven judge panel on March 23, 1992. Due to the resignation of Stevenson J., it was reargued on January 28, 1993 before the full Court.

34. *Supra*, note 32 at 90.

35. *Ibid.* at 91.

36. *Ibid.* at 138-9.

37. The majority argument on this point carries little weight, apart from McLachlin J.'s rebuttal within the CAP context. The assumption that there is a finite specifically targeted "pot" which actually determines political allocations in any measurable way is highly questionable and certainly not as self-evident as Sopinka J. would have readers believe.

were not free to ignore the standard of basic necessities which was a condition of cost-sharing of social assistance under CAP.<sup>38</sup> While they held that CAP was not violated on the facts of that case, the decision implies that a clear CAP violation could lead to a judicially enforceable remedy.

In the end, however, the legal ramifications of *Finlay* seem increasingly irrelevant, at least to Ontario's social assistance programs, in the light of the federal government's frontal assault on all social spending, including the "cap on CAP" which has cost Ontario billions of dollars in welfare cost-sharing.<sup>39</sup> Since Mr. Finlay began his judicial saga, saving CAP from the federal government has become a more urgent priority than using it as a weapon against recalcitrant provinces.

*(iii) The Social Assistance Review Board*

The Social Assistance Review Board (SARB) again saw a steady increase in business. In the 1992-93 fiscal year SARB received approximately 8600 requests for hearing, an increase of 100% over two years ago (although the actual number of cases heard did not rise quite so steeply).<sup>40</sup> According to preliminary figures, appeals increased a further 30% in the first two months of the current fiscal year, with comparable increases in the number of requests for interim assistance. We do not have comparison figures but it seems safe to assert that SARB has by far the highest volume of any comparable social assistance appeal tribunal in the country.

The increased volume of appeals placed a considerable strain on the Board, which struggled to find ways to use its existing resources more efficiently. Its responses have included "fast-track" hearings projects in parts of the province to clear up chronic backlogs, revision of interim assistance procedures, assigning more single member panels to hear cases, revised and simplified decision formats and, perhaps most controversially, establishment of a new and much stricter scheduling system.

SARB has succeeded (at least temporarily) in reducing its backlogs both of requests for interim assistance and in scheduling hearings, although some problems remain in both areas. Many municipalities misunderstand and resent the Board's power to award interim assistance and there was a notable increase in the number of instances of municipalities refusing to pay interim assistance

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38. *Ibid.* at 88.

39. *Supra*, note 19.

40. Official figures for 1992-1993 are not available. Statistics cited here are from: Letter from Laura Bradbury, Chair, dated June 21, 1993, to John McKean, Bloor Information and Legal Services; and from information provided in meetings with the Board.

ordered by the Board. Advocates were upset by the Board's attempts to introduce a "no adjournments" scheduling policy, when hearing dates were set without consultation with appellants or their representatives. The Board eventually modified this policy to one more acceptable to clinic advocates.

The main short-term challenge to the Board will be staying ahead of its enormous caseload. The Board has indicated that it is examining every aspect of its operations in efforts to find more efficient ways to use its resources. The more important long term question facing the Board is what the appeals system will look like under the NDP government's proposed radical reform of social assistance.

*(iv) "Last Month's Rent" And Municipal Discretionary Spending*

Many important social assistance benefits in Ontario are provided solely at the discretion of municipal governments, with no statutory right of appeal. Historically, there has been very little litigation in Ontario directed at this discretion. The Ontario Divisional Court provided no encouragement in this direction in the first major test case on discretionary assistance.

*Simon v. Toronto*<sup>41</sup> was a challenge to the decision of Metropolitan Toronto to stop providing social assistance recipients seeking to move or establish a residence with money for last month's rent deposits. *Simon* contained a two part challenge: the first was to the decision to cut all such assistance under a purely discretionary program, the second was to a policy directive to welfare workers that money for rent deposits would never be granted under a mandatory benefit (the "community start-up benefit") specifically for those establishing new residences in the community.

The case was summarily dismissed. The result is disappointing for many reasons. The decision never clearly distinguishes between the two separate grounds for the application. To the extent that the decision affirmed what seemed like a textbook case of fettering of discretion with respect to the narrower "community start-up benefit" argument, we suggest that it is simply wrong.

The more disturbing aspect of *Simon*, however, is the implication that the impugned decision was not even subject to judicial scrutiny. O'Brien J. stated: "In my view, courts should be very reluctant to interfere with policy and financial decisions made by any level of government in these difficult times".<sup>42</sup> He went

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41. (1993), 61 O.A.C. 389 (Div.Ct.). An application for leave to appeal to the Ontario Court of Appeal was dismissed August 3, 1993.

42. *Ibid.*

on to suggest that decisions not to expend public funds need not even be made within the statutory frameworks established to govern those decisions.<sup>43</sup>

The result in *Simon* is not particularly surprising, but the extraordinary degree of judicial deference expressed in the decision goes far beyond anything necessary to the actual issues before the Court. *Simon* certainly stands as a major barrier to future attempts to litigate discretionary issues.

(v) *Benefit Unit Issues*

Because social assistance entitlement is based on family status rather than purely individual entitlement, problems often arise in trying to define family relations for social assistance purposes. Social assistance legislation treats as a single benefit unit any two people otherwise defined as “spouses”<sup>44</sup> who are determined to be “living together”. Situations often arise where such “spouses” share a residence but nothing else. Although several older SARB decisions found such persons to be members of a benefit unit, more recent decisions suggest a liberalization of this test. Some panels have held that spouses were not “living together” where there was no conjugal relationship and financial or other considerations made separation extremely difficult<sup>45</sup>, or where a recipient chose to care for a former spouse for purely humanitarian reasons.<sup>46</sup> One panel even held—in contradiction to an earlier decision involving very similar facts—that a young mother was eligible as a single person where she lived in a house with the father of her child - along with his wife and children.<sup>47</sup>

Conversely, in *Director, Ministry of Community and Social Services v. Roper*<sup>48</sup> the Ontario Divisional Court affirmed a SARB decision that a couple must

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43. *Ibid.* citing with approval *Hamilton-Wentworth (Regional Municipality) v. Ontario* (1991), 2 O.R.(3d) 716 (Div.Ct.).
  44. Current definitions of “spouse” in Ontario social assistance legislation includes relationships with no conjugal element as traditionally defined; for example, any person owing a support obligation to an applicant’s child is deemed to be a spouse: *Family Benefits Regulations*, R.R.O. 1990 Reg.366, s.1(1).
  45. E.g., see *SARB K-10-27-32* (November 16, 1992; Renault, Cardinal). The applicant was represented by West End Legal Services.
  46. *SARB K-12-24-04* (April 13, 1993; Zinger, O’Connell). The applicant allowed the 86-year-old father of her child to board with her after a long separation, at her children’s request, where spouse was old and sick and needed assistance. The applicant was represented by Kensington-Bellwoods Community Legal Services.
  47. *SARB K-06-03-12* (May 26, 1993; Hazelle). The applicant was represented by Hamilton Mountain Legal and Community Services; but see *contra SARB J-10-03-03R#2* (December 7, 1992; Draper, Adams). The applicant was represented by Community Legal Service of Niagara South.

actually live together to be treated as “living together”. The appellant was a disabled recipient who lived in a special environmentally controlled house in a rural area. Her husband had a job in an urban area and had no job prospects where she lived, but visited her on weekends. The Ministry had argued that because there was no marital breakdown between them, she should be deemed to be in receipt of his entire income as if they were living together, which would have rendered her ineligible. (The province subsequently legislated to preclude such an argument being made on behalf of a sole support parent who is living apart but not separated from her spouse.<sup>49</sup>)

Other benefit unit problems arise around questions of custody of children. Several panels have now held that joint custody does not preclude welfare or FB eligibility even though the child is only with the applicant parent part-time.<sup>50</sup> Indeed, one panel has gone so far as to hold that where two separated parents have joint custody of a child, *both* may be entitled to receive a Family Benefits Allowance for the child, even though the Act does not allow for the allowance to be prorated and thus both parents would receive the full allowance.<sup>51</sup>

(vi) *Financial Eligibility*

The most important case on financial eligibility in the past year was the decision of the Divisional Court in *Director of Income Maintenance v. Wedekind*<sup>52</sup>. Ms. Wedekind was an FB recipient whose spouse received Unemployment Insurance benefits. In accordance with federal rules, income tax deductions were made from his UI benefits, so that the amount he actually received was considerably less than his full entitlement. Nevertheless, the Director deducted the full UI entitlement from the FB allowance. Although SARB had ruled in numerous cases that income should be determined on a net rather than gross basis, the Divisional Court affirmed the Director’s position.

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48. *Director of Income Maintenance v. Roper* (1993), 62 O.A.C. 76 (Div.Ct.).

49. O.Reg.436/93, amending s-s.2(7)(b) of R.R.O. 1990 Reg.366, making eligibility conditional on “separation or desertion”.

50. E.g. see *SARB L-08-26-30* (April 5, 1993; Brooks, O’Connell). The applicant was represented by Hastings and Prince Edward Legal Services.

51. *SARB L-01-03-03* (May 17, 1993; Heath). The applicant was represented by Dundurn Community Legal Services.

52. (1993), 62 O.A.C. 70 (Div.Ct.).

The implications of *Wedekind* are far from settled. There are a wide range of situations in which social assistance authorities deem welfare recipients to receive income they do not in fact receive. For example, many recipients have UI, CPP or workers' compensation benefits that are reduced substantially due to overpayments, administrative penalties, or garnishment.<sup>53</sup> Prior to *Wedekind* SARB held in most such cases that recipients could only be charged with income actually received or which they could have obtained by taking appropriate action.<sup>54</sup> Since *Wedekind* the Board has been split, with some panels distinguishing it wherever possible while others have applied it broadly.<sup>55</sup> An application for leave to appeal to the Ontario Court of Appeal has been made; whether or not it is granted, there will obviously be more litigation on this important point.

On a more positive note, the Divisional Court ruled this year that money borrowed by a welfare recipient to meet mortgage payments was not income.<sup>56</sup> An application for leave to appeal *Rubino* was filed but later abandoned, so it remains good law in Ontario, at least for the present.

(vii) *Immigrants And Refugees*

Provision of social assistance to sponsored immigrants, refugee claimants and others seeking to remain in Canada on humanitarian grounds has always been a highly contentious political problem in Ontario, especially in the large municipalities such as Toronto and environs which have the largest such populations.

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53. Even though most benefits are not ordinarily subject to attachment or garnishment by creditors, child support obligations are an exception to this rule: *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c.4 (2d Supp.).
54. For example see *SARB L-01-23-21* (January 6, 1993; Draper) The applicant had taken out loan insurance several years previously. When she became unable to make payments, the loan insurance took over. She had no control over insurance payments and could not divert them to her own use. The payments were not "income". The applicant was represented by Niagara North Community Legal Assistance. More common situations involved garnishments or deductions from statutory benefits such as UI or CPP.
55. For example see *SARB L-03-04-28* (June 28, 1993; Cardinal, O'Connell). The applicant was represented by Renfrew County Legal Clinic. (CPP benefits garnished 50% by Family Support Plan—Only net benefits were "income"), *SARB L-10-27-24* (July 26, 1993; Campbell). The applicant was represented by Dundurn Community Legal Services. (UI benefits should be treated as income net of income tax deductions and 50% garnishment); but see *contra SARB L-08-24-19* (June 14, 1993; Bolduc). The applicant was represented by Elliot Lake and North Shore Community Legal Clinic. (UI benefits garnished for child support conferred "benefit" on appellant by reducing his debt load and were therefore "income").
56. *Rubino v. Metropolitan Toronto* (1992), 11 O.R. (3d) 289 (Div.Ct.).

On the whole, litigation on behalf of such claimants before SARB has been successful. SARB has generally viewed any efforts by an appellant to obtain legal status in Canada as evidence of 'residence' and therefore conferring eligibility. It has rebuked municipalities in several cases for demanding that applicants produce information which was not within their power to produce, as a condition of eligibility. It has rejected municipal attempts to refuse welfare to refugees who entered under group sponsorship when the group sponsors reneged on their agreements. However, many of these litigation successes have been wiped out by legislative change. Failed refugee claimants and other non-residents have been rendered categorically ineligible,<sup>57</sup> a move which is certain to cause great hardship in some cases.<sup>58</sup> Furthermore, the regulations have been amended to deem sponsored immigrants to be getting support from their sponsors<sup>59</sup> — a particularly unfair move as sponsored immigrants have no legal right to enforce a sponsorship undertaking.

*(viii) Disability Issues*

In August 1993 the province finally implemented a 1991 promise to disabled persons. A disabled recipient may now have a beneficial interest in a trust of up to \$65,000.00 and will not be charged with income from the trust as long as it is spent on an approved list of disability related expenses.<sup>60</sup> The reform is a limited one: apart from the low capital limit and limited list of approved expenditures, the amendment is restricted to trusts from inheritances; living relatives of disabled people still face difficulties providing financial assistance for special purposes. Nevertheless, it will allow for modest provision of assistance to disabled persons to meet needs not met by public programs.

On the other hand, the status of many people currently receiving benefits as "disabled" or "permanently unemployable" persons under the *Family Benefits Act* has been threatened by another Expenditure Control Plan initiative. MCSS has already instituted a plan to review the eligibility of all disabled and permanently unemployable recipients. A particular problem here is the

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57. O.Reg.320/93, amending s.5 of R.R.O. 1990 Reg.366; R.R.O. 1990 Reg.321/93, amending s.7 of R.R.O. 1990 Reg.537.

58. Many people who do not meet the strict UN Convention definition of "refugee" are nevertheless not removed from Canada, sometimes because of a policy not to deport people to sites of civil war such as the former Yugoslavia, sometimes because they have no travel documentation. Such people may remain in Canada for years or even permanently, if accepted on humanitarian and compassionate grounds.

59. O.Reg.436/93, amending s.13 of R.R.O. 1990 Reg.366; O.Reg.437/93, amending s.15 of R.R.O. 1990 Reg.537.

60. O.Reg.436/93, amending s.13 of R.R.O. 1990 Reg.366.

increased pressure on people receiving provincial disability benefits to apply for a CPP disability pension. The stringent rules of the CPP disability program are a real disincentive to attempts by disabled people to re-enter the workforce, and seem to be wholly at odds with the social assistance system's attempts to encourage self-sufficiency.

*(ix) Students And Welfare*

Eligibility of secondary and post-secondary students for welfare assistance has always been a contentious issue in Ontario. We reported last year on the problems faced by advocates in finding practical solutions to the plight of students refused welfare and without other resources and the special inequity of the student welfare rule whereby whole families were rendered ineligible simply because one member of the family was a student eligible for an OSAP grant.<sup>61</sup>

The province has again changed the student welfare rules. It first announced that as of September 1993 the program of student grants was discontinued, with all grants being converted to loans. The province then, with no prior warning or consultation, amended the GWA regulations to provide that any student in receipt of a federal or provincial student loan, or ineligible for such a loan due to family income, was categorically ineligible for welfare.<sup>62</sup> There will still be people ineligible for student loans who will be seeking welfare for post-secondary education, but this change will affect a large percentage of those who previously applied to welfare.

One welcome change is a new policy that entire families will no longer be rendered ineligible because of one family member's school attendance. Under the new policy the student may simply be removed from the benefit unit.<sup>63</sup>

**(c) Welfare At The "Turning Point"**

In July 1993 the government released *Turning Point*,<sup>64</sup> its long awaited white paper on welfare reform. *Turning Point* is the first commitment of an Ontario government to fundamental reform of the welfare system since the institution of the current system in the 1960's. *Turning Point* promises to "dismantle

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61. Ellsworth & Morrison (1992), at 18-20.

62. O.Reg.437/93, amending s.7 of R.R.O. 1990 Reg.537.

63. R.R.O. 1990 Reg.537 s.7(2.1) (as amended). Unfortunately, while this is the policy intent of the amendment, as reflected in policy guidelines distributed by the Ministry, it is not clear that the regulation actually allows for this result.

64. *Supra*, note 19.

welfare as we know it” and transform social assistance from a passive income maintenance system to an active strategy for economic renewal.

The following are some of the key features of the proposal:

Child and adult assistance will be severed, with current assistance to children being replaced by the ‘Ontario Child Income Program’ (OCIP). It is intended that OCIP will be harmonized with the federal child tax credit and delivered primarily through the tax system. It will be income tested rather than means tested and paid on behalf of all children in low income families, including those not on social assistance.

General Welfare and Family Benefits will be replaced by the ‘Ontario Adult Benefit’ (OAB). The focus of government energy for people on the OAB will be on job readiness, through education, training or retraining. A new program, ‘JobLink’, is supposed to “help people to prepare an employment plan that maps out the education, training and supports necessary to return to the labour market and to independence”. The government claims that JobLink will eventually have 100,000 targeted places in educational institutions and pre-employment programs.

People who participate in JobLink will get an as-yet-unspecified additional supplement to the OAB, called the Employment and Training Allowance. *Turning Point* announced a long term supplement for the elderly and those so disabled that they cannot reasonably be expected to work. Although not mentioned in *Turning Point*, it appears at the time of writing that the government also intends a supplement for sole support parents.<sup>65</sup>

The government has also announced companion reforms intended to reduce barriers to leaving welfare. The most important are changes to the Ontario Drug Benefit. This benefit, currently available to social assistance recipients and the elderly, will be expanded to include the working poor.

Unfortunately, while the promise to dismantle welfare is clear, the same cannot be said for much else about *Turning Point*. Although there have been years of detailed work done in preparation for social assistance reform, *Turning Point* is devoid of enough specific information to determine whether this is a regressive or progressive reform. Nevertheless, there is considerable cause for concern about *Turning Point*.<sup>66</sup>

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65. Government discussion papers prepared for the purposes of public consultation indicate that some kind of sole-support parent supplement is under consideration, but no details of this part of the benefit structure have been released.

*Turning Point* contains no commitment to assistance which is adequate to maintain a dignified life in the community. Contrary to the urging of anti-poverty activists, *Turning Point* strongly implies acceptance of the neo-conservative ideology that maintenance of strong work incentives and income adequacy are incompatible. While the adequacy of the new system cannot be ascertained without knowing the precise value of all benefits—information which the government either does not have or will not release<sup>67</sup>—*Turning Point* states that rates will be pegged to the minimum wage to ensure that Ontarians are always better off working. As the minimum wage is no longer sufficient to raise many working poor above the poverty line, *Turning Point* is in effect a commitment to inadequacy.

Despite the claim in *Turning Point* that the proposed reforms go far beyond those suggested in previous recommendations, the reality is that *Turning Point* has considerably narrowed the vision of community participation which has been a central feature of reform discourse since the release of the first major advisory report, *Transitions*, in 1988.<sup>68</sup> While *Turning Point* adopts the language of “transition” from welfare to community participation, the concept of participation has shifted from the *Transitions* vision of a broad range of community activities to a strict employment focus.

Apart from the substantive details of the new programs, advocates also have serious cause for concern about the manner in which the reform is proceeding. The government has announced that new legislation will be introduced in the 1993 calendar year, with the intention that first and second reading will be completed in this term with third reading in the spring term, and will be implemented before the end of its term of office, but it has not yet even decided who will deliver the new system.<sup>69</sup> Even the relatively minor changes introduced over the last two years threw the delivery system into chaos. There are

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66. Space here obviously precludes a full analysis of the reform proposals and the initial responses of the advocacy and activist community. Interested readers may obtain more detailed analyses from the Clinic Resource Office.

67. However, it will be impossible to extend some kinds of benefits (eg., payments on behalf of dependent children) to a much larger group without either reducing the value of the benefit to individuals, cutting expenses in other areas, or committing to much larger social assistance budgets. The latter option seems out of the question in the current fiscal environment.

68. Ontario, *Report of the Social Assistance Review Committee; Transitions* (Toronto; Queens' Printer, 13 May 1988) (Chair: G. Thomson).

69. Almost unbelievably, despite a decade of debate on social assistance reform, the government has failed to make a decision on whether the new system will be administered provincially, municipally or in combination.

legitimate grounds to be concerned whether such fundamental changes can be enacted within such a narrow time frame without equal or worse chaos.

Overall, *Turning Point* represents a drastic narrowing of the NDP's one-time social vision. No one could argue that the welfare system should become far more involved in assisting people to prepare for the labour market and to help those who need help find jobs. However, in the end the question that must be posed against *Turning Point*'s main thrust is: What jobs? It will be a particularly acute irony if Ontario's first NDP government is the one which finally succeeds in substantially cutting the value of social assistance benefits and entrenches a new neo-conservative spin on the old principle of "less eligibility"<sup>70</sup>, in return for nothing more than a faster cycling of people through the most marginal employment market.

## 2. Worker's Compensation

Beleaguered. That may be the best word to describe the state of the Worker's Compensation Board in Ontario. In the past year many of the actions of the Board (which would normally pass almost unnoticed) have been the subject of newspaper headlines, questions in the provincial Legislative's Question Period, a Provincial Auditor's report and even of a private member's motion in the Legislature.<sup>71</sup>

### (a) New WCB Headquarters

Perhaps the most controversial issue was the Provincial Auditor's report on the Board's decision to construct and be the principal investor in its new headquarters, to be known as Simcoe Place. Concerns raised about the project included whether it was necessary to construct a new office tower when there was a glut of office space already available in Toronto, whether the tendering process was as open and fair as it could have been, whether the Board was politically accountable for the decisions it had made concerning the project,

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70. "Less eligibility" is the phrase traditionally used to describe the fundamental principle of nineteenth century welfare programs that welfare must always be less attractive than the least attractive employment alternative, as a deterrent to the "natural sloth" of the poor.

71. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, (May 20, 1993) at 933-942. The motion was moved by Elizabeth Witmer (PC-Waterloo North). The gist of the motion was that immediate action was needed to rectify the problems at the Board, including an investigation into the privatizing of workplace accident and injury insurance, a moratorium on all new entitlement until the unfunded liability had been dealt with, a reduction of benefit levels and a streamlining of administrative procedures, adoption of a value-for-money approach to rehabilitation and value-for-money audits of the Board's procedures. The motion was defeated.

and even whether the Board had the legal authority to become involved in the project in the first place. The Auditor was to do a value for money audit of the Simcoe Place project. While the report confirmed that the project did represent value for money,<sup>72</sup> it was very critical of the Board's decision-making process. In fact, the Auditor claimed that the major recommendation in the report was that "the accountability framework within which the WCB operates" should be examined.<sup>73</sup> Overall, the Auditor's report was less than a ringing endorsement for the Board.

### (b) Unfunded Liability

The Board also faced increasing scrutiny over the continued growth of its unfunded liability.<sup>74</sup> Opposition politicians continually berated the government with the accusation that the Board's unfunded liability, which stood at approximately \$11 billion at the end of 1992, was increasing at the rate of \$100 million per month.<sup>75</sup> In fact, according to Brian King, the vice-chair of administration, the unfunded liability was expected to increase by only 4% (\$440 million) by the end of 1993.<sup>76</sup>

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72. In fact, even this point was qualified by the Auditor. The statement from the Auditor's report which the Board claimed demonstrated that the project represented value for money stated

The \$26 per square foot non-arms length rental rate paid by the WCB for 70 per cent of the office space ensures that the investment will provide a reasonable rate of return comparable to other investments in the Accident Fund.

However, as the Auditor stated in testimony before the Standing Committee on Public Accounts,

These are not rentals that are achieved from anywhere outside the board. In other words, they did construct the rental rate in such a way that it would give them a reasonable rate of return. But this is taking money from one pocket and putting it into the other.

...

I stick by my response that there are flaws in the value for money that they have obtained.

Ontario, Legislative Assembly, Standing Committee on Public Accounts, "Worker's Compensation Board Subcommittee Report" in *Official Report of Debates (Hansard)*, No. P-9 (July 23, 1993) at P-122.

73. *Ibid.* at P-114.

74. For a discussion of the background to this issue and the Board's attempts to rectify the situation see Ellsworth & Morrison (1992) at 22-23.

75. *Supra*, note 71 at 933.

76. Martin Mittelstaedt, "WCB unfunded liability rising" *The [Toronto] Globe and Mail* (14 September 1993) B1. The vice-chair was testifying before a legislative committee.

In truth, the unfunded liability is a convenient issue with which to pillory the government. Neither of the opposition parties is blameless in the matter. From 1983 to 1985, the last two years of the Conservative regime, the unfunded liability grew by 166% from \$2 billion to \$5.44 billion. During five years of Liberal government, it grew by 69%, from \$5.44 billion to \$9.1 billion. Even taking into account the projected figure for 1993, the unfunded liability has grown by only 27% under the New Democrats' tenure.<sup>77</sup>

**(c) Fraud**

The Board has also been making efforts to deal with fraud within the Worker's Compensation system. The Board's approach to combat fraud has included the development of an internal strategy which focused on "prevention, detection, investigation and recovery" and the creation of a Fraud Investigations Unit.<sup>78</sup> Despite these efforts, the Board admitted that it was losing over \$150 million a year through fraud and theft.<sup>79</sup> In its own defense the Board pointed out that it was precisely because of the anti-fraud strategy which it had adopted that the magnitude of the problem was becoming more publicly known, and that its strategy would ensure that the figure would decrease over time.<sup>80</sup>

**(d) The WCB's "ACTION PLAN"**

Last year we commented upon the recommendations of the Report of the Chairman's Task Force on Service Delivery and Vocational Rehabilitation and their implications for the Board.<sup>81</sup> The Chair and the Vice-Chair of Administration viewed this Report as the "single most significant event of 1992" for the Board.<sup>82</sup> The Board instituted a comprehensive review of the Report which was to outline the Board's response to the Task Force's recommendations and to report on the implementation of those recommendations (or

77. *Worker's Compensation Board of Ontario: Annual Report 1992* at 44.

78. *Ibid.* at 14.

79. R. Mackie "WCB official defends move against fraud" *The [Toronto] Globe and Mail* (date unknown, Spring 1993), page unknown. The anti-fraud strategy focussed on four areas; Board employees, suppliers of services to the Board or to injured workers, tax avoidance by employers and workers claiming benefits when they either weren't disabled or weren't injured on the job.

80. *Ibid.* Even this point was not without controversy. Both opposition parties called for the resignation of the Board's chairman when the level of fraud was made public. This was notwithstanding the fact that it was this chairman who was, in part, responsible for the Board's approach to exposing the level of fraud.

81. Ellsworth & Morrison (1992) at 24-25.

82. *Supra*, note 77 at 4.

the reasons why implementation would not occur). The Board's response was the *ACTION PLAN*.<sup>83</sup>

Space prohibits a full analysis of the *ACTION PLAN*. However, it is divided into four parts: an overview of the themes of the Task Force Report and the five goals endorsed by the Board to guide the WCB over the next two years, the WCB's objectives in response to those themes and goals, a recommendation-by-recommendation accounting of the WCB's responses to the Task Force Report and a recommendation-by-recommendation accounting of those responses by expected implementation dates.<sup>84</sup> The Board has and will continue to publish quarterly reports indicating the success it has had in achieving its objectives in this area.<sup>85</sup>

The five themes which the Board has drawn from the Task Force Report are the following:

- introduction of a new case management model and a new emphasis on early appropriate vocational rehabilitation
- creating partnerships with stakeholders
- developing a new corporate culture
- developing the internal partnership
- looking to the future.<sup>86</sup>

The Board is taking steps to respond to each of these themes. In the area of improving vocational rehabilitation services one of the Board's goals was the appointment of a Chief Vocational Rehabilitation Officer. This appointment was made effective in the late summer of 1993.<sup>87</sup> With respect to the development of a new corporate culture, one of the goals was to "strive for excellence as an employer...including proper training and support for staff". Unfortunately the Board has not been as prompt in fulfilling this objective although some progress has been made.<sup>88</sup>

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83. Ontario Worker's Compensation Board, *ACTION PLAN: The WCB's response to the Report of the Chairman's Task Force on Service Delivery & Vocational Rehabilitation* (November 27, 1992).

84. *Ibid.* at 2.

85. For example see Ontario Worker's Compensation Board, *ACTION PLAN: First Quarter Report 1993* (April 15, 1993) and *ACTION PLAN: Second Quarter Report 1993* (July 14, 1993).

86. *Supra*, note 83 at 8.

87. For an examination of the Board's efforts on this issue see *ACTION PLAN: Second Quarter Report 1993* Objective 1.1 at 2-1.

Overall, however, the Board would appear to be making serious efforts to implement the many good recommendations contained in the Task Force's Report. The effect of the implementation of these recommendations still remains to be seen.

**(e) Occupational Disease Task Force**

Another important event in the field of worker's compensation was the release of the *Report of the Occupational Disease Task Force*.<sup>89</sup> The Task Force was set up to examine the principles underlying the determination of occupational and industrial disease claims. Its process involved examining the worker's compensation system in the broader context, examining the legislative provisions applicable to occupational and industrial diseases, reviewing the adjudicative process (including the information sources and policies available to adjudicators), identifying the issues and difficulties in the process and making recommendations to facilitate adjudication.<sup>90</sup>

The recommendations made by the Task Force are too numerous to examine in this context. However, several of them, if followed will have an effect on more than just occupational disease claims. It stated that serious consideration should be given to amending the *Worker's Compensation Act*<sup>91</sup> to include a "purpose" clause and that, regardless of whether such an amendment was made, the Board of Directors should insure that the purpose and intent of legislation are clearly conveyed and reflected in the development of the guiding principles used by the WCB in administering the *Act*.<sup>92</sup>

The Task Force also opined that the present definition of "accident" should be altered. It proposed instead that "compensable medical conditions" should be defined to include "injuries and sudden onset conditions" and "progressive onset" conditions.<sup>93</sup> Essentially, this would amount to a consolidation of the

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88. *Ibid.* objective 3.13 at 2-18.

89. Ontario, Ministry of Labour *Report of the Occupational Disease Task Force* (March, 1993).

90. *Ibid.* at ix.

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

92. *Supra*, note 89 at 42-43. The purpose and intent of the *Act* is to provide ...a no fault insurance scheme funded by employers to provide compensation for injuries and illnesses when work or work factors made a significant contribution to the development of the injury or illness."

93. *Ibid.* at 56. Injuries and sudden onset conditions would include those conditions covered under subsections 1(1)(a) and (b) of the present *Act*; wilful and intentional

present "accident" section and the section granting entitlement for occupational disease. The Report stated that this would ensure that occupational disease was an "integral component" of the compensation system, and recognize that it is part of a continuum of disabilities which can result from work.<sup>94</sup>

The Task Force also found the present lack of guiding principles for adjudicating occupational disease claims to be of concern. It inferred that many of the shortcomings in the present decision-making process were a result of this absence of principles, and urged the Board of Directors, along with the body responsible for developing policy, to formulate such guiding principles.<sup>95</sup> The Task Force proposed a revamped Industrial Disease Standards Panel to fill this policy making role.<sup>96</sup> It concluded that the IDSP should be responsible for developing the specific policies for occupational diseases, subject to the approval of the Board of Directors. The process of developing such policies should include consultation with the public and consideration of the concerns of the Board and the needs of adjudicators. The policies should be published in the Ontario Gazette along with the IDSP's rationale for adopting them. The Task Force also recommended that the WCB be required to publish its response to the IDSP's proposal and its time frame for implementation, or its reasons why it does not intend to implement the policy.<sup>97</sup>

The Task Force viewed this expanded role for the IDSP as accomplishing several things. It would decrease the delays in adopting and implementing policies. It would ensure external input into the policy development process. Further, it would mean the elimination of the WCB's department which was dedicated to reviewing the process and conclusions of the IDSP, a blatant duplication of effort.<sup>98</sup>

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acts not being the acts of the worker and chance events occasioned by a physical or natural cause. Progressive onset conditions would include disablements (subsection 1(1)(c)) and occupational diseases. The Task Force also recommended that the presumptions and requirements for determining causal relationships should also be placed together in one section of the *Act*.

94. *Ibid.* at 55.

95. *Ibid.* at 73-75.

96. *Ibid.* at 88. The Task Force recommended that the IDSP have a full time executive consisting of a neutral chair, two vice-chairs representing labour and employers respectively and other part-time members who have expertise in the various technical specialities.

97. *Ibid.* at 88-89.

98. *Ibid.* at 88.

The Task Force consulted widely before the production of its Report. While it is a lengthy document, it contains many well thought out recommendations, both for improving the compensation and adjudication of occupational disease claims as well as for other compensation claims in general. It is hoped that the government will respond promptly to the initiatives in the Report.

**(f) Litigation Developments**

*(i) Future Economic Loss (FEL) awards*

*Decision No. 344/93*<sup>99</sup> was the first case in which the WCAT gave consideration to the issues surrounding a FEL award.<sup>100</sup> The worker suffered a compensable injury in March of 1990. He attempted to return to modified work in April of 1991, but had to stop after one shift. The WCB closed his vocational rehabilitation file and terminated his benefits, claiming that the modified work was suitable. The WCB also did a FEL assessment at this time and found that the worker was “not entitled” as he had been offered suitable employment at no wage loss. The worker appealed this decision. The Hearings Officer decided that the modified work was not suitable and ordered temporary benefits restored from April, 1991. The Hearings Officer also rescinded the FEL assessment. The WCB reactivated the worker’s VR file, but no VR assessment or FEL assessment were done. A new modified job was developed in April of 1992, but after two days the worker decided that he was unable to do it. The VR file was closed again and the worker appealed this closure. In September of 1992 the worker began work with another employer as a salesperson, although with substantially lower earnings than his pre-accident employment. In December of 1992 a second Hearings Officer decision determined that the worker’s VR file should not be reactivated, that his entitlement to a FEL award was denied and that he was not entitled to a FEL supplement. The worker appealed this decision to the WCAT.

The WCAT found that the second modified job was not suitable for the worker. The panel also concluded that the WCB’s initial determination (in April, 1991), that the worker was “not entitled” to a FEL award was incorrect, as the worker had met the threshold for entitlement to a FEL award; an injury which resulted in temporary disability for 12 continuous months. The panel stated that the real issue which the WCB should have decided was whether the

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99. (July 14, 1993; McCombie, Barbeau, Lebert).

100. Section 43(1) of the Worker’s Compensation Act provides:

43(1) A worker who suffers an injury resulting in permanent impairment or resulting in temporary disability for twelve continuous months is entitled to compensation for future loss of earnings arising from the injury.

worker had suffered any wage loss or whether a 0% FEL award should have been made.<sup>101</sup> In fact, the WCAT interpreted the WCB's and the first Hearings Officer's decision in this manner. This approach was considered important by the panel because it allowed for a subsequent review of the FEL award to conclude that a wage loss had been suffered. If the WCB's approach was followed, then the worker could never have the FEL decision reviewed in the future.

WCB policy stated that an appeal of a FEL award should be based upon the circumstances as they existed at the time of the "original determination". The WCAT concluded that, as the initial FEL assessment had been rescinded, the "original determination" date would be the date of the second Hearings Officer's decision (December, 1992). At that time the worker was employed as a salesperson and was experiencing a fluctuating wage loss. The panel reasoned that the wage loss could be addressed by setting a FEL award to reflect this difference in wages or by granting a nominal FEL award (a sustainability award) and a FEL supplement which would fluctuate with the wage loss of the worker.<sup>102</sup> The Tribunal viewed the worker's job as a salesperson as a suitable vocational rehabilitation program, entitling him to a FEL supplement. The panel concluded that the worker's future loss of earnings could best be compensated by granting a FEL sustainability award and a FEL supplement.<sup>103</sup>

(ii) *Implementation of Board of Director's Review of Chronic Pain Decisions*

The past year witnessed a continuation of the saga over who has the "final say" in compensation matters. In several decisions the WCAT was faced with deciding how (or if) to implement the *Review of Decisions No. 915 and 915A*.<sup>104</sup> *Decision No. 12R2* was the first of such decisions.<sup>105</sup>

101. *Supra*, note 99 at 11.

102. *Ibid.* at 12.

103. *Ibid.* at 14.

104. (1990), 15 W.C.A.T.R. 245 (WCB Board of Directors). This was one of 25 decisions in which the Tribunal had awarded benefits for chronic pain. Pursuant to section 93 of the Act, the Board of Directors reviewed all of these decisions. Section 93 provides:

93(1) Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of directors may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.

The panel noted that, before even getting to an application of the board of director's determinations to the facts of the case, consideration should be given to whether the board of director's review was lawfully constituted. This involved an examination of three factors:

- did the Tribunal's original decision turn upon an interpretation of the policy and general law of the Act,
- if it did, was the determination in question a determination of an issue of interpretation upon which the original decision turned,
- if the review was authorized on the latter two grounds, was it nonetheless unauthorized by reason of its being patently unreasonable?<sup>106</sup>

The panel also stated that other concerns may arise, such as whether the rules of natural justice were met in the review process before the board of directors.<sup>107</sup>

Due to the cumulative effect of many factors, the panel was not satisfied in this case that the preliminary grounds had been met. Their concerns primarily focused on whether the original decision actually turned upon an interpretation of the policy and general law of the Act. However, the review process itself also troubled the panel. Factors such as the delay which occurred between the Tribunal's original decision and the direction from the board of directors to reconsider the decision, the paucity of reasons given by the board of directors for its determination and the lack of certainty as to which members of the board made the decision and whether the decision was unanimous or only by a majority vote were major concerns on this issue. The panel outlined the following general guidelines for evaluating the section 93 review process:

- when these extraordinary powers are invoked, the WCAT decision must be challenged as soon as is reasonably possible;

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105. (March 25, 1993; McCombie, Chapman, Cook). The worker was represented by Injured Workers' Consultants. The other decisions included *Decision No. 797/87RI* (October 29, 1992; McCombie, Shartal, Chapman), *Decision No. 178RI* (October 14, 1992; McIntosh-Janis, Lebert, Chapman), *Decision No. 178RI2* (December 10, 1992; McIntosh-Janis, Lebert, Chapman), *Decision No. 284/88RI* (November 3, 1992; Moore, Cook, Meslin), *Decision No. 396RI* (November 11, 1992; Moore, Lebert, Nipshagen) and, *Decision No. 757R* (June 29, 1993; Onen, Shartal, Barbeau).

106. *Ibid.* at 22. These criteria were adopted from *Decision No. 42/89* (1989), 12 W.C.A.T.R. 85 at 100.

107. The panel posited this inquiry as a "threshold test", different from the one usually applied by the Tribunal in reconsideration decisions.

- when a WCAT decision is challenged, the substantive arguments and objections of the parties and, in particular, of the appellant whose decision is under review must be fully answered, and;
- the decision-makers must be plainly identified and any dissenting views must be noted in writing.<sup>108</sup>

It will be interesting to see how the board of directors responds to this decision of the Tribunal. Could this decision be reviewed pursuant to section 93?

*(iii) Permanent Partial Disability Supplements*

In *Decision No. 50/93*<sup>109</sup> the worker had suffered a back injury for which he received a 15% pension. He had returned to work but was sent home in December, 1990 because there was no longer any suitable work. The Board took no further action until February, 1991 although the worker's 147(2) supplement was reduced to a 147(4) supplement.<sup>110</sup> The worker appealed this reduction. The Tribunal concluded that the Board was penalizing the worker for the Board's own inactivity. The worker had kept in contact with the employer and his union office regarding other suitable work. This is what he had done (and had been instructed to do by the Board) during previous periods of vocational rehabilitation. The Tribunal concluded that these actions met the requirements of the Board's policy on full supplementary benefits and granted the worker's appeal.

In *Decision No 592/92I*<sup>111</sup> the worker was receiving a pension and a 147(2) supplement. He was sponsored in training program by the Board, but in 1990 had failed four of five courses and was dismissed from the program. He had

108. *Supra*, note 105 at 28-29.

109. (February 18, 1993; McIntosh-Janis, Shartal, Chapman).

110. Section 147(2) and (4) provide:

147(2) Subject to subsections (9) and (10), the Board shall give a supplement to a worker who, in the opinion of the Board, is likely to benefit from a vocational rehabilitation program which could help to increase the worker's earning capacity to such an extent that the sum of the worker's earning capacity after vocational rehabilitation and the amount awarded for permanent partial disability approximates the worker's average or net average earnings, as the case may be, before the worker's injury.

...

(4) Subject to subsections (8), (9) and (10), the Board shall give a supplement to a worker,

(a) who, in the opinion of the Board, is not likely to benefit from a vocational rehabilitation program in the manner described in subsection (2); or

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

111. (February 16, 1993; Moore, Lebert, Howes).

been reinstated in the program, but failed to write his exams in February, 1991. The Board discontinued vocational rehabilitation services and reduced his supplement to a section 147(4) supplement. The worker appealed. The Tribunal concluded that the worker's lack of success in the program was not due to lack of cooperation but was because the program was not suitable. While the Board was justified in terminating sponsorship in the program, the worker would still benefit from appropriate vocational rehabilitation services and therefore remained entitled to a section 147(2) supplement.

### 3. Unemployment Insurance

#### (a) Bill C-113

Bill C-113, *An Act to Provide for Government Expenditure Restraint*<sup>112</sup> was the subject of much public debate. The Bill was seen by many as a further step to undermine the unemployment insurance scheme in place in Canada and to bring it more into line with the scheme in the United States. It was not a direct amendment to the *Unemployment Insurance Act*.<sup>113</sup> Rather, it was a money Bill whose aim was to cut government spending. With rising unemployment, the federal government was concerned about controlling and limiting expenditures to the unemployed.

The Bill cut the UI benefit rate from 60% of insurable earnings to 57%. This "temporary" measure is to last until April 1995.<sup>114</sup> Further, those workers who voluntarily leave employment without just cause (i.e., quit) or who are fired for misconduct will now be categorically ineligible for benefits.<sup>115</sup> Previously these claimants were subject to a period of disqualification but were ultimately entitled to benefits. Previously section 28(4) of the UIA named five possible grounds that could constitute just cause. This has expanded to include 14 possible grounds.<sup>116</sup> Policy guidelines give examples of 40 instances where just cause may be found to exist.<sup>117</sup>

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112. S.C. 1993, c. 13. Proclaimed in force April 3, 1993.

113. R.S.C. 1985 c. U-1, as amended. Hereinafter the UIA.

114. SOR/93-178, section 1.

115. *Supra*, note 112, section 21.

116. *Ibid.* section 19.

117. Canadian Employment and Immigration Commission, *Digest of Benefit Entitlement Principles*, Vol. 1, Ch. 6 "Voluntarily Leaving Employment" at 26-44. The list was previously and does remain an open list. It is not limited by statute to those named grounds. The government feels the list includes all those grounds presently recognized by the jurisprudence.

The Policy guidelines also state that the benefit of the doubt will be given to claimants under these provisions, however this principle is not stated in the legislation itself.<sup>118</sup> Further, according to the UIA, claimants must still prove that there was “no reasonable alternative to leaving the employment” in question. The burden of proof is placed on claimants to prove they were not fired for misconduct or did not quit without just cause. Many of these workers will be the most vulnerable of working persons. It is feared that these workers will feel compelled to accept poorer or less safe working conditions rather than leave their employment. This will undermine the enforcement of provincial employment standards and health and safety legislation.

One additional ground that is not set out in s. 28 of the UIA, but will be accepted as just cause for leaving work, is where employees leave work according to an employer downsizing/ employee buy-out arrangement. Such claimants may receive benefits if they otherwise qualify.<sup>119</sup>

#### **(b) Retraining**

The Minister for Employment and Immigration announced in December 1992 that he was committing \$250 million over the next five years to develop a comprehensive “human resource strategy” (i.e., retraining). To date much of the UI training money has been directed out of the UI fund. It is therefore heavily subsidized by employees. It is difficult to properly assess this retraining initiative. Money allocated so far appears to have gone to retraining and upgrading the skills of already highly skilled workers. It would appear that no substantial funds have been allocated to the less skilled or unskilled worker. The trainers are private companies which are not subject to close regulation despite the considerable government funding. There is very little possibility of carefully monitoring the benefit derived from the programmes offered.

It is too early to determine the impact that these changes will have on the unemployed. However, whether it is provincial social assistance or federal unemployment insurance, the myth of wide-spread fraud on the system is being perpetuated by the respective governments.<sup>120</sup> Therefore, it is anticipated that there will be increased investigations of UI claims.

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118. *Ibid.* at 6-8.

119. *Supra*, note 113, section 44(w.1).

120. See the discussion about fraud in Section C SOCIAL ASSISTANCE and WORKER'S COMPENSATION, *supra*.

### (c) Litigation Developments

#### (i) Claimants' Rights

In *R v Mascia*<sup>121</sup> the claimant was convicted of ten counts of false reporting contrary to s. 103 of the UIA. The conviction was based on admissions made during an interview with an investigating officer employed by the Commission. The Claimant had been employed for four months while he was receiving benefits from the Unemployment Insurance Commission. An investigations officer with the Commission requested an interview with the Claimant after noting some irregularities with the claim.<sup>122</sup> The claimant did not know what the subject of the interview was until he arrived and at no time was he cautioned as to his rights to counsel or that he need not participate in the interview. In response to questioning, he admitted that he had signed the report cards in issue and that he had been employed while in receipt of benefits. After these admissions were made, the investigations officer advised the Claimant that he would forward the information to his superiors at the Commission and a decision would be made as to what sanction would be imposed.<sup>123</sup> It was admitted that the Commission would not have been able to prove its allegations in the absence of the admission by the claimant.

The claimant appealed, on the ground that the admissions were not voluntary and were therefore inadmissible, that his right to be free from self-incrimination pursuant to section 7 of the *Charter* was infringed and that he had been detained by the investigator during the interview and was therefore entitled to be advised of his right to counsel, pursuant to section 10(b) of the *Charter*.<sup>124</sup>

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121. [1993] O.J. No. 638 (O.C.J.) (QL) [unreported].

122. The Claimant was sent a Notice to Report pursuant to s. 41(6) of the Unemployment Insurance Act. Section 41(6) basically requires the claimant to attend and supply information to the Unemployment Insurance Commission. This Notice is normally sent to persons whose current claims and benefits are being investigated. However it was a past claim that was being investigated in this instance. This notice provided in bold print:

This interview is to obtain information required by the commission to determine your entitlement to unemployment insurance benefits. Not reporting may result in a denial or suspension of benefit.

123. The Commission could impose one of three sanctions:

1. a repayment;
  2. a repayment and internal fine; or
  3. a repayment and institution of criminal charges.
- See sections 35, 103 and 104 of the UIA.

124. *Supra*, note 121 at 1.

The Court in *Mascia* held that the trial judge appeared to apply the correct test of voluntariness and had reached his conclusion on all the facts before him. There was no error made. This ground of appeal failed.<sup>125</sup> The Court also held it was not necessary to consider whether the claimant was “detained” during the interview. Therefore the Court did not decide whether his s. 10(b) right to counsel may have been infringed.<sup>126</sup>

The balance of the decision considered whether section 7 of the *Charter* protects a person who is statutorily compelled to give information from having that information used against him or her in a subsequent criminal proceeding. The Court stated that section 7 requires that “use immunity” be provided whenever a person is statutorily compelled to testify and his testimony may be used against him in a criminal proceeding.<sup>127</sup> The Court also held that it was quite apparent that s. 7 of the *Charter* includes the right to remain silent. This right arises “when the coercive power of the state is brought to bear against the individual”. It is when the adversary relationship comes in to existence between the state and the individual that the right to silence first emerges.<sup>128</sup>

The Court reasoned that once the state suspected the claimant of falsifying his claims and placed him in the position that he must answer pertinent questions (under statutory compulsion), the “adversary relationship” was created. Therefore, the section 7 right to remain silent arose when the claimant was speaking to the investigations officer. In the Court’s view, when the state used the statement that it had statutorily compelled from the claimant to prove the criminal offence with which he was charged, that amounted to the conscripting of the claimant against himself, and was a violation of the appellant’s right to silence. The claimant succeeded on this ground of appeal.<sup>129</sup>

*R v Diggs*<sup>130</sup> involved a criminal prosecution of a UI claimant for making false or misleading statements. The investigation officer employed by the Commission had reason to suspect that the claimant had worked during a previous claim without reporting that fact. She requested the claimant to come in to the

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125. *Ibid.* at 4.

126. *Ibid.* at 17.

127. *Ibid.* at 6-7. Citing *Thomson Newspapers Ltd. v. Director of Investigation & Research* (1990), 54 C.C.C. (3d) 417 (S.C.C.).

128. *Ibid.* at 14. Citing *R v Hebert* (1990), 57 CCC (3d) 1 (S.C.C.).

129. *Ibid.* at 15-16. However, if the state had used the information it obtained strictly for its own administrative purposes, then the claimant’s right to remain silent would not have been violated.

130. (May 19, 1993), Dartmouth #299880 -299909 (N.S. Prov. Ct.) [unreported].

office to answer some questions.<sup>131</sup> During the course of this interview the claimant gave some statements which the Commission attempted to use in the criminal prosecution. As in *Mascia*, at issue in this case were whether the claimant's right to remain silent (section 7) and his right to counsel (section 10(b)) had been violated.

The Court concluded that the claimant had not been "detained" and thus there was no obligation on the investigation officer to advise the claimant of his right to counsel.<sup>132</sup> In coming to this conclusion the Court noted that the claimant was not obliged to attend the meeting, that he came and left the meeting on his own, that at the time of the interview the investigation officer had not formed an opinion as to the reasons for the claimant's misleading statements, and that there was no evidence from the claimant that he believed that he was detained.<sup>133</sup>

The Court also held that the claimant's right to silence had not been infringed. On the basis of the *Hebert*<sup>134</sup> case, the Court stated that the right to remain silent only arose upon detention. The Court distinguished the decision in *Beads*<sup>135</sup> on two grounds. The first was that the evidence, viewed objectively, did not show that the claimant would have felt compelled to attend and make the statements which he did. The second was that there was no subjective evidence to show that the claimant felt compelled to make the statements which he did, as he did not testify on this issue.<sup>136</sup>

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131. The investigation officer in this case testified that she simply telephoned the claimant and asked him to come and talk about what happened. She stated that the Commission no longer used the Notice to Report because of the decision in *R. v. Beals* (1991), 68 C.C.C. (3d) 277 (N.S.C.C.). For a discussion of this case see Ellsworth & Morrison (1992) at 32-33.

132. *Supra*, note 130 at 14.

133. *Ibid.* at 10-12.

134. *Supra*, note 128.

135. *Supra*, note 131. In *Beads* the court had found a violation of the section 7 right to silence in circumstances very similar to *Mascia*; that is, the statements were compelled by statute.

136. *Supra*, note 130 at 16-17. The one glimmer of hope in this reasoning is that it leaves open the possibility that a claimant who, out of the not unnatural (nor unwarranted) fear that the refusal to consent to the interview would jeopardize his or her benefits goes to the interview and makes an incriminating statement, could still argue that subjectively he or she felt compelled to make the statement.

*(ii) Jurisdiction of Boards and Umpires*

With disenfranchisement and disqualifications being so oppressive under the current UI scheme it is important that claimants have a meaningful right of appeal. Unfortunately many boards of referees and some Umpires are deferring to the Commission in some very important areas. It is arguable that they are in fact declining jurisdiction which is mandated to them on an appeal.

Where a claimant is disqualified under section 27(1)(a) or (b) (or prior to Bill C-113, under section 28) the claimant has his or her benefit rate reduced to 50% of insurable earnings and the reduction continues "for such weeks as the Commission may determine within the benefit period".<sup>137</sup> The Commission has no discretion to vary the 50% reduction rate.<sup>138</sup> The reduction in benefit need not be for the entire benefit period, but may be only for some portion of it.<sup>139</sup>

The real issue in such cases is whether the Commission's decision as to the length of time for which the reduction applies is reviewable by the board of referees and/or the Umpire. There is no decision of an Umpire to date that has expressly stated that this is so. Two decisions have come close. In *CUB-21695*<sup>140</sup> the Umpire stated that at the very least the board may refer the matter back to the Commission for reconsideration and require a report as to the Commission's decision. The Umpire asked the Commission to re-evaluate the period of reduction in this case. In *CUB-20509*<sup>141</sup> the Umpire referred the matter back to a differently constituted board and therefore impliedly found that the board had jurisdiction to vary the duration. However, in *CUB-21665*<sup>142</sup> and *CUB-21673*<sup>143</sup> the Umpire expressly stated that the decision is not reviewable. Finally *CUB-21318* referred the matter back to the Commission and is therefore not determinative of the issue.

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137. *Supra.*, note 113, sections 30(6) and (7).

138. For example see: *CUB-20683* (January 3, 1992; Rouleau J.), *CUB-20795* (February 24, 1992; McKay J.), *CUB-21419* (June 3, 1992; Rouleau, J.), *CUB-21628* (June 9, 1992; Jerome, J.).

139. For example see: *CUB-21665* (June 8, 1992; Walsh, J.), *CUB-21318* (June 17, 1992; Dennault, J.), under appeal to the Federal Court, *CUB-21695* (June 26, 1992; Reed, J.) under appeal to the Federal Court, *CUB-20509* (October 25, 1992; Reed, J.).

140. *Ibid.*

141. *Ibid.*

142. *Ibid.*

143. (June 1, 1992; Walsh J.).

Two of these decisions, *CUB-21318* and *CUB-21695* are under appeal to the Federal Court of Appeal. However, the real issue before the courts appears to be whether the Commission has a discretion to exercise in setting the period for which the reduction applies and not whether that decision by the Commission is reviewable. As noted above, with the increased severity of the penalty for disentitlements and disqualifications, a meaningful appeal process is of paramount importance. While neither of the decisions under appeal provides any kind of careful analysis of the provisions in question, it is hoped that the Federal Court will clarify the issue, in a favourable way for claimants.<sup>144</sup>

*(iii) Availability for Work - Full Time Students*

In *Landry v Canada (AG)*<sup>145</sup> the Court held that an error in law had been made by an Umpire who had held that a claimant was not available for work merely because he was a full-time student. The Court stated that there may be a presumption to this effect, but that a claimant may rebut that presumption on the facts.<sup>146</sup> In this case the Court was not satisfied that the claimant had rebutted the presumption. The claimant had not been believed when he stated that he would have quit his studies if employment had become available.

It would appear that in such cases it will be necessary for a claimant to satisfy the Commission or, on appeal, a board of referees or an umpire that he or she was looking for employment, and that the course of studies would not have prevented the claimant from accepting employment if it was offered. This might require the claimant to quit all or part of his or her studies.

*(iv) Interruption of earnings*

In *Canada v Duffenais*<sup>147</sup> the claimant's employment had been reduced to one day per week. He was informed by a Commission employee that he could work any day of the week and it would not affect his UI entitlement. However, the employee did not inform him that he had to have seven consecutive days of no work and no earnings in order to be eligible.<sup>148</sup> The claimant returned to

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144. A similar debate has arisen under section 33 of the UIA. Under s. 33(1) the Commission may impose a penalty upon claimants where "in its opinion" they have made false or misleading statements. *CUB-20766* (February 14, 1992; Denault J.) concluded that board of referees had no power to vary a section 33 penalty. However, in a well-reasoned decision, the Umpire in *CUB-21413* (May 11, 1992; Joyal J.) expressly disagreed with *CUB-20766*, and noted that the issue would have to be resolved by the Federal Court. To date, this issue has not been appealed.

145. (1992), 152 N.R. 164 (F.C.A.).

146. *Ibid.* at 165.

147. (1993), 154 N.R. 203 (F.C.A.).

his one day of work after only five days off. The Commission found him ineligible, as he did not have an interruption of earnings. The Court held that despite the fact that the claimant had acted to his detriment on erroneous advice from a Commission agent, the claimant was not eligible as there was no exception to the statutory requirements<sup>149</sup>.

(v) *Negligent Misrepresentation*

The only remedy for a claimant such as the one in *Duffenais* may be to sue the Crown for damages for negligent misrepresentation. This issue was considered in the UI context in *Yaholnitsky v. Canada*.<sup>150</sup> The plaintiff was suing the Commission for representations made to her concerning the eligibility for and duration of maternity benefits. The Court set out the five-part test for success in a negligent misrepresentation action as follows:

- a) there must be a representation which is inaccurate or misleading;
- b) the representation must have been made negligently;
- c) there must be a duty of care based on a "special relationship" between the representor and representee;
- d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
- e) damages must have resulted from the representee's reliance on the negligent misrepresentation.<sup>151</sup>

In *Yaholnitsky* the Court found that the representations made by the Commission employees were not inaccurate or misleading.<sup>152</sup> However, in *Duffenais* the Court accepted that the claimant had acted upon erroneous or misleading advice.<sup>153</sup> It would also appear to be without question the claimant reasonably relied on the representation (by returning to work) and suffered damages (the loss of his UI entitlement). It might be more difficult to establish that a "special relationship" existed between the claimant and the Commission employee responsible for adjudicating claims under the Act and advising claimants as to their rights and responsibilities so as to give rise to a duty of care. The most difficult issue would be in determining whether the representations were made negligently (i.e., whether in the context of the situation the information con-

148. *Supra*, note 113, section 6(2) and section 37(1) of the *Unemployment Insurance Regulations* C.R.C. 1978, c. 1576, as amended.

149. *Supra*, note 147 at 205.

150. (June 23, 1993), Action No. T-3006-91 (F.C.T.D.) [unreported].

151. *Ibid.* at 5.

152. *Ibid.* at 6.

153. *Supra*, note 147 at 205.

veyed to the claimant who asked how working one day per week would affect his UI eligibility, was sufficient).<sup>154</sup>

#### 4. Canada Pension Plan

##### (a) Appeals Process

The past year has seen the first appeals dealt with by the new Review Tribunal.<sup>155</sup> The Review Tribunal was meant to provide a more professional and independent second level of appeal in the CPP appeal process. Anecdotal evidence seems to suggest that the Tribunal is in fact achieving this end.<sup>156</sup> The Commissioner of Canada Pension Plan Review Tribunals appears to be aware of the shortcomings of the old Review Committees, and is making efforts to ensure that the Tribunal is, and is perceived to be, at arm's length from the Minister and the Income Security Programs Branch of the Minister of National Health and Welfare.<sup>157</sup>

The hearing process before the Review Tribunal has become somewhat more formalized as well. (In fact, the Tribunal has its own Rules of Procedure which should be consulted throughout the appeal process.) As soon as an appeal is acknowledged, the Commissioner writes to the Minister to request copies of all material used in making the initial decision. A copy of this material is provided to the appellant (or his or her legal representative) for review before the hearing. The appellant also has the ability to submit additional evidence either before or at the hearing, although it is probably a good policy to provide such material before the hearing so the Tribunal panel may review it. When the Tribunal has reached its decision, the decision will be communicated to the parties by the Commissioner.<sup>158</sup>

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154. For a good discussion of these issues see *The Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.).

155. For a fuller discussion of the effect of the amendments to the appeal process, see Ellsworth & Morrison (1992) at 39.

156. Conversation of the author with Mr. Ron Stuart, Commissioner of Canada Pension Plan Review Tribunals, June 17, 1993. However, some legal clinics have reported a less than cooperative attitude on the part of some of the staff in the Office of the Commissioner, especially in so far as scheduling of hearings is concerned. The Commissioner does seem to be open to input on Tribunal procedures, and has been responsive to clinic concerns.

157. *Ibid.*

158. This information is provided to appellants by the Office of the Commissioner of Canada Pension Plan Review Tribunals in a handout entitled "Information for appellants and other parties to an appeal to a Canada Pension Plan Review Tribunal" (May, 1993).

While more independence and more consistent decision making on the part of the Review Tribunal is sure to be welcome by advocates, there is a downside. It is likely that fewer cases will be granted leave to appeal to the Pension Appeals Board, due to the increased competence of the Review Tribunal panels.

**(b) Disability Eligibility Criteria**

As was noted last year, the disability eligibility criteria were amended, effectively allowing many who would not previously have qualified for a disability pension because they had not made sufficient contributions to qualify for such a pension.<sup>159</sup> Specifically, section 44(1)(b)(iv) of the *Canada Pension Plan* provides that a disability pension is payable to a contributor who:

...is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled had an application for a disability pension been received prior to the time the contributor's application for a disability pension was actually received.<sup>160</sup>

As would not seem surprising (given the convoluted wording) the application of this subsection has not been without controversy or confusion. This situation will probably remain unchanged for the near future, at least until the PAB gives consideration to the interpretation of this section.

Previously, in order for an applicant to be eligible for a CPP disability pension s/he must not only have been found to be disabled but also to have made sufficient contributions to the Plan within his or her qualifying period.<sup>161</sup> Health and Welfare's normal practice in disability cases was to first determine whether an applicant had made sufficient contributions to qualify for a pension. If not, the applicant was determined not to be qualified, regardless of whether or not s/he was disabled. Now however, if an applicant does not qualify for a pension under the above criteria, then Health and Welfare will, (allegedly) pursuant to section 44(1)(b)(iv), determine when the applicant last met the contribution requirements. When that date is determined, they then decide whether the applicant was disabled on that date. If so, the applicant would be eligible for a disability pension.<sup>162</sup>

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159. For the discussion of these amendments, see Ellsworth & Morrison (1992) at 36-37.

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

161. *Ibid.* sections 44(1)(b)(ii) and 44(2)(b). In the vast majority of cases "sufficient contributions" means contributions within five of the last ten years or two of the last three years.

162. However, the pension would only be payable beginning with the eleventh month prior to the application pursuant to which this determination was made. See section 69 of the *Canada Pension Plan*.

Clearly this amendment is an improvement over the state of affairs which existed previously. Arguably, the manner in which it is being interpreted and applied by Health and Welfare does not always produce the best result for the applicant. For example, suppose a person had contributed to the *Plan* for the years 1981-85 inclusive. In 1986 the person became disabled, and made no further contributions. In January of 1993 the person applied for a disability pension. By applying the "deemed disability" section, Health and Welfare would determine that the person's contributory period ended in 1991 and included the years 1982-1991. The person would only have contributed for four of those years and thus would not be eligible for a pension. However, by virtue of the new amendment the person would be eligible. Health and Welfare would determine that the person last met the contributory requirements in 1990, when s/he would have contributed five out of the last ten years. At that time the person was also disabled and so would be eligible for a pension.

While this is a better result than would have been reached under the old legislation, it is not the most favourable one. Arguably, Health and Welfare could have gone back to the date when the applicant became disabled, which was 1986. At this point the applicant had met the contributory criteria and was disabled. The advantage to the applicant in this approach is that the years 1987-90 are not included in his or her contributory period for the purposes of calculating the level of disability benefit.

### (c) Litigation Developments

#### (i) *Reconsideration on new facts—Right of appeal*

One of the first actions taken by the Commissioner of Review Tribunals required clarification by the Federal Court, Trial Division. The applicant had applied for a disability pension but had been denied in 1987. She failed to appeal the decision within the required time. In 1991 she applied to have the Minister reconsider the decision on the basis of new facts, pursuant to section 84(2) of the *Plan*.<sup>163</sup> The Minister did not change his decision. The applicant attempted to appeal the Minister's decision to the Review Tribunal, but the Review Tribunal concluded that it did not have jurisdiction to hear the appeal. The applicant brought an application for judicial review in which the issue to be decided was whether the Minister's decision under section 84(2) could be appealed to the Review Tribunal.

The Federal Court, Trial Division in *Peplinski v. Canada*,<sup>164</sup> ordered the Review Tribunal to hold a hearing. In reaching this conclusion Noel J. stated:

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163. Section 84(2) allows the Minister, *inter alia*, to rescind or amend a decision given by him or her, where new facts are present.

It follows that this right of appeal can only be exercised if the Minister decides to reconsider his original decision in light of new facts. If the Minister, in the exercise of his discretion under subsection 84(2), concludes that there are no new facts which would warrant a reconsideration of the original decision, no fresh decision can be said to have been rendered and no right of appeal lies under subsection 82(1). However, if the Minister decides that the new facts warrant a reconsideration of his original decision, a fresh decision will result under subsection 84(2) as it will be based on facts different from those under consideration when the original decision was rendered, and a right of appeal lies under subsection 82(1). This is the result whether or not the original decision is amended, rescinded or is allowed to stand as originally rendered. A decision based on new facts is a fresh decision irrespective of whether the original decision is allowed to stand or not.<sup>165</sup>

As there is no time limit to apply for a reconsideration under section 84(2), the section may be used to reverse an initial denial of entitlement by characterizing new medical evidence as “new facts”, even in circumstances where an appeal of the initial denial would be out of time (as was the case in *Peplinski*). The case is important because the court appears to affirm the principle that, at least in some circumstances, such decisions on reconsideration are appealable through the normal process. However, the distinction that the court makes between a decision not to review a case on the basis of new facts and a decision not to change a decision after reviewing new facts may be difficult to apply in practice. In almost any case, it is likely to be arguable that the original decision was reviewed in light of the new facts and is therefore subject to appeal. In *Peplinski* itself, the Federal Court found that the Minister had reviewed the original decision on eligibility, notwithstanding fairly ambiguous evidence on this point.<sup>166</sup>

(ii) *Survivor's benefits—Common law spouse*

In *Minister of National Health and Welfare v. Mosher*<sup>167</sup> the applicant argued that the requirement, contained in then section 64 of the *Canada Pension Plan*, that a common law spouse have resided with a deceased contributor for one year before his or her death in order to be eligible for a surviving spouse's

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164. [1993] 1 F.C. 222 (T.D.). The applicant was represented by the Renfrew County Legal Clinic.

165. *Ibid.* at 227.

166. After the court's decision, the applicant submitted her material for the appeal to the Review Tribunal. However, the Minister conducted another reconsideration (although on no new facts) in March of 1993 and awarded the applicant a disability pension retroactive to 1986.

167. (1990), C.E.B. & P.G.R. # 8616. For a more detailed discussion of this case see Ellsworth & Morrison (1991) at 45-46.

pension violated the equality rights section *Charter*. The *Canada Pension Plan* does not have the same requirement for a legally married spouse, and the applicant argued that this was discrimination on the basis of marital status. However, the PAB found no violation of the *Charter*. The applicant has commenced a judicial review of the PAB decision, seeking to have the decision set aside and a declaration that the decision erred in ruling that section 64 was not contrary to the *Charter*.<sup>168</sup>

(iii) *Disability pensions and the Charter*

Last year we reported on the PAB's decision in the *Johnston*<sup>169</sup> case. Unfortunately, the Pension Appeals Board has again decided that the differing contributory and eligibility requirements applicable to disabled contributors do not violate the equality rights section of the *Charter*. In *Minister of National Health and Welfare v. Sinclair*<sup>170</sup> the PAB merely adopted the simplistic reasons from the earlier decision in *Johnston*.<sup>171</sup> Perhaps this outcome was not surprising as MacIntosh and Dureault J.J.A., two of the PAB members in *Sinclair*, were also members of that earlier Board in *Johnston*.

The applicant in *Sinclair* also argued that the contributory and eligibility criteria violated her section 7 rights under the *Charter*. On this issue the PAB adopted the reasoning in the earlier decision of *Kartisch*<sup>172</sup> and concluded that while the differing criteria "may result in a negative and economic consequence" they did not violate section 7. Again, this result is probably not surprising as the panel in *Sinclair* was the same panel that decided *Kartisch*.

While these decisions do not preclude poverty law practitioners from arguing that these provisions violate the *Charter* in future cases before the PAB, it may be that an application to the courts or a judicial review of one of the PAB decisions will be necessary to satisfactorily resolve this issue.

(iv) *Chronic pain*

One of the most positive notes in the jurisprudence of the Pension Appeals Board in the past year is the emerging recognition that a person suffering from chronic pain may be eligible for a disability benefit under the *Plan*. The PAB

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168. *Mosher v. Canada*, Action No. T-598-91 (F.C.T.D.) [unreported].

169. *Minister of National Health and Welfare v. Johnston* (1991), C.E.B. & P.G.R. # 9214. See Ellsworth & Morrison (1992) at 41-42.

170. (1992), C.E.B. & P.G.R. 8501. The applicant was represented by the Advocacy Resource Center for the Handicapped.

171. *Ibid.* at 5960.

172. *Minister of National Health and Welfare v. Kartisch* (1991), C.E.B. & P.G.R. 8625. For a discussion see Ellsworth & Morrison (1991) at 43.

considered this issue in *Reichel*,<sup>173</sup> *Thompson*<sup>174</sup> and *Densmore*.<sup>175</sup> In all three cases the PAB had no difficulty in accepting that chronic pain syndrome exists, but stated that the real issue was whether the pain was so severe that the sufferer was prevented from “regularly pursuing a substantially gainful occupation”. As the Board in *Densmore* reasoned

The issue is difficult because its resolution depends upon the view which the Board ultimately takes of the genuineness of what are strictly subjective symptoms. In effect, the judgment call, made generally without the assistance of objective clinical signs, will be one of credibility on a case by case basis, as to the severity of the pain complained of.<sup>176</sup>

In discussing the type of evidence which would be required in order to support a conclusion that the chronic pain syndrome was “severe” the Board stated in *Reichel*

By its very nature, there can be no objective evidence as the pain being described by the patient is inconsistent with clinical findings. Psychiatric evidence may not be required in all cases, but such evidence would be viewed as helpful for most. Clearly the evidence of an applicant, particularly respecting his or her efforts to cope with the pain and to receive treatment is imperative.<sup>177</sup>

In fact, all three decisions stress the importance of having the applicant give testimony concerning the effects of the syndrome on their daily lives.

## D. DEVELOPMENTS IN HOUSING LAW

### 1. Rent Control and the *Landlord and Tenant Act*<sup>178</sup>

The *Rent Control Act*<sup>179</sup> replaced the former *Residential Rent Regulation Act*.<sup>180</sup> Under the RRRRA, and now under the RCA, tenants are able to apply for

173. *Minister of National Health and Welfare v. Reichel* (1991), C.E.B. & P.G.R. 9218.

174. *Minister of National Health and Welfare v. Thompson* (November 30, 1992), Appeal: CP 2310 (Pension Appeals Board)[unreported]. The applicant was represented by Hastings and Prince Edward Legal Services.

175. *Minister of National Health and Welfare v. Densmore* (June 2, 1993), Appeal: CP 2389 (Pension Appeals Board)[unreported].

176. *Ibid.* at 3.

177. *Supra*, note 173 at 6229.

178. R.S.O. 1990, c. L-7, [hereinafter the *LTA*].

179. S.O. 1992, c. 11. [hereinafter the *RCA*].

180. R.S.O. 1990, c. R-29, [hereinafter the *RRRA*].

rent abatements, although under the RCA this right is somewhat expanded. Tenants also have the right to apply for an abatement of rent under either section 94 or section 113 of the LTA. Frequently landlords apply for above guideline rent increases which are not opposed by tenants. Some courts have declared that the tenant's failure to make a case for an abatement in the former administrative process renders the matter *res judicata* in subsequent judicial proceedings under the LTA.<sup>181</sup>

However, in *Re Bleszynski and Admann International Trade Inc.*<sup>182</sup> the Divisional Court gave consideration to this issue. The lower court had held that certain orders made by the Rent Review Hearings Board (in which the tenants had raised allegations of non-repair) estopped the tenants from seeking an order under the LTA on the same evidence. The Divisional Court noted that the remedial powers available under the RRRRA and the LTA were quite different, with the powers under the LTA being much broader. It found that it would be unfair to prevent a tenant from seeking relief under one of the Acts if the remedy granted under the other Act had not provided adequate compensation. The court concluded:

...we are of the opinion that there is not necessarily a situation of *res judicata* or estoppel when matters are raised before the Rent Review Hearings Board which could also be the subject of an application under section 96 [now section 94, ed.] of the *Landlord and Tenant Act*.<sup>183</sup>

Another significant decision under the rent control regime is *Re Tenants of the Grenadier and We-Care Retirement Homes*.<sup>184</sup> This case deals with the exemption of accommodation occupied by a person "for the purpose of receiving care" from the definition of "residential premises" in the RRRRA. The identical provision is contained in the LTA. Therefore, the case will also be relevant under that legislation.

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181. This type of ruling undermines a tenant's broad range of remedies under the LTA. Since one of the main purposes for the 1969 amendments to the LTA was to guarantee tenant's s. 94 rights (landlord's responsibility to repair) the application of *res judicata* significantly undermines the ability to rely on that remedial legislation.

182. (August 4, 1993), #643 and 644/92 (Ontario Court (General Division) Divisional Court) [unreported]; sub nom *Re Tutzakow and Admann International Trade Inc.* The case arose under the RRRRA. The tenants were represented by Parkdale Community Legal Services.

183. *Ibid.* at 6-7. Unfortunately the Divisional Court went on to conclude that the orders under the RRRRA had dealt with all the tenants' complaints. Implicit in that conclusion was the fact that they had already been fully compensated by those orders.

184. (July 6, 1993), Toronto # 717/91 (Ont. Div. Ct.) [unreported]. The tenants were represented by the Advocacy Centre for the Elderly.

The landlord claimed the premises were exempt from rent review because it was a care facility for senior citizens. Many of the occupants receive no care or minimal care. The Divisional Court stated:

... it is surely not the case that any receipt of care, however insignificant in amount and however far removed in nature from medical or nursing care, can take the premises out of rent review. To hold this would create a vast opportunity for evasion of rent review. The legislature must have intended that the receipt of care be more than merely incidental to occupancy of the premises.<sup>185</sup>

The Court held that the use of the words "the purpose" supported the view that it was the intent of the legislature to require that the care be the primary reason why the occupant was occupying the particular accommodation.<sup>186</sup> The Court also stated that to find that these premises were exempt would be

...to establish a class of accommodation, inevitably catering primarily to the elderly, in which neither cost nor quality would be regulated. Given the complex statutory framework establishing Ontario's regime for the care of the elderly, this result would be an anomalous one...<sup>187</sup>

## 2. Co-operatives

A second legislative enactment which will have impact on housing issues is the *Co-operative Statute Law Amendment Act*.<sup>188</sup> This legislation provides certain procedural safeguards to member occupants in non-profit co-operative housing. The procedural provisions mirror those in the LTA. This legislation has extended the common law and statutory rights of member occupants in

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185. *Ibid.* at 1-2.

186. *Ibid.* at 4. The Court noted that the view it took in this case is contrary to the view taken in *Keith Whitney Homes Society v Payne* (1992), 9 O.R. (3d) 186 (O.C.J.). *Payne* is presently under appeal to the Divisional Court. That decision had held that the premises were exempt from the equivalent provision of the LTA because "a purpose", rather than "the primary purpose", of the accommodation was rehabilitation. The primary purpose test has also been used under the LTA in *Re Foster and Lewkowicz* (1993), 14 O.R. (3d) 339 (O.C.J.). *Lewkowicz* dealt with an exemption from the definition of "residential premises" in s. 1 of the LTA for "tourist homes".

187. *Ibid.* at 4. While Charter issues were raised on the appeal, they were not dealt with. The Court's acknowledgement of the interests of the elderly comes as close to a consideration of Charter interests as the reasons get. The Court notes that this accommodation impacts on the elderly and uses this as a further basis for its interpretation of the statutory provision.

188. S.O. 1992, c. 19. Hereinafter the CSLAA. This was proclaimed in force in August of 1992.

non-profit co-operative housing. The amendment has expressly excluded non-profit co-ops from the provisions of the LTA.

While there are not, at present, any decisions under the CSLAA, there are two decisions which will be relevant to determinations under this legislation. In *York Condominium Corporation No. 382 v Dvorchik*<sup>189</sup> the Court held that a rule of the condominium corporation prohibiting occupants from having large dogs was unreasonable. The *Condominium Act*<sup>190</sup> requires that rules be reasonable. In *Re Optimism Place Second Stage Residences and Edwards*<sup>191</sup> the Court held that given the nature of the residence, (i.e., an emergency shelter), the staff must have known it would have to deal with abuse from abused and dysfunctional children. Therefore, it could not seek to evict for those reasons alone.

Similarly, the CSLAA permits termination where the occupant breaches grounds set out in the by-laws, although these grounds must not be "unreasonable or arbitrary".<sup>192</sup> The reasoning of the Court in *Dvorchik* and in *Edwards* is certainly applicable to a determination of what is reasonable grounds for the purpose of the CSLAA.

### 3. *Human Rights Code*<sup>193</sup>

In *Re Browne and Knights Village Non-Profit Homes Inc.*<sup>194</sup> the Court appears to have accepted that it had jurisdiction to entertain whether a qualification for occupation in subsidized housing violated the Ontario *Human Rights Code*. In that particular case it found that the requirement that the tenant have custody of three children to occupy a three bedroom unit did not constitute discrimination on the basis of family status. Otherwise, the decision is of limited application since it dealt with the interpretation of the term "custody" as used in a settlement agreement reached by the parties in the LTA dispute.

### 4. *The Charter of Rights*

The decision of the Nova Scotia Court of Appeal in *Sparks v Dartmouth/Halifax County Regional Housing Authority*<sup>195</sup> is also relevant to the LTA. The

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189. (1992), 24 R.P.R. (2d) 19 (O.C.J.).

190. R.S.O. 1990, c. C-26, section 29.

191. [1992] O.J. No. 1832 (O.C.J.) (QL).

192. *Supra*, note 188, section 171.8(2)2.

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

194. (1992), 60 O.A.C. 155 (Div. Ct.), leave to appeal to Court of Appeal denied March 1993.

legislation in question in *Sparks* was not saved under s. 1 of the *Charter* as it was held that there was no reasonable basis for the differential treatment. The rights of subsidized tenants were not impaired as little as possible. In this regard the Court specifically referred to the Ontario *Landlord and Tenant Act* provisions dealing with subsidized tenants.<sup>196</sup> It determined that subsidized tenants in Ontario had far greater equality of treatment with other tenants. It found that the limited differential treatment accorded subsidized tenants in Ontario was reasonable and justifiable given the purpose of housing subsidies. While this determination regarding the *Charter* implications of the Ontario provisions was *obiter*, the decision would likely provide a substantial barrier to a *Charter* attack on the Ontario provisions relating to subsidized tenants. Regardless, the decision may well be applied to tenants in general where they are subjected to differential treatment at the hands of public authorities: e.g., public utilities. It would be necessary to establish that historically disadvantaged groups tend to be disproportionately represented in the tenant population.

Another *Charter* decision of interest was *A & L Investments Ltd. v Ontario*.<sup>197</sup> This was a motion by the Crown to strike out a claim by landlords that the RRRRA violated their s. 7 and s. 15 *Charter* rights. The Court held that the landlord's interests were purely proprietary and economic and that there was no basis for a claim for damages based on an infringement of their s. 7 *Charter* rights.<sup>198</sup> The Court also held that landlords do not constitute a discrete and insular minority who have traditionally been discriminated against. The claim for damages based on s. 15 of the *Charter* was also struck.<sup>199</sup>

The Court permitted certain of the landlords to proceed to trial on other grounds. It held that those landlords who had received conditional, partial or final orders had vested property rights which were subsequently taken away retroactively by legislation which amended the RRRRA and which became effective on October 1, 1990.<sup>200</sup>

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195. *Infra.*, note 226. For a discussion of this case see Section E. The Constitution, Human Rights and Poverty Law.

196. *Supra*, note 178. The Court would appear to be referring to sections 89, 107 and 110 of the Act.

197. (1993), 13 O.R. (3d) 799 (O.C.J.).

198. *Ibid.* at 817-819.

199. *Ibid.* at 819-822.

200. *Ibid.* at 822-823.

## 5. The Rules of Civil Procedure<sup>201</sup> and the Landlord and Tenant Act

There has long been a debate as to applicability of the Rules of Civil Procedure (or their precursor, the Rules of Practice) to LTA proceedings. Some courts have held that the LTA procedural provisions are not exhaustive.<sup>202</sup> Regrettably, in *McBride v Comfort Living Housing Co-operative Inc.*<sup>203</sup> the Court of Appeal stated unequivocally that Part IV of the LTA was a “not only comprehensive, but exhaustive” code of procedure for residential premises.<sup>204</sup>

This decision makes any argument that in some circumstances the Rules may apply a difficult one. However, since this decision, the Rules have been amended and now specifically refer to LTA proceedings.<sup>205</sup> In *Re Lakeshore Limited Partnership and Pieprzyk*<sup>206</sup> the Court considered whether a judge could set aside the default order of another judge in an LTA proceeding. The Court concluded that there was nothing in the Rules or the LTA to preclude the application of rule 38.12 (setting aside default judgments) to the case before it. The Court stated:

This is not to open the flood gates to import into the summary proceedings under Part IV of the *Landlord and Tenant Act* the whole of the machinery of the Rules of Civil Procedure.<sup>207</sup>

It would therefore appear that, provided the Rule in question does not conflict with a specific procedural provision in the LTA and is consistent with the remedial, summary and expeditious nature of that legislation, there is no reason why it should not be applicable in an LTA proceeding.

## 6. Abatement of rent

A number of decisions have been relying on the decision in *Re Herbold and Pajelle Investments Ltd.*<sup>208</sup> to limit the abatement remedy. This trend is dis-

201. R.R.O. 1990, Reg. 194.

202. This should be readily apparent from a review of the legislation itself. For example, while some procedural provisions exist for section 113 applications, there are no procedural provisions at all for section 94 applications.

203. (1992), 7 O.R. (3d) 394 (C.A.).

204. *Ibid.* at 400. However, the Court was not expressly addressing the issue of the applicability of the Rules to LTA proceedings. The Court determined that because co-ops were at the time exempted by regulation from the definition of residential premises in s. 1 of the LTA, not only did Part IV not apply but no other Part of the LTA could apply either.

205. O. Reg. 175/92. Now see Rule 38.04.

206. (September 30, 1992), Toronto #92-LT-040305 (O.C.J.) [unreported].

207. *Ibid.* at 14.

turbing since those courts are applying *Herbold* in a manner that, arguably, was not intended by the Court. In *Herbold* the Court stated:

...only in the most exceptional circumstances [should a court] grant an abatement for rent because of failure to provide the repairs and services *during a short period required for necessary repairs and renovations...*[emphasis added].<sup>209</sup>

This has been misapplied in at least two recent decisions. In *Re Casnig and Jordan*<sup>210</sup> the court seems to have interpreted *Herbold* as stating that abatement is an exceptional remedy. In *Re Stephos Management Services and McGregor*<sup>211</sup> the Court only looked at the period during which repairs were undertaken but entirely ignored the long duration of the complaint. Abatement is clearly not an exceptional remedy. Further, while discounting abatement during the "short period required for necessary repairs" was recommended in *Herbold* it was not suggested that the period before repairs were undertaken should not be subject to the remedy of abatement.

The *Herbold* principle was applied appropriately in *Re Tagwerker and Zaidan Realty Corp.*<sup>212</sup> In that case the Court held:

... the amount of the abatement should reflect the gravity of the landlord's failure and its obvious impact on the diminution of the aggregate benefits bargained for by the tenants.<sup>213</sup>

This decision was upheld by the Divisional Court.<sup>214</sup>

## 7. Punitive or exemplary damages

The issue of the availability of punitive or exemplary damages has been considered in two recent landlord and tenant applications. In *Re 690981 Ontario Ltd. and Park*<sup>215</sup> the Court awarded \$1000 punitive damages against a landlord who harassed an immigrant single parent tenant who was in arrears of rent. The Court stated that punitive damages were not normally awarded in

208. [1976] 2 S.C.R. 520 (S.C.C.).

209. *Ibid.* at 528.

210. (December 17, 1992), Kingston #5101/92 (O.C.J.) [unreported].

211. (May 25, 1993), Ottawa #71674/93 (O.C.J.) [unreported].

212. (1991), 5 O.R. (3d) 129 (O.C.J.).

213. *Ibid.* at 142.

214. *Re Tagwerker and Zaidan Realty Corp.* (February 17, 1993) File No. 551/91 (Ont. Div. Ct.) [unreported].

215. (January 5, 1993), Toronto #92-LT-42153 (O.C.J.) [unreported]. The tenant was represented by Metro Tenants Legal Services.

LTA proceedings but may be awarded where the landlord has acted in a “high-handed and arrogant” manner towards the tenant.<sup>216</sup> Similarly, in *Re Zahalan and Dill*<sup>217</sup> the Court awarded punitive damages of \$500 against a sophisticated landlord who was “wilfully blind” to its responsibilities under the LTA.

## E. THE CONSTITUTION, HUMAN RIGHTS AND POVERTY LAW

### 1. Charter Jurisprudence—General Developments

#### (a) Poverty as a Ground of Discrimination

In an encouraging development, the Tax Court of Canada has found that poverty can be a personal characteristic for the purposes of inclusion as an unenumerated ground of discrimination under section 15 of the *Charter*,<sup>218</sup> and that there is some room for economic rights within the meaning of “security of the person” contained in section 7 of the *Charter*.<sup>219</sup> *Schaff v Canada*<sup>220</sup> involved a claim by a custodial parent that the taxation of child support payments violated both section 7 and 15.

The claim was ultimately unsuccessful. In regard to section 15, the court found that a poor, single, female divorced parent was part of a discrete and insular minority, and that poverty was a “personal characteristic that can form the basis of discrimination”.<sup>221</sup> However, the court concluded that the impugned section of the *Income Tax Act* did not have a discriminatory effect on the appellant. The court’s reasoning turned on the view that it should be possible, in obtaining child support, to have the amount of support increased to recognise the fact that it is taxable.<sup>222</sup>

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216. *Ibid.* at 12.

217. (December 2, 1992), Ottawa (O.C.J.) [unreported].

218. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*]. Section 15 provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

219. Section 7 provides:

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

220. (August 5, 1993), Action No. 92-1054(IT) (T.C.C.) [unreported].

221. *Ibid.* at 16.

In regard to the application of section 7, the court relied on the reasoning in *Irwin Toy Ltd. v. Quebec*<sup>223</sup> for the proposition that security of the person can have an economic component.<sup>224</sup> However, the court stated that the economic component must be related to "the necessities fundamental to human life or survival within the spirit of section 7".<sup>225</sup> Since the appellant had not claimed that her access to necessities was jeopardised, the court concluded that the provision did not breach section 7.

*Schaff* is potentially a very useful precedent for cases involving social welfare programs, which by their nature usually involve circumstances beyond the control of the individual and concern the necessities of life.

### (b) Public Housing Tenants

Another reason for optimism is the Nova Scotia Court of Appeal's decision in *Sparks v. Dartmouth Housing Authority*.<sup>226</sup> In the course of its judgement, the court revisited a *Charter* section 15 issue which it had determined in its own earlier decision in *Bernard v Dartmouth Housing Authority*.<sup>227</sup> In *Bernard*, the court had held that there was no evidence that differential treatment between tenants in public housing and tenants in private housing was discriminatory. The court was willing to reconsider the issue because *Bernard* had been decided before the Supreme Court of Canada's judgments in *Andrews v Law Society of British Columbia*<sup>228</sup> and *R v Turpin*.<sup>229</sup> Further, the court was concerned that in *Bernard* evidence of discrimination had been seriously lacking, while in *Sparks* "the appellant adduced a substantial body of evidence

222. *Ibid.* at 17.

223. [1989] 1 S.C.R. 927 (S.C.C.).

224. *Ibid.* at 1003-1004.

225. *Supra*, note 220 at 25.

226. (March 2, 1993), SCA # 02681 (N.S.C.A.) [unreported]. *Sparks v Dartmouth Housing Authority* (1992), 112 N.S.R.(2d) 197 (N.S. Co. Ct.) was a Nova Scotia County Court decision which considered a section 15 challenge to certain provisions of Nova Scotia's *Residential Tenancies Act*. The provisions exclude the tenants of public housing from the notice provisions in the Act. Counsel for the tenant argued that public housing tenants are disproportionately made up of black single mothers, and that statutory provisions that work to their detriment constitute constructive discrimination on the ground of race, family status and receipt of social assistance. The court denied the application. See Ellsworth & Morrison (1992) at 47.

227. (1988), 88 N.S.R. (2d) 190 (N.S.C.A.). The trial court in *Sparks* had followed this decision.

228. [1989] 1 S.C.R. 43 (S.C.C.).

229. [1989] 1 S.C.R. 1296 (S.C.C.).

at trial relating to the composition of the group of public housing tenants and the social condition of this group as related to their housing needs".<sup>230</sup>

The approach of the court in *Sparks* is unusually realistic, (as opposed to legalistic) when compared with the bulk of section 15 jurisprudence. With a minimum of discussion, the court considered the makeup of the public-housing group (predominately people of colour, sole-support mothers, elderly or disabled people), and the disadvantage that the legislation imposed on public-housing tenants (and thus on people of colour, sole-support mothers, elderly or disabled people).<sup>231</sup>

The Court opined that it was not necessary to view this treatment as constructive discrimination. It was willing to look beyond the description of the group in question as "public housing tenants" and to acknowledge who the tenants were. It therefore concluded that the statutory provision in question was not "neutral on its face" and violated section 15. The court stated:

The content of the law and its impact on public housing tenants is not only that they are treated differently but the difference relates to the personal characteristics of the public housing tenant group. To come to any other conclusion is to close one's eyes to the makeup of the public housing tenancy group and the effect on them of the exempting sections.<sup>232</sup>

The court also held that the legislation was not saved under section 1 of the *Charter* as there was no reasonable basis for the differential treatment. The rights of subsidized tenants were not impaired as little as possible.<sup>233</sup>

## 2. Social Welfare Programs and the *Charter*

Unfortunately, direct *Charter* challenges involving income maintenance and social welfare schemes have not been so successful. In *Egan and Nesbit v Canada*,<sup>234</sup> the appellants sought a declaration that the definition of "spouse" contained in the *Old Age Security Act*<sup>235</sup> offends section 15 of the *Charter* because it excludes same-sex spouses from spousal benefits. The majority

230. *Supra*, note 226 at 9.

231. *Ibid.* at 12-14.

232. *Ibid.* at 14.

233. *Ibid.* at 18. Section 1 of the *Charter* provides:

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

234. (1993), 153 N.R. 161 (F.C.A.).

235. R.S.C. 1985, c. O-9, as amended.

allowed that sexual orientation could be an analogous ground of discrimination for the purpose of section 15,<sup>236</sup> but dismissed the appeal, concluding that the definition was not discriminatory. While the majority judgement in *Egan* is incoherent, it would appear that there were four reasons for the result reached.

First, the majority took the view that, because the Supreme Court in *Andrews* had rejected the notion that the “similarly situated” test was the relevant test in establishing discrimination, no comparative analysis could be made.<sup>237</sup> This unnecessarily restrictive approach enabled the court to ignore the relevance of the trial judge’s finding that, had this been a heterosexual couple, the spousal allowance would have been granted.<sup>238</sup>

Secondly, the court focused on the statement in *Andrews* that a person should not be deprived of a benefit because of a distinction based on irrelevant personal differences. Astonishingly, the court inferred from that statement that there is a “legal requirement that a distinction be based on an irrelevant personal difference” in order for discrimination to be established. The court concluded that this “requirement” precluded a finding of discrimination in this case because sexual orientation was highly relevant to the appellant’s claim.<sup>239</sup>

Thirdly, the court took the view that because other groups were excluded, such as unrelated housemates and brothers and sisters who lived together, the exclusion was not discriminatory.<sup>240</sup> However, the response to this argument can be found in the dissenting opinion of Linden J.A. who stated:

...it is no answer to a charge of discrimination to say that admitting one group to the benefits program would leave another unjustly excluded. To use...(this possibility)...as a basis for denying the equality claim of gay men and lesbians would be, to quote the Supreme Court, “equality with a vengeance”...The better solution is to address the claim before the Court, leaving other groups or individuals...to advance their own claims...and to deal with them on their own merits in due course.<sup>241</sup>

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236. *Supra*, note 234 at 167.

237. *Ibid.* at 175.

238. In dissent, Linden J.A. pointed out that comparative analysis remains a part of the exercise in establishing discrimination under s.15, citing not only *Andrews*, but *R. v. Swain* (1991) 63 C.C.C. (3d) 481 (S.C.C.), *Rudolf Wolff & Co. v. Canada* [1990] 1 S.C.R. 695, *R v Hess*; *R v Nguyen* [1990] 2 S.C.R. 906. See *Egan* at 199-200.

239. *Ibid.* at 175.

240. *Ibid.* at 178-179.

241. *Ibid.* at 198. The “equality with a vengeance” quote comes from *Schachter v Canada* (1992), 93 D.L.R. (4th) 1 (S.C.C.).

Finally, the court made findings concerning the purpose of the legislation. Since there was no need to refer to section 1, it is not clear why it did so. Possibly it was an attempt to respond to an argument that the legislation deliberately discriminated on the basis of sexual orientation. The court accepted that the objective of the legislation was to ameliorate the severe cut in income experienced by one-“breadwinner” couples, where the breadwinner becomes eligible for a pension before the other spouse. The evidence as to legislative intention that was placed before the court clearly contemplated “traditional” heterosexual marriages in which the wife was younger than the husband.<sup>242</sup> If, however, the purpose of the review of legislative objective was to respond to an argument of intentional discrimination, it is notable that the court failed to address the relevance of an argument that same-sex couples might find themselves in exactly the same situation as that which the legislation purports to address.

In *Conrad v County of Halifax*,<sup>243</sup> the Nova Scotia Supreme Court briefly considered, and dismissed, an argument that the termination of welfare benefits without notice or an opportunity for a hearing breached section 7 of the *Charter*. Assistance for the claimant and her children had been cut off after a neighbour had reported that the claimant’s husband was living with her. Significantly, once the claimant appealed this decision, it was reexamined and reversed by the county social assistance authority without the need for a hearing. The claimant also subsequently qualified for assistance from the provincial authority as a single mother. However, counsel brought the matter of the termination procedure before the court.

The court cited the egregious *Brown v. British Columbia (Minister of Health)*,<sup>244</sup> and *Irwin Toy*<sup>245</sup> as support for its view that “purely property and economic interests have not yet been protected by the courts” under section 7.<sup>246</sup> Finally, the court found in *obiter* that the process by which the plaintiff’s

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242. *Ibid.* at 181. The evidence also focused on the plight of the spouse, usually female, who has eschewed the financial security of paid employment to fulfil domestic duties, while failing to acknowledge that the spousal allowance is payable regardless of previous employment or need.

243. (Aug 11, 1993), C.H. No. 70286 [unreported].

244. (1990), 66 D.L.R. (4th) 444 (B.C.S.C.).

245. *Supra*, note 223.

246. *Supra*, note 26 at 31. No mention was made of the fact that in *Irwin Toy* the Supreme Court of Canada recognised that not all economic interests are the same, and that economic interests “fundamental to human life or survival” may be subject to *Charter* protection. See also the discussion of *Sparks*, above.

welfare benefits were terminated was fair and did not violate the principles of fundamental justice.<sup>247</sup>

While the *Conrad* decision is not to be recommended as a thoughtful study of the law, it is illustrative of an attitude that is common, at least among the lower courts, to welfare recipients. What was at issue at the trial was whether the procedure by which assistance was terminated breached section 7. However, the result in *Conrad* appears to stem in large part from the judge's finding that the plaintiff was lying about her eligibility for assistance, despite the fact that the both the municipal and the provincial social assistance authorities apparently considered her eligible. The openly hostile remarks of the judge include a criticism of the plaintiff's "legalistic" attitude, she having had the temerity to go to court instead of having her case handled "in a non-adversarial fashion in accordance with established social work procedures".<sup>248</sup>

### 3. Developments in Human Rights Law

#### (a) Gay and Lesbian Rights

In *Clinton v Ontario Blue Cross*<sup>249</sup> the complainant had applied to have her same-sex partner recognised as a common law spouse for the purposes of her employer's group benefit plan. The respondents (the insurer and employer) stated that the plan did not allow for same-sex partners to receive benefits. They argued that they were permitted to discriminate against the complainant on the basis of her "marital status" pursuant to section 25(2) of the *Human Rights Code*.<sup>250</sup> However, the complainant argued that the respondents' discrimination was on the basis of her sexual orientation, and was thus not exempted by section 25.

The board in *Clinton* applied the broad and purposive approach to the interpretation of human rights legislation that the Supreme Court of Canada has urged in numerous cases. The board decided that section 25(2) should not be interpreted to allow employers and their insurers to deny spousal benefits to same-sex spouses.

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247. *Ibid.* at 32-33.

248. *Ibid.* at 23.

249. (July 19, 1993) Ont. Bd of Inquiry [unreported].

250. R.S.O. 1990, c. H-19. Section 25 provides, *inter alia*, that the right to equal treatment with respect to employment without discrimination because of age, sex, marital status or family status is not infringed by a contract of group insurance between the employer and an insurer that complies with the *Employment Standards Act* and its regulations.

The board pointed out that the term “marital status” as defined in the *Code* appears specifically to exclude same sex spouses, and has certainly been interpreted to do so. Having been interpreted exclusively to deny rights it could not be interpreted inclusively for the same purpose.<sup>251</sup> Instead the board agreed with the complainant that the discrimination was on the basis of sexual orientation. Accordingly, the board ruled that the complainant did not need to turn to the *Charter* for protection.<sup>252</sup>

### (b) Disabled Persons’ Rights

There have been two recent decisions with major implications for the disabled community; one concerning the right to access to buildings and the other on the right to individual assessment before employment decisions are made.

In *Elliot v Epp Centres Ltd*<sup>253</sup> the complainant had a mobility disability which required the use of a wheelchair and a specially equipped van. On arrival at a shopping mall, where she intended to go to a restaurant, she could not find a parking space wide enough to accommodate her van, nor a ramp for her wheelchair. She parked near the mall’s entrance, but was told to leave by an employee.

At the hearing, the respondent argued that the buildings in question were in conformity with the Ontario *Building Code*, and that installing “handicapped parking” would cause him to be in non-compliance with his site plan and with municipal bylaws. Citing both Supreme Court of Canada jurisprudence and a legislative provision that gives the *Human Rights Code* paramourcy over existing provincial legislation, the board ruled that this was not a defence. The respondent was ordered to provide “handicapped parking”, construct a wheelchair ramp, and pay the complainant \$1000 for loss of the right to be free from discrimination.

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251. *Supra*, note 249 at 12. Such an interpretation was first made in a separate concurring judgement by Brettel Dawson, one of the three adjudicators in *Leshner v Ontario (No.2)*, (1992) 16 C.H.R.R. D/184. Professor Dawson disagreed with the majority’s view that the s. 25(2) of the *Code* provided an exception that allowed the Ontario government to refuse pension benefits to same-sex spouses, and therefore was contrary to the *Charter*. She held that s. 25(2) did not operate to bar same-sex spouses from inclusion. For a discussion of the *Leshner* decision see Ellsworth & Morrison (1992) at 44-45.

252. *Ibid.* at 16. Since interpretation of the *Charter* was not at issue in *Clinton*, the board did not feel compelled to apply *Egan and Nesbit v Canada*, *supra* note 234.

253. (June 27, 1993), Ont. Bd. of Inquiry [unreported]. The complainant was represented by Niagara North Community Legal Assistance.

*Thwaites v Canadian Armed Forces*<sup>254</sup> concerned a member of the naval service who was discharged because of the Force's assumption that someone infected with HIV would be unfit for service. The board of inquiry found that the *Canadian Human Rights Act*<sup>255</sup> had been breached. The decision contains an interesting review of the progression of caselaw on the issue of risk as it relates to the "reasonable and bona fide" defence. The board concluded that there is a concept of "tolerable risks" within the workplace and that the analysis of that risk must be employment-specific. There is also an examination of the requirement for employers to assess each case individually, rather than making blanket rules concerning various disabilities. The board ruled that the employer had a duty to inquire about the facts of the complainant's medical situation, assess it in relation to the actual job requirements, and consider reasonable accommodation.

Advocates who are considering a discrimination argument in a particular poverty law case will need to give some thought to the utility of a discrimination argument under federal or provincial human rights legislation, as well as under the *Charter*. This is particularly important where the Ontario *Human Rights Code* would be applicable, since the *Code* has a clause that overrides other provincial legislation.<sup>256</sup> In terms of forum, it is arguable that human rights legislation can, and indeed must, be considered and applied by courts and tribunals deciding issues with respect to income maintenance, social insurance and landlord and tenant law, as well as by tribunals appointed under human rights legislation.<sup>257</sup> The interpretative approach fostered by the Supreme Court of Canada and taken in *Leshner* and in *Clinton*, if adopted by other tribunals, could produce worthwhile results.

### (c) Minimum Income Requirements in Rental Accommodation

For decades, Ontario landlords have felt free to refuse accommodation to prospective tenants on the ground that the source of the tenant's income is social assistance.<sup>258</sup> Often, the refusal is blatant; "we don't rent to people

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254. (June 7, 1993) Can. Human Rights Trib. [unreported].

255. R.S.C. 1985, c. H-6, as amended.

256. *Supra*, note 250, section 47(2); cited in *Elliot, supra*, note 253.

257. See Keene, *Human Rights In Ontario*, (2d ed.) (Toronto: Carswell, 1992), at 267-269; *OSSTF v Haldimand Bd. of Education* (1991), 6 Admin. L.R. (2d) 177 (Ont. Div. Ct.); and *Re ONA and Etobicoke General Hospital and Craven* (June 4, 1993), Action No. 570/92 (Ont. Div. Ct.) [unreported].

258. Although this situation most commonly arises with social assistance recipients, it

on welfare". In other circumstances, landlords set minimum income requirements that cannot be met by people on social assistance.

Since 1982, the *Code* has prohibited such discrimination in accommodation on the ground of receipt of public assistance. In addition, the existence of the *Code's* provisions on indirect discrimination and constructive discrimination clearly render exclusionary income requirements a *prima facie* breach of the legislation.<sup>259</sup> In *Willis v David Anthony Phillips Properties*,<sup>260</sup> an Ontario board of inquiry held that a landlord's refusal to rent because the prospective tenant was on Family Benefits contravened the *Code*.

Despite the relative clarity of the law on this point, there has been a problem getting complaints involving minimum income requirements through the Human Rights Commission's investigative and deliberative processes and on to boards of inquiry. This was true even when the imposition of minimum income requirements was coupled with blatant refusal to rent to people on welfare. In part, the problem was due to difficulties common to all complaints and arising from the backlogged investigative and settlement process. However, part of the difficulty seemed to stem from a reluctance on the part of the Commission to refer these complaints for hearings. The Commission appeared to have some difficulty with the idea of enforcing the law in this area. This appearance was reinforced by the Commission's tactic of organizing a series of "consultation meetings at which the concerns of the various players can be aired and policies examined"<sup>261</sup> in the summer of 1992, at a point in time when a number of investigated cases awaited board referrals.

Finally, in February, 1993 the Commission released a "Position Statement" on minimum income criteria.<sup>262</sup> The Statement declares that the practice of requiring that rental payments not exceed 30% of an applicant's income discriminates against people receiving social assistance, younger people, women and the elderly. The Statement also indicates that the Commission

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can also affect recipients of other statutory benefit programs such as unemployment insurance or Canada Pension Plan pensions.

259. *Supra*, note 250, sections 9 and 11 respectively.

260. (1987), 8 C.H.R.R. D/3847.

261. Letter from Ontario Human Rights Commission, dated August 24, 1992, to Judith Keene, Clinic Resource Office.

262. Ontario Human Rights Commission, *Position Statement The Minimum Income Criterion* (February, 1993).

“does not view credit checks, credit references, rental history or guarantors as appropriate alternatives”.<sup>263</sup> The Commission has also referred four cases to boards of inquiry.

#### (d) Employment Equity

Bill 79 finally received second reading in July, 1993, and a draft Regulation has been circulated.<sup>264</sup> As noted in last year's review, the Bill itself is disappointing, and the draft Regulation does little to augment it. Public hearings began in August, 1993 before the Standing Committee on Administration of Justice.

## F. CONCLUSIONS

Even given the expanded scope of this year's article, there remain many issues which we have not been able to cover. These include Ontario's Fair Tax Commission<sup>265</sup>, the failure of the Constitutional Accord,<sup>266</sup> the alleged reinstatement of the Court Challenges Program<sup>267</sup> and the progress of the *Advocacy Act, 1992*.<sup>268</sup> While none of these were directly relevant to the practice of poverty law, they were of tangential importance, and all were the subject of varying degrees of activism by advocates.

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263. *Ibid.*

264. For a discussion of Bill 79, see Ellsworth & Morrison (1992) at 51-52.

265. The Ontario Fair Tax Commission released its discussion paper entitled *Searching For Fairness* in the winter of 1993. The paper deals with many issues of concern around taxation and tax policy, including the effects on low income earners and social assistance recipients. The Commission held hearings across the province in April, May and June to allow interested people to make comments on the discussion paper prior to the preparation of its final report. The final report is expected by the end of 1993.

266. The Charlottetown constitutional Accord was repudiated in a referendum held on October 26, 1993. The Accord contained the "Social Charter" which was discussed in last year's article; see Ellsworth & Morrison (1992) at 49-50. Constitutional discussions passed quickly from the agenda after the Accord's defeat.

267. In a pre-election announcement the Prime Minister stated that the Court Challenges Program would be reinstated at its previous funding level. However, this announcement came from the same person who was Justice Minister when the program was cancelled, and publicly defended the decision. For a discussion, see Ellsworth & Morrison (1992) at 6.

268. S.O. 1992 c. 26. This Act along with the *Substitute Decisions Act, 1992*, S.O. 1992 c. 30, the *Consent to Treatment Act, 1992*, S.O. 1992 c. 32 and the *Consent and Capacity Statute Law Amendment Act, 1992*, S.O. 1992 c. 33. are to provide a coordinated system of rights to ensure that people with disabilities and other vulnerable people have ways of finding out what their rights are and how to exercise them. For a discussion of these statutes see 10 *ArchType* No. 5 at 21-23 and No. 6 at 22-24.

Our conclusions this year can be little more than a reiteration of those of the previous years. To paraphrase the President of the United States, "its the stupid economy". Clearly, nothing can be expected to improve until the recession/depression has run its course. However, we have noted where things have gotten or are getting worse. Social programs are under attack from a diverse number of forces. Advocates and their clients have had to argue their case, not just to the bureaucrats and tribunals who are responsible for decision-making under the various social welfare schemes, but to the politicians, media and public at large. At times its seems that even our allies of yesterday have taken up arms against us.

The work however does and must go on. The rewards are few, and at times fleeting. They are a testament to the many hard-working people engaged in the task. It is from their limited successes today through which the hope of tomorrow is fostered.