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## "Special Circumstances": Teens, Welfare and Politics in Ontario During the 1990s

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# **“SPECIAL CIRCUMSTANCES”: TEENS, WELFARE AND POLITICS IN ONTARIO DURING THE 1990S**

**R. BLAKE BROWN\***

## **RÉSUMÉ**

Dans cet article, l'auteur trace l'évolution des politiques en Ontario concernant les demandeurs d'aide sociale de seize et dix-sept ans au cours des années quatre-vingt-dix. Il y présente l'évolution historique des dispositions en matière d'aide sociale pour les jeunes ontariens au cours des deux dernières décennies. Il y identifie les questions de politiques importantes. Il y souligne les contestations d'ordre constitutionnel qui ont eu lieu. L'auteur conclut en faisant des observations et des recommandations concernant d'éventuels changements au réseau qui pourraient rendre plus efficaces les politiques d'aide sociale pour les jeunes. Il brosse un tableau du débat entourant cette question d'un point de vue idéologique et avance l'argument que les actuelles politiques envers les jeunes ont été le fruit d'un débat polarisé et politique entre des perceptions concurrentes de la jeunesse. Les opposants à l'aide sociale envers les jeunes disent que cela est coûteux, que cela encourage l'éclatement de la famille et crée une génération de fraudeurs de l'aide sociale. D'un autre côté, les défenseurs affirment que nous avons la responsabilité d'aider les jeunes dans le besoin. Cette question est devenue fortement politisée au cours des années quatre-vingt-dix et on n'a pas fait de cas du fait que les politiques d'avant 1995 étaient généralement adéquates mais piètrement mises en oeuvre. Parmi les questions d'actualité et à venir qui devront être prises en considération, on compte la résolution des questions d'ordre constitutionnel de même que le recentrage du débat sur les jeunes plutôt que de se servir de cette question comme une arme politique.

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## 1) INTRODUCTION

Since the Progressive Conservative Party's victory in the 1995 Ontario provincial election, Premier Mike Harris and his cabinet have radically restructured Ontario's social programs. Many Ontario residents have voiced their complaints about a government that seems intent on bringing middle-American values to what has historically been a province of relatively high quality social assistance programs.<sup>1</sup> However, one group that has not been heard from in the outcry is marginalized youth. This segment of the population represents those sixteen and seventeen year olds facing increased difficulties receiving welfare assistance despite their often trying backgrounds. Since taking office the Progressive Conservatives have made good their promise to limit the benefits paid to youth, and have faced virtually no public demand that this be stopped or altered.

This paper will frame the debate surrounding this issue in ideological terms, lay out the development of Ontario's youth welfare provisions during the last two decades, identify the key policy issues, highlight the constitutional challenges involved, and conclude by making observations and recommendations regarding possible future changes to the system that could create a more effective youth welfare policy. It will be argued that the current legal policy towards youth has been the result of a polarized, political debate between competing perceptions of youth. Opponents of youth welfare argue that it is costly, encourages family breakdown, and creates a generation of welfare abusers. Proponents, on the other hand, claim that there is always a responsibility to assist youth in need.

The issue has become highly politicized during the 1990s, and the fact that the pre-1995 policy was generally adequate, but poorly implemented, has been disregarded. The current and future issues to be faced include the resolution of constitutional issues, and refocusing the debate on the needs of young people.

## 2) FRAMING THE POLICY DEBATE

The debate over youth welfare in Ontario has mirrored the discussion throughout Canada, and in many Western nations, over the role of social assistance in modern society. According to Andrew Armitage, the traditional liberal discourse concerning social assistance was characterized by seven key values: a concern for the individual; faith in humanity; equitable treatment of individuals; equal treatment of individuals; a concern for community; an acceptance of diversity; and a belief in democracy.<sup>2</sup> These factors culminated in a belief that social assistance was a right of all citizens. In comparison, the conservative viewpoint in relation to welfare has been enunciated by the C.D. Howe Institute:

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1. R. Ellsworth, "Squandering our Inheritance: Re-forming the Canadian Welfare State in the 1990s" (1997) 12 *J.L. & Social Pol'y* 259.
  2. A. Armitage, *Social Welfare in Canada Revisited*, 3d ed. (Don Mills, Ontario: Oxford University Press, 1996) at 12.

Canada's social programs need repair. They are too elaborate. They are too expensive. And they may not be good for the people they are supposed to help. They may not have caused Canada's huge debt problem, but they are too large a component of public expenditures not to be part of the solution.<sup>3</sup>

The conservative view is often at odds with the traditional liberal conception. For instance, welfare conservatives have little faith in humanity. Welfare should be granted under supervision due to a suspicion that fraud is the foundation for most welfare claims. A "public largesse model," in which welfare constitutes a public charity, is the principle underlying the conservative view. Rather than perceive poverty as indicative of the Canadian economy's structural failures, conservatives believe poverty is a result of individual citizens' inadequacies.

The question of youth welfare in Ontario is part of this larger debate. Until the enactment of the *Ontario Works Act*, 1997<sup>4</sup> youth applied for welfare under the *General Welfare Assistance Act (GWAA)*.<sup>5</sup> Applications for support were made to municipal welfare offices.<sup>6</sup> These offices provided social assistance to individuals in accordance with the guidelines established by the provincial Ministry of Community and Social Services. Under this two-tiered system, funding for social assistance was provided from both the provincial and municipal levels of government. Welfare administrators examined applicant's circumstances, then decided the youth's eligibility under special rules that apply to youth. There are several rationales for, and against, this type of support.

The foremost concern for proponents is that youths are unable to leave abusive homes without financial assistance. A "typical" case would be a sixteen-year old who has long suffered as a "victim" of an abusive parent. In the absence of access to social assistance, such a youth would have three primary choices. The abused youth could go to the police to seek an end to the abuse, stay in his or her current position until it became more feasible to leave, or run away from home and gain employment thereby prematurely ending his or her education.<sup>7</sup> Each of these options are obviously problematic for teenagers. For example, given the clear connections between education and earning potential, leaving home to gain employment is a poor alternative. The issue of youth crime must also be considered. The Canadian public has demonstrated a considerable concern with teenage crime,<sup>8</sup> and advocates of teenage welfare believe

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3. W. Watson, *The Case for Change: Reinventing the Welfare State* (Toronto: C.D. Howe Institute, 1995) at 1.
  4. *Ontario Works Act*, 1997, S.O. 1997, c.25, Sch.A [hereinafter *Ontario Works Act*]
  5. *General Welfare Assistance Act*, R.S.O. 1990, c.G.6, as amended. A closer examination of the alterations in social assistance legislation as pertaining to youth will be discussed later in this paper.
  6. Under the *Ontario Works Act*, municipal welfare offices have been renamed Ontario Works offices.
  7. Similar concerns about physical abuse on teenagers have been raised in the British context. See G. Randall, *No Way Home: Homeless Young People in Central London* (London: Centrepoint, 1988).
  8. J.B. Sprott, "Understanding Public Views of Youth Crime and the Youth Justice System" (1996) 38 *Can. J. Crim.* 271.

that viable alternatives are required to prevent teenagers from turning to criminal activities. This is especially true given that the teenage years are an important period in developing youth as good citizens. The European Foundation for the Improvement of Living and Working Conditions has stated that:

Young adulthood is a crucial and formative period in the life cycle, full of challenge, risk and potential. However, tensions are arising out of the extension of this period of transition to autonomy. Moreover, increasing numbers of young people are coming to suffer multiple difficulties in making the transition to adulthood and are becoming excluded from mainstream society through poverty, unemployment, lack of qualifications, homelessness. In the worst cases this exclusion leads to the use of drugs and alcohol, to criminality and delinquency.<sup>9</sup>

Opponents, however, are concerned with the potential negative effects of youth welfare. Many argue that the family unit remains the primary method of structuring Canadian society, and there are fears that giving teenagers the financial resources to leave home might encourage youths to remove themselves from situations that are far from dire. This view characterizes teenagers as welfare abusers, as freeloaders responsible for their own sorry positions. Teenagers probably seek monthly welfare cheques in order to move away from home and pursue practices frowned upon by their parents, such as consuming alcohol, partying excessively, staying out all night, and using illegal drugs. Proponents of this view suggest that difficult home circumstances are often the result of the teenager's actions, not those of the parents. For example, a sixteen-year old wanting assistance might attempt to infuriate his or her parents so that he or she would be told to leave. The danger, it is suggested, is that youth social assistance could create a generation of welfare abusers — a generation of dishonest sixteen and seventeen year olds who believe government assistance is the easy answer.

Legislators have been required to balance these two views: they must provide support for youth in damaging family situations, but they must also be wary of undermining family structures that often experience tension as children enter their teenage years. Therefore, until recently, the law has sought the middle ground, refusing to grant sixteen and seventeen year olds a fully independent status until they can demonstrate "special circumstances" in their lives requiring them to move away from home. The nuances of this test will be discussed later in this paper, but for now it is necessary to note that this "special circumstances" restriction has not been placed on other welfare applicants.

This compromise has dissatisfied many. At one extreme have been those who perceive youth welfare applicants as truly needy welfare applicants. Advocates claim that many youth come from abusive homes, and therefore the higher standard is too onerous. It places a restrictive burden on applicants whose need is as great, if not greater, than the majority of welfare recipients. Opponents, on the other hand, have been interested in toughening the test to reduce youth benefits. As will be shown, the public debate

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9. European Foundation for the Improvement of Living and Working Conditions, *Growing Up, Leaving Home* (Luxembourg: E.C. Commission, 1990) at 4.

on this issue, carried out in the press and amongst politicians, typically fell into a debate between these two polarized views. Not surprisingly, however, many teenage welfare applicants did not actually fall into one of these two extremes. Some youths were looking for easy money with which to break free of parental control, while others were among the most needy of all people — abused children. A substantial segment probably fell on the continuum between these extremes. The following will illustrate the debate between the two views and will also demonstrate that there is no such thing as a typical teenage applicant.

### 3) YOUTH WELFARE IMPLEMENTATION AND DEBATE, PRE-1996

With an understanding of the basic policy rationales underlying the debate, this paper will now turn to examining the issue's development during the 1990s.

#### a) *Policy Formation: 1970–1995*

Prior to 1971 there was no special test used for teenage welfare applicants in Ontario. The regulations of the *General Welfare Assistance Act* defined anyone over sixteen years of age as an adult, and determined that teenagers above this age still completing their secondary school education were eligible for assistance.<sup>10</sup> In 1971, these regulations were amended to provide that a single person under eighteen was not eligible for assistance “where the welfare administrator is of the opinion after making appropriate inquiry that it is not contrary to his best interests to reside in the home of his parent.”<sup>11</sup> There was, however, no need to prove special circumstances until 1976, when the issue of youth welfare became a topic for debate in the Ontario legislature. It was reported in the press in 1976 that 500 teenagers in Toronto were receiving welfare.<sup>12</sup> Though the opposition New Democratic Party suggested that the government should blame itself for welfare abuse, the Progressive Conservative government of the day implemented new requirements that became the basis of the “special circumstances” test. The 1976 regulations stated that an “employable person under the age of eighteen who is not the head of a family is not eligible for assistance unless the welfare administrator is satisfied that there are special circumstances that justify providing the assistance.”<sup>13</sup> The Minister of Community and Social Services, J.A. Taylor, explained why this stipulation was necessary. He suggested that it:

... Is incumbent now upon a welfare officer to make payments to a child between the ages of, say, 16 and 18 who has left home and who may not be going to school. That mandatory provision is being redressed so that payment of welfare to that type of person will be on a discretionary basis rather than on a mandatory basis. I think that is good in that it will not encourage children of that age to leave home and to

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10. *Regulation made under the General Welfare Assistance Act*, O.Reg. 150/70.

11. *Regulation made under the General Welfare Assistance Act* O.Reg. 248/71.

12. *Toronto Star* (18 February 1976) B1.

13. *Regulation to Amend Regulation 383 of Revised Regulation of Ontario, 1970 made under the General Welfare Assistance Act*, O.Reg. 293/76.

set up independent house keeping for no good reason.

Mind you, there may be circumstances in which a young person may be better off out of the family setting because of severe home problems. It may be better for his health, physical and mental. Those cases, of course, will be dealt with individually in light of their own particular circumstances.<sup>14</sup>

These concerns were echoed again and again in the next twenty years.

During the late 1980s and early 1990s, several government reports studied the issue of teen welfare. In the influential 1988 *Transitions* report, the Social Assistance Review Committee published a comprehensive plan for improving the Ontario welfare system.<sup>15</sup> Using the principle that “lack of need ought to be the only criterion for the denial of assistance, unless there are clear and justifiable reasons why other criterion ought to prevail,” the Review Committee recommended that some limitations be placed on teen welfare applicants. It recommended that sixteen and seventeen year olds be eligible for social assistance, but subject to a special approach to “opportunity planning.”<sup>16</sup> This special opportunity planning was intended to help rectify family problems, or assist in making the youth self-sufficient.<sup>17</sup> It was felt that “planning and counselling must be provided to young applicants as soon as possible.”<sup>18</sup>

When the New Democratic Party was elected in 1990 there were suggestions that the special circumstances test would be eliminated in favour of a needs-based test. In 1991, the Ontario government’s Advisory Group on New Social Assistance Legislation recommended that the onus of demonstrating special circumstances be reversed — applicants should be considered eligible unless there were special circumstances that indicated that they should not be eligible.<sup>19</sup> However, the Advisory Group retreated from this position in 1992, asking that a “special assessment” be made of teenage applicants.<sup>20</sup> No major policy change, however, was implemented at that time. A new policy was prepared in 1994 and circulated for comment, but was not implemented. Finally, in 1995, despite appeals by a variety of concerned groups requesting that youth not be required to face more stringent requirements, a new, tougher policy was released.<sup>21</sup>

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14. Ontario Legislative Assembly, *Debates* (17 March 1976) at 572 (J.A. Taylor).

15. Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto, Queen’s Printer, 13 May 1988)(Chair: G. Thomson).

16. *Ibid.* at 141.

17. *Ibid.* at 235-236.

18. *Ibid.*; at 236.

19. Ontario, *Back on Track: First Report of the Advisory Group on New Social Assistance Legislation: Report on Short-term Reform* (Toronto: Queen’s Printer, March 1991) (Chair: A. Moscovitch) at 13.

20. Ontario, *Time for Action: Principal Report of Advisory Group on New Social Assistance Legislation: Report on Legislative Reform* (Toronto: Queen’s Printer, May 1992) (Chair: A. Moscovitch) at 45.

21. I. Morrison, “GWA Eligibility & Entitlement Issues ‘Special Circumstances’: Teens,” Clinic Resource Office Current Issues Paper, (Clinic Resource Office, 26 May 1995) at 1.



### b) *Pre-1995 Policy Implementation*

As mentioned, a key component of the regulations was the requirement that sixteen and seventeen-year olds prove "special circumstances" to receive welfare benefits. Only sole-support parents and married couples under eighteen years of age were not subject to the special circumstances requirements. However, what constituted special circumstances was not strictly defined prior to April 1995, and the decision of whether to grant assistance was quite discretionary.<sup>22</sup> The *Ministry Policy Manual* suggested that a successful applicant had to show that "there is no 'suitable home' and / or it is not in the best interests of the youth to return to this home."<sup>23</sup> The administrator was to take into consideration health concerns, and "concerns about physical safety or serious emotional conflict."<sup>24</sup> Without a more precise regulatory framework, the decisions of the Social Assistance Review Board (SARB) filled the gap by providing guidance as to how the policy should be interpreted. SARB was the highest administrative appeal mechanism under the *GWAA*. It heard appeals from the decisions of welfare administrators all across Ontario, and though the decisions of the appeal tribunal are not binding like Canadian judicial precedents, they did provide an indication of how policies were to be implemented.<sup>25</sup>

SARB usually granted assistance in cases involving child abuse. For example, in one case special circumstances were proven where a sixteen year old left home after being kicked out by her father — a father that had a history of physically abusing his children.<sup>26</sup> In another case, emotional abuse by an alcoholic parent constituted special circumstances,<sup>27</sup> and in another special circumstances were found to exist where the youth was concerned about a mother's abusive boyfriend.<sup>28</sup> However, SARB was reluctant to allow appeals for support where the alleged abuse was not onerous, or was unproven. Two examples illustrate this. In one case, SARB refused assistance where part of the youth's claim was based on a single physical confrontation.<sup>29</sup> In another case, SARB did not grant assistance where the allegations of abuse were unproven, and where the tribunal felt the parents had reasonable grounds for imposing restrictive rules on their daughter's conduct.<sup>30</sup>

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22. *Ibid.*

23. Ontario, *Ministry of Community and Social Services General Welfare Policy Manual* (1 February 1994) Tab 0304-05 at 2-3. [hereinafter, *Policy Manual*].

24. *Ibid.* at 3.

25. For a discussion of recent changes to the Social Assistance Review Board see T.J. Weiler, "Independence, Impartiality, & the Ontario Social Assistance Review Board in 1997" (1997) 12 *J.L. & Social Pol'y* 178.

26. SARB G-08-22-17 (30 January 1989; Bolduc, Roy).

27. SARB J-02-29-23/J-05-15-13 (10 December 1990; Novac, O'Connell).

28. SARB K-01-15-29 (9 September 1991; Douglas, Rangan).

29. SARB N-04-05-35 (21 November 1994; Roy).

30. SARB H-08-09-12 (20 August 1990; Nikius, Quamina, Roy).

Appeals were also successful when parents were unwilling to support their children, even in those situations in which the teenager had a role in creating the poor home environment. Such was the case where a seventeen year old had uncontrollable behavioural problems that resulted in him being asked to leave home.<sup>31</sup> In another scenario, two sisters fought verbally and physically. The sixteen year old daughter left home when her mother threatened that she would move unless the sisters stopped fighting. Again, SARB deemed the situation to be one of special circumstances.<sup>32</sup>

SARB was wary of finding special circumstances in situations that could be described as instances of normal teenage-parent conflict. These included situations in which teenagers were unwilling to move back into their parents' homes because it was too distant from a particular community,<sup>33</sup> or where the conflict was the result of chores, rules, and the parents' decisions regarding how they disposed of their income.<sup>34</sup>

SARB jurisprudence on youth welfare was summarized in a 1994 decision. Special circumstances had been found in cases when 1) there was emotional, physical or sexual abuse by a parent; 2) when youth were asked to leave home and not return; 3) there existed unreasonable or inconsistent house rules; 4) the mental or physical health of parents was deteriorating; 5) situations equivalent to abuse; 6) when a parent was an alcoholic; or, 7) when family problems resulted in poor school performance. On the other hand, special circumstances were not deemed to exist where 1) the family conflict was the result of rebellion against reasonable house rules; 2) the reason for leaving was not because of family breakdown; 3) there was no evidence of abuse; 4) the claim consisted only of family arguments; 5) the complaints were unsubstantiated, or; 6) the circumstances for leaving were beyond the parents' control.<sup>35</sup>

The number of teenagers receiving welfare in Ontario increased dramatically in percentage terms under the NDP government, although they remained a numerically small group. In 1990, 7316 sixteen and seventeen year olds were receiving welfare assistance. In March of 1994, this figure climbed to 10,965,<sup>36</sup> an increase of 49.9 per

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31. SARB K-11-20-12 (14 December 1992; O'Connell, Brooks).

32. SARB M-05-24-23 (25 January 1994; Cardinal).

33. SARB N-04-05-35 (21 November 1994; Roy).

34. SARB M-08-25-07 (5 October 1994; Adams).

35. *Ibid.* SARB's efforts to give meaning to the special circumstances test is illustrative of the search for an adequate test to determine teens' eligibility for social assistance in other jurisdictions. For example, in Britain teenagers are required to prove "exceptional hardship" in their living conditions to be accepted. They do not, however, have to prove that they had good reasons for leaving home. See N. Harris, "Youth, Citizenship and Welfare" (May 1992) *J. Soc. Welfare and Fam. L.* 175. Similarly, the Australian *Social Security Act* requires that there be "exceptional circumstances" that necessitate the child leaving home. For an example of the application of this test see the following decision of the Australian Administrative Appeals Tribunal: *Re Secretary, Department of Social Security and Tu-Nguyen Tran* (1991), 23 A.L.D. 449. In *Tran*, a seventeen-year old youth was threatened by his father if he returned home after quitting school and leaving home. The Administrative Appeals Tribunal held that this scenario entitled the youth to receive benefits as a homeless person.

36. M. Philp, "Teen-agers a Prime Target for Harris Assistance Cuts" *Globe and Mail* (14 July 1995) A6.

cent. Nevertheless, the 1990 figure represented 5.2 per cent of the total welfare recipients in Ontario, while in 1994 it represented only 2.9 per cent. The reasons for this numerical increase are difficult to establish, but there are several potential factors. First, the economic recession of the early 1990s may have placed additional economic strain on families and youth, which led to more teenagers leaving home. A second factor may have been the increased awareness of youth of their eligibility for welfare, a trend that several non-profit groups encouraged.<sup>37</sup> This factor was likely accentuated by the large amount of media attention the issue received in 1994. Lastly, interim assistance — that is, assistance granted to appellants by the SARB pending the determination of their appeals — was granted liberally to teenagers who appealed the rejection of their applications.<sup>38</sup> With SARB's increasing caseload during the recession of the early 1990s, SARB became backlogged, and a growing number of teens were placed on interim assistance.<sup>39</sup>

**c) *Politicizing the Issue: Calls to Reduce Youth Welfare, 1994–1995***

Regardless of the reasons, the numerical growth in teenage welfare recipients soon became a political liability for the NDP, as did the growing number of welfare recipients generally.<sup>40</sup> Attempts to limit youth welfare, however, did not begin in Ontario. The issue was an important one in Alberta where Premier Ralph Klein cut the benefits to teen recipients even more than other groups.<sup>41</sup> Between 1993 and 1996, the number of teenage welfare recipients in Alberta dropped 75 per cent. Proponents of the policy believed that the cuts were necessary to put teens back to work.<sup>42</sup> Ontario's Conservatives noted the popularity of this policy, and stated that they would adopt similar measures.<sup>43</sup>

In 1994 the Progressive Conservatives made clear their intention to limit the availability of welfare to teenagers. The issue fit perfectly with the aims of the Conservative's cost-cutting agenda. Given that there were only a few thousand youth affected, none of whom could vote and who were predominantly apolitical, teenagers offered a powerless, voiceless target in comparison to some other recipients of welfare, such as the physically disabled, who were more organized and thus better able to resist

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37. For example, see Justice for Children and Youth, *Know Your Rights: A Legal Guide to Your Rights and Responsibilities for Young People Under 18* (Toronto: Justice for Children and Youth, 1997).

38. Interview with C. Milne (18 March 1998). Ms. Milne is a Staff Lawyer with Justice for Children and Youth in Toronto.

39. Between 1990 and 1995, SARB experienced a 170 percent increase in its caseload. Weiler *supra* note 25 at 187.

40. The NDP government's reluctance to have welfare expand further can be seen in many government publications. For example, see *Ontario, Assistance in Ontario: Finding the Problems and Fixing Them* (October 1994).

41. The relevant Alberta statute is the *Social Assistance Development Act*, R.S.A. 1970, c.S-16. The regulations determining eligibility are the *Social Allowances Regulation* Alta. Reg. 213/93.

42. M. Jenkinson, "Better to Wash Cars than Starve: Cutting the Dole Puts Youth to Work" *Alberta Report* (28 April 1997).

43. *Supra* note 36.

government attacks. In tightening the requirements for youth welfare, the Conservatives tapped attitudes that prevail across much of North America — the fear of youth crime, youth delinquency and the perception that a generation has gone astray. As the federal government's planned replacement of the *Young Offenders Act* demonstrates, all levels of government in Canada seem convinced that the correct recipe of legal inputs has not yet been found to adequately adjust teenage behaviour to conform with some undefined ideal of youth culture.<sup>44</sup> Combining societal fears of young offender crime with the desire to reduce welfare payments created high-powered ammunition for the Conservatives with which to attack the NDP prior to the 1995 Ontario provincial election.

The Conservatives' position was clearly articulated in the Ontario legislature. Throughout 1994 opposition members hammered away at the high price of welfare, and the costs of youth assistance. Politicians continually demonstrated their polarized position on youth welfare recipients. An example is a 29 March 1994 debate between Mike Harris and the then Minister of Community and Social Services, Tony Silipo. Harris pointed towards the increased cost of Ontario's welfare system and discussed youth as an example. According to Harris, "16- and 17-year-olds have been simply saying 'I don't want to live at home anymore,' and they are eligible for welfare."<sup>45</sup> Silipo tried to correct Harris' comment regarding eligibility, pointing out that:

... We have to be able to continue to provide support in those instances where there is abuse or other legitimate reasons for the young person leaving home but to also make it clear that we will not support young people simply leaving home, and becoming automatically eligible for social assistance.<sup>46</sup>

The Conservatives nevertheless continued to attack youth welfare. Particular examples of irregular implementation of the welfare program were used to undermine the government's position. On March 30, 1994, Ted Arnott, a Progressive Conservative

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44. See the federal government's policy statement on the upcoming replacement to the *Young Offenders Act*, R.S.C. 1985, c.Y-1: Canada, *A Strategy for the Renewal of Youth Justice* (Ottawa: Department of Justice, 1998). The societal preoccupation with youth crime and delinquency — and the failure of the law to correct this perceived problem — forms an important part of the contextual background for the issue of youth welfare during all of the 1990s. The academic literature on the societal preoccupation with youth delinquency and crime is extensive. See, for example, *supra* note 8. For examples of recent media comments on the problems of youth crime in Ontario see T. Boyle, "Shame Seen as Crime Fighter" *Toronto Star* (2 June 1998) A3; T. Blackwell, "Ontario Urged to Crack Down on Minor Crime" *Globe and Mail*, (10 December 1997) A10; R. DiManno, "Brutal Teen Clash is Just Routine Stuff as City gets Meaner" *Toronto Star* (10 June 1996) A7; K. Makin, "Ontario Targets Young Offenders" *Globe and Mail* (3 June 1996) A1; H. Hess, "Juveniles Climbing Robbery Charts" *Globe and Mail* (16 May 1996) A1; I. Vincent, "Girl-gang Violence Alarms Experts" *Globe and Mail* (12 September 1995) A10. More balanced accounts have been considerably less prevalent, but for an example see K. Orstad, "What are we afraid of?: The Myth of Youth Crime" *Saturday Night* (March 1997) 46.

45. Ontario, Legislative Assembly, *Debates* (29 March 1994) at 5231 (M.D. Harris).

46. Ontario, Legislative Assembly, *Debates* (29 March 1994) at 5231 (T. Silipo).

MPP from Wellington, stated that the Minister of Community and Social Services was unaware of the true situation. "The minister is not well-informed on what's going on today," Arnott suggested, "because today in Wellington county there is a 16-year-old girl receiving welfare who lives in a self-contained apartment attached to her parents' house. She collects welfare and pays rent to her parents."<sup>47</sup> Silipo could only respond that the girl had probably been granted interim assistance. This response was leapt upon by Harris, who pointed out that interim assistance had too commonly been awarded, often for long periods. Interim assistance was given to other categories of applicants as well, yet Harris' use of teenagers to illustrate his point again suggested that they were a safe target. "Do you know," Harris queried "of even one example — one, all across the province — where a 16- or 17-year-old who claimed that he or she needed welfare was refused?"<sup>48</sup> Silipo's response was twice interrupted by interjections, but he took a balanced approach. He admitted that there were instances of abuse, but that the government's approach "is not to assume, as members of the third party seem to want to assume, that every 16- and 17-year-old who is receiving social assistance is not entitled to receive social assistance."<sup>49</sup> This was, however, the conclusion that the Conservatives seemed determined to prove. Harris pointed out in April 1994 that the number of teenage welfare cases had doubled in three years, and suggested that the reason for this was not hard economic times or an increased awareness of youth to their rights, but was because "16- and 17-year-olds have learned how to beat the system."<sup>50</sup> Moreover, it was submitted that youth crime was actually assisted by teen welfare. Though one rationale of the welfare program was to prevent teenagers from turning to crime, MPP James Bradley suggested during a discussion of the *Young Offenders Act* that allowing youths to establish themselves independent of their parents "contributes, to a certain extent" to the problem of youth crime. How did Bradley propose this might occur? He gave one example in which he alleged that a teenager tried to provoke his father to violence because, "then, of course, that would make for easy student welfare."<sup>51</sup> These issues continued to be raised in the legislature throughout 1994.<sup>52</sup>

#### d) *The Role of the News Media*

The news media took note of this issue and adopted the Conservatives' position. Complaints were published about the cost of granting welfare to youth and of the negative social effects of youth welfare. A 1994 article by sociologist Elaine Lowe published in the *Globe and Mail* reiterated the Conservative Party's perception that

47. Ontario, Legislative Assembly, *Debates* (30 March 1994) at 5272 (T. Arnott).

48. Ontario, Legislative Assembly, *Debates* (30 March 1994) at 5272 (M. D. Harris).

49. Ontario, Legislative Assembly, *Debates* (30 March 1994) at 5272 (T. Silipo).

50. Ontario, Legislative Assembly, *Debates* (12 April 1994) at 5533 (M.D. Harris).

51. Ontario, Legislative Assembly, *Debates* (7 June 1994) at 6714 (J. Bradley).

52. See Ontario, Legislative Assembly, *Debates* (29 March 1994) at 5286-5287; (7 April 1994) at 5438-5441; (18 April 1994) at 5670-5671; (7 June 1994) at 6692-6693; (16 November 1994) at 7719, 7723 & 7735-7736; (7 December 1994) at 8408.

lethargic youth applicants were looking for handouts. Lowe discussed her son's decision to move out. She alleged that he did not move out because of abuse, but because he believed welfare could be taken at his choosing. This decision was a painful one for the author to accept:

For me, it is incomprehensible to *want* to go on welfare. This is not a lifestyle to aspire to! The ethics of personal responsibility, accountability and honesty in me are very strong, and I thought we had fostered these in our children too. I am not implying that these values are absent in those who receive welfare support. But the rationale of my son's application for welfare is an abuse. The system was intended as a safety net to catch you if you fall, not to encourage a jump.<sup>53</sup>

Another *Globe and Mail* article published in October 1994 also pointed to the alleged abuses the system was fostering.<sup>54</sup>

The concerns expressed in the rural media were somewhat different from those of the *Globe and Mail*, illustrating the particular worries of rural Ontario residents. For example, *The Sault Star* devoted considerable attention to this issue. During the week of June 13, 1994, *The Sault Star* published a four-part series on youth and Ontario's social safety net. Again and again, concerns were raised about the harmful effects of awarding teenagers assistance, not least of which was the fear that healthy families would be pulled apart by impetuous teenagers seeking an easy life.<sup>55</sup> Teenagers were portrayed as bragging about their ability to obtain welfare<sup>56</sup> and as manipulative in how they reported their cases to social assistance administrators.<sup>57</sup> Underlying these concerns was the fear that those who became eligible for assistance were likely to move to a larger urban centre, often Toronto.

#### e) *1995 New Democratic Party Reforms*

Faced by this chorus of criticism, the NDP government instituted a new set of regulations that slightly toughened the requirements for youth welfare. As has been mentioned, the NDP government launched a review of youth welfare in 1994 that was not accepted, but was replaced by more stringent requirements in early 1995.<sup>58</sup> The "special circumstances" test was kept, but there was an attempt to flesh out its meaning in the *Policy Manual*. Four broad categories were enunciated that could form the basis of a special circumstances claim. The first category was physical, emotional, or sexual abuse.<sup>59</sup> This could include verbal abuse, or exposure to the abuse of another family member. The onus was placed on the teenager to show this abuse, and the word of the

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53. E. Lowe, "Jump Right In: The Safety Net's Great" *Globe and Mail* (21 July 1994) A24.

54. J. Breckenridge, "Student-Welfare System Seriously Abused, School Board Says" *Globe and Mail* (22 October 1994) A7.

55. A. Tomec, "Broken Family, Broken Dreams" *The Sault Star* (15 June 1994) B1.

56. "Something to Brag About" *The Sault Star* (14 June 1994) B1.

57. A. Tomec, "Savvy to the System" *The Sault Star* (13 June 1994).

58. *Supra* note 21 at 1.

59. *Policy Manual* (April 1995) Tab 0304-05 at 7-10.

youth was not by itself sufficient. For instance, in situations in which physical abuse was not readily apparent, the youth had to prove his or her claim by obtaining documentation from a third party such as a guidance counsellor, social worker, teacher, police officer, clergy member, neighbour, other relative, or even a sibling.<sup>60</sup> Secondly, irreconcilable differences and withdrawal of family support which was clearly demonstrated could substantiate a claim of special circumstances. This did not include situations of normal sibling rivalry, or circumstances in which parents were applying reasonable rules, such as cleaning up one's room or attending school.<sup>61</sup> Thirdly, situations that clearly demonstrated the parents' inability to provide adequate care and support to the youth constituted special circumstances. For instance, if the parent abused drugs or alcohol, was emotionally unstable or incarcerated, then the parent would be deemed unable to provide adequate care and support.<sup>62</sup> Lastly, special circumstances could be found if there was no familial home or financial support available to the youth. This could include scenarios in which the parent had died, abandoned the youth, or where there was serious overcrowding in the home.<sup>63</sup>

As has been pointed out by Ian Morrison, the new guidelines had both positive and negative characteristics. On the positive side, they stressed that teenagers should be encouraged to complete high school.<sup>64</sup> More negatively, many aspects of the new guidelines were very subjective, and implied that welfare administrators had more discretion than the regulations intended. For example, it could be inferred, albeit erroneously, that administrators could require counselling for youths, even after special circumstances had been found.<sup>65</sup> Other provisions were also unclear. What, for instance, constituted "irreconcilable family differences"? Given these amorphous provisions, teenagers were increasingly refused interim assistance if they appealed to SARB.<sup>66</sup>

Such problems with discretion were indicative of some of the most important limitations placed on youth's eligibility for welfare, which often occur at the lowest levels of policy implementation. Welfare workers are generally not trained in assessing family relationships in the same way as children's aid workers. This has increased the level of subjectivity in the screening of applicants. Justice for Children and Youth reports that teenagers are often told over the phone that they are ineligible for welfare, or that they require a third person of responsible character to be involved in their claim. Or, youths are told that a family assessment is mandatory, which — for teenagers who

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60. *Ibid.* at 8-9.

61. *Ibid.* at 8-9.

62. *Ibid.* at 8.

63. *Ibid.* at 10.

64. *Supra* note 21 at 3.

65. *Ibid.* at 8.

66. *Supra* note 38.

may already have experienced unpleasant government intervention — may dissuade them from pursuing their claims further.<sup>67</sup>

**f) *Constitutional Challenge to “Special Circumstances” at the Social Assistance Review Board***

A constitutional challenge to the special circumstances requirement for youth was successfully argued in a 1996 SARB appeal known as *Pyke*<sup>68</sup> In this case, two legal clinics — Justice for Children and Youth, and Hastings and Prince Edward Legal Services — represented a woman named Pyke who moved out of her mother’s home in 1992 due to the cramped living arrangements, the resulting lack of privacy, as well as ongoing arguments with her mother. The issues before the review board were whether the requirement of special circumstances for youth violated section 15 of the Charter’s equality guarantee of the *Charter*;<sup>69</sup> and if so, was this a reasonable and demonstrably justifiable limit within the meaning of section 1 of the *Charter*? In a twenty-seven page decision, the SARB found that there was a violation of s.15. The government regulation made a distinction based solely on Pyke’s age. Although the Attorney General argued that the distinction was based upon the capacities, needs, and circumstances of the age group involved and that the distinction was made to accommodate these differences, the Review Board rejected this line of argument. Instead, the Board inquired as to whether the legislative distinction was based on a group association or on an individual’s merits and capacities. It determined that, because there was no standardized test to determine special circumstances, the distinction was based on a group association. Thus, the legislation was found to be discriminatory.

The Review Board went on to hold that the special circumstances provision was not saved by s.1 of the *Charter*. The Attorney General claimed the objective of the “special circumstances” requirement was threefold:

1. In combination with other Ontario legislation, to ensure that the needs of children and adolescents are met in a manner which is appropriate to their age and circumstances, either through an adult who can care for the adolescent in his or her home or by direct payment to the adolescent where no such adult’s home is available or appropriate.
2. To support the family unit and not interfere with its integrity, where the family unit is appropriate for the child or adolescent.

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67. *Supra* note 21 at 10. Other authors have commented upon the discretion granted to social assistance administrators generally. See M. Ginsburg, “Discretionary Powers in the General Welfare Assistance Act of Ontario” (1987) *J.L. & Social Pol’y* 1 at 2; and see N. des Rosiers & B. Feldthusen, “Discretion in Social Assistance Legislation” (1992) 8 *J.L. & Social Pol’y* 204.

68. SARB L-09-21-43B (27 May 1996; Solomon, Fyles, Shilling) [hereinafter *Pyke*].

69. *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. The provision could not be challenged under the *Human Rights Code* because the *Code* does not protect those under eighteen years of age from age discrimination. *Human Rights Code*, R.S.O. 1990, c.H.19, as am.



3. That the need for assistance should be assessed by considering the family unit as a whole and the support obligations of others, along with individual requirements.<sup>70</sup>

Using the *Oakes*<sup>71</sup> test, the Board rejected these objectives. Instead, SARB pointed out that "the legislation in question is not Child Welfare legislation, as the objectives suggest, but rather legislation with a primary purpose to provide for the financial needs for those persons who fit within the definition of a person in need. The objectives are thus inappropriate."<sup>72</sup> Therefore, the Review Board found that the regulation failed on the pressing and substantial objective portion of the *Oakes* test. The Review Board continued the section 1 analysis, and also held that it failed at the minimal impairment stage. Using the Attorney General's stated objectives of the provision, SARB determined that there were less intrusive methods to protect family structures. In addition, the Attorney General's claim that the special circumstances test was needed to ensure that various pieces of legislation all work together was deemed defective because "not all persons are covered under the proposal."<sup>73</sup>

This decision was viewed as a victory by those hoping to expand youth welfare, but its importance was undermined by several factors. Most obviously, it was a decision of a tribunal, rather than a court of law. Although an administrative tribunal, such as SARB, has jurisdiction to decide *Charter* issues, it only has the power to grant a constitutional remedy to the individual appellant before it (namely Pyke). It does not have the power to strike down the special circumstances test from the *Act* on the basis that it is unconstitutional. The Government of Ontario was therefore not required to amend the legislation or change its official policies. Nonetheless, the *Pyke* decision was treated as persuasive by subsequent panels of the Board and the Ministry found its decisions very difficult to defend when appealed to the Review Board. After *Pyke*, youths who appealed their initial assessment, were often awarded interim assistance by SARB pending disposition of their case, no doubt due to their increased likelihood of successfully challenging the special circumstances provision.<sup>74</sup> The provincial government appealed this decision to the Ontario Court (General Division)(Divisional Court), but it took two years before this next step was reached.

#### 4) THE CONSERVATIVES IN POWER: THE CURRENT STATUS OF YOUTH WELFARE POLICY

##### a) *New Limitations*

The Progressive Conservatives altered the legislation regarding youth welfare in a number of ways after attaining power in 1995. Two major sets of revisions took place,

70. *Supra* note 68 at 21.

71. *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87.

72. *Supra* note 68 at 21.

73. *Ibid.* at 27.

74. Interview with C. Milne, *supra* note 38.

the first in 1996 and the second in 1998. While the special circumstances test was kept, many other limitations on youth welfare applicants were implemented.

Under the 1996 regulations, school attendance was made mandatory and failure to attend education or training programs would lead to the youth's ineligibility.<sup>75</sup> This requirement was made explicit:

No person who is eligible...shall continue to be so eligible where he or she has been absent from his or her education or training program unless the welfare administrator is satisfied that the absence was justified and eligibility shall cease the month following the month the welfare administrator is advised of the absence.<sup>76</sup>

The policy guidelines dictate that "16-17 year olds will no longer have the option of to either go to school or look for employment. Youth must be either in school or training or they will be ineligible for assistance."<sup>77</sup> The stated rationale for this policy was economic: "obtaining a high school education will assist the youth to obtain and keep employment in the future."<sup>78</sup> This placed a new burden on youth welfare recipients. Previously, youth had been encouraged to attend school regularly, but there were no legislative provisions allowing welfare administrators to enforce this requirement, although some municipalities had attempted to institute such policies anyway.<sup>79</sup> The only scenarios under the new regulation where a youth could be excluded from this requirement were if he or she were denied admission to an educational institution for reasons outside the person's control, or if there was medical evidence of a condition that prevented attendance.<sup>80</sup> A more onerous change was the determination that youth had only one opportunity to gain and keep welfare assistance. Thus, if a youth's eligibility was revoked, he or she could not re-apply.<sup>81</sup> Clearly, a more interventionist, instrumentalist policy was enunciated, the effect of which has been to create a form of "learnfare" for teenagers. To be eligible for welfare, youths must be going to school or receiving training.<sup>82</sup>

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75. O.Reg 383/96.

76. *Ibid.*

77. *Policy Manual* (1 January 1996) Tab 0304-05 at 14.

78. *Ibid.*

79. For example, in Hastings County students were docked up to \$21 per day for a missing a day of classes without a proper excuse. B. Hunt, "Cutting Class can be Costly" *The Intelligencer* (3 March 1995).

80. *Supra* note 75.

81. *Ibid.*

82. Learnfare is typically understood as a policy in which value of a family's welfare cheque is tied to the propensity the family's children have to attend school. Such policies have been brought into effect in several American jurisdictions, the best known of which in Wisconsin. See M.A. Drumb, "Exploring the Constitutional Limits to Workfare and Learnfare" (1994) 10 *J.L. & Social Pol'y.* 107 at 115. Under this legislation, families lost their "Aid for Families with Dependant Children Grant" (AFDC) if their children failed to attend school. (1987 Wis. Laws 27; Wis. Admin. Code para [HHS] 201.195(1), 4(a), 4(b), (8) (March 1990)). While these types of measures have not always been judged successful, they have remained politically popular. For comments on the problems of this

There were other limitations placed on youth welfare in the 1996 regulations. As a condition of eligibility a welfare administrator could require that the teenager take part in family counselling.<sup>83</sup> Although this term of eligibility was premised on the willingness of the parents to participate, the regulations did not take into consideration whether the youth was willing to participate in such counselling. This condition insinuated that the youth was the party behaving irrationally. As a further condition to ensure the good behaviour of the welfare recipient, the youth might also be required to maintain contact with a "responsible adult" of at least twenty-one years of age, who was to ensure that the youth was keeping adequate living arrangements, and was to notify the welfare administrator if these conditions were no longer being sustained.<sup>84</sup> Justice for Children and Youth has criticized this aspect of the policy for a number of reasons:

First, the youth may not have a trusting relationship with any such adult and may turn to strangers. Second, it imposes a tremendous burden on any adult who comes into contact with the youth and the youth may be treated like a hot potato. Third, it places the youth and the adult in a position of "subject and snitch" and in the end, may be counter to the objective that it seeks to foster.<sup>85</sup>

With the implementation of the *Ontario Works Act* and its accompanying regulations<sup>86</sup> and policy directives,<sup>87</sup> the limitations placed on teenage social assistance applicants were made even more stringent. The legislation and regulations added three new hurdles. First, sixteen and seventeen year olds are required to have an adult act as a trustee. Social assistance no longer goes directly to the recipient but will be paid to an adult, who is then to dispense this money to the youth as needed.<sup>88</sup> How these adults

style of learnfare see M.K. Gotlieb, "Pennsylvania's Learnfare Experiment: Real Welfare Reform or Politics as Usual" (1995) 100 Dickinson L.R. 151; and M.E. Ethridge, and S.L. Percy, "A New Kind of Public Policy Encounters Disappointing Results: Implementing Learnfare in Wisconsin" (1993) 53 Pub. Admin. Rev. 340.

83. *Supra* note 80.

84. *Ibid.*

85. Justice for Children and Youth, *General Welfare Assistance Act*, (1996) [unpublished, archived at Justice for Children and Youth] 6.

86. O.Reg. 134/98.

87. Ontario, *Ontario Works Policy Directives: Making Welfare Work* (1 June 1998), [hereinafter *Policy Directives*].

88. *Ontario Works Act*, *supra* note 4 at s.17. This policy was considered as early as June 1997. The Minister of Community and Social Services, Janet Ecker, commented in June 1997 that a teenager leaving his or her family home would be required to "have adult supervision, and if there is indeed financial support that's required [sic], it will go through a trustee." Ontario, Legislative Assembly, *Debates* (18 June 1997) at 10,769 (J. Ecker). This policy is another example of the predominant ideological position *vis-a-vis* youth suggesting that increased legalization will solve irresponsible youth behaviour. Janet Ecker has shown herself to be a strong proponent of this position. Ecker, for example, co-chaired the 1996 provincial government report that recommended "boot camps." The report sought to reduce youth's "anti-social behaviour" by creating a highly-supervised, legalized test program that would encourage offenders to "gain insight into their behaviour and to deal with the consequences of accepting responsibility for their criminal actions." Ontario, Solicitor General

will be chosen is as yet undecided. One possibility mentioned in the *Policy Directives* is that non-governmental organizations who deal with this age group may be given the responsibility of administering the funds.<sup>89</sup> However, given that many non-governmental organizations (or NGOs) already face heavy workloads, this may not be plausible. A second new barrier is the stipulation that youth may only apply once for welfare assistance.<sup>90</sup> Thus, if a youth applicant is turned down just after turning sixteen years of age, he or she will not be permitted to reapply in the two-year period between their sixteenth and eighteenth birthdays. Finally, sixteen and seventeen year old couples and single-parent mothers are now treated identically as others in their age group, and are thus officially required to meet the special circumstances standard.<sup>91</sup>

**b) Constitutional Challenge to “Special Circumstances” at Ontario Court (General Division) (Divisional Court)**

In addition to these changes, the Ontario government also assaulted youth welfare applicants by appealing SARB’s *Pyke* decision in which the special circumstances test was held to be unconstitutional on the grounds of age discrimination.<sup>92</sup> The appeal was heard by the Divisional Court on May 26, 1998 before Justices Farley, Chapnik, and Karam. The case is significant not only because it determined the welfare rights of Ontario’s sixteen and seventeen year olds, but because of the dearth of section 15 jurisprudence across Canada in respect of youth. It is therefore one of the major decisions on the equality rights of young people in Canada. While the Supreme Court has given considerable attention to equality issues relating to old age,<sup>93</sup> there have been no Supreme Court or Court of Appeal decisions on youth discrimination, let alone determinations regarding youth age discrimination relating to social assistance. Dean Peter Hogg of Osgoode Hall Law School has ruminated on the issue of youth age discrimination. He reasons that youth age distinctions are discriminatory, but he also concludes that they are necessary for administrative efficiency, and should thus be saved under section 1 of the *Charter*.<sup>94</sup> The limited number of relevant lower court decisions,

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and the Minister of Correctional Services, *Recommendations from the Task Force on Strict Discipline for Young Offenders to the Ontario* (Toronto, Queen’s Printer, August 1996) at 5.

89. The *Policy Directives* state that municipalities may “contract with an agency to act as a trustee for an applicant aged 16 or 17 years. The delivery agent [the municipality] must ensure the responsibilities and available compensation are agreed to by the agency (*Supra* note 87 at 19.0-6).”
90. *Ibid.* at 19.0-15 to 19.0-16.
91. *Ibid.* at 19.0-6 & 19.0-10.
92. Despite the 1996 SARB decision regarding the constitutionality of special circumstances, the test was incorporated into the subsequent *Ontario Works Regulations* and *Policy Directives*. See *supra* note 86 and *supra* note 87 at 19.0-7 to 19.0-10.
93. See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545, 118 N.R.; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, 77 D.L.R.(4th) 55, 120 N.R.; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700, 118 N.R. 241; and *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94, 118 N.R. 340.

meanwhile, have been split in their findings. In *Mohamed v. Metropolitan Toronto*, the Ontario Divisional Court held that the legislation preventing youth under age sixteen from applying for welfare was a breach of s.15, but was saved by s.1.<sup>95</sup> Even more on point was *Clemons v. City of Winnipeg*,<sup>96</sup> a 1994 decision of the Manitoba Court of Queen's Bench that was reversed on other grounds by the Manitoba Court of Appeal.<sup>97</sup> In *Clemons* the complainant argued that the municipal restrictions on welfare applicants under eighteen years of age were discriminatory. The Court of Queen's Bench agreed, holding that it:

... Is only where the person seeking relief is under 18 years of age that the city purports to inquire into and set itself up as the adjudicator of the ins and outs of the parent/child relationship and of the reasonableness of terms which the parent purports to impose on the child as a condition of the city's granting social assistance.

The city advances no evidence under s.1 of the *Charter* which might justify this clearly discriminatory treatment.<sup>98</sup>

However, as mentioned, the Manitoba Court of Appeal reversed this decision on the basis that the complainant in *Clemons* failed to exhaust the available administrative appeal process, prior to applying to the Court.

Returning to the Divisional Court decision in *Pyke*, the court unanimously reasoned that there was no violation of section 15, and that, even if there was, it was saved by section 1 of the *Charter*. The Court concluded that the special circumstances test did not place a burden on this age group, and that the distinction was not based on a group stereotype. It reasoned that various pieces of government legislation, such as the *Divorce Act*<sup>99</sup> and the *Child and Family Services Act*,<sup>100</sup> should be considered together in analysing the constitutionality of special circumstances. "It may be observed," the court stated, "that the legislation in this area is a patchwork of provisions in different statutes; however it appears that they have been joined together to form a serviceable quilt."<sup>101</sup> Thus, the special circumstances test "is not an onerous requirement; rather it would merely be a matter of showing that the legal and practical financial need is truly present."<sup>102</sup> The court also refused to acknowledge that legislative decisions as

94. P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996) at 943.

95. *Mohamed v. Toronto (Municipality of Metropolitan)* (1996), 133 D.L.R. (4th) 108, 89 O.A.C. 339 (Div. Ct.).

96. *Clemons v. Winnipeg (City of)* (1994), 22 C.R.R. (2d) 160, 93 Man. R. (2d) 281, 114 D.L.R. (4th) 702 (Q.B.).

97. *Clemons v. Winnipeg (City of)* (1995), 27 C.R.R. (2d) 353, 100 Man. R. (2d) 64, 122 D.L.R. (4th) 676 (C.A.).

98. *Supra* note 96 at 164-165.

99. R.S.C. 1985 (2d Supp.), c.3, as am.

100. R.S.O. 1990, c.C.11, as am.

101. *Ontario (Attorney General) v. Pyke*, (15 October 1998), Doc. 364/97 (Ont. Div Ct.) [[1998] O.J. No. 4125, online: QL (OJ)].

102. *Ibid.*

to age divisions, including the special circumstances test, are based on stereotypes: "If viewed from one perspective, this may be characterized as stereotyping; if looked at from another, it may be viewed as the evolutionary distillation of human experience."<sup>103</sup> This view was strengthened, in the Court's opinion, by the fact that welfare administrators are required to make individual assessments of applicants' eligibility, and the Court concluded that this demonstrates that the special circumstances provision "does not rely on stereotypes or presumed characteristics."<sup>104</sup> Given that the Court could find no onerous requirement to the special circumstances test, nor a stereotypical application of a presumed group or personal stereotype, it was held that there is no violation of s.15.

The Court continued the *Charter* analysis and suggested that even if there was an infringement of section 15, that violation would be saved by section 1. It is under the auspices of section 1 that Hogg believes that legislation precluding youth from certain benefits should be saved,<sup>105</sup> and the Court accepted the Attorney General's section 1 submissions. Relying on the Supreme Court's decision in *McKinney*, the Court found that the government should face a less stringent burden in terms of justifying the limitation of the equality right in the context of age discrimination.<sup>106</sup> The Court accepted the three objectives of the "special circumstances" test put forward by the Attorney General at the SARB hearing.<sup>107</sup> This finding did not acknowledge that the definition of the government's objectives was a contentious issue. The Attorney General lacked research demonstrating the validity of these objectives, relying instead solely on the acceptance of these objectives by the Divisional Court in *Mohamed*. Counsel for Pyke, however, stressed that the Attorney General could not prove the objectives were accurate and argued that the Divisional Court in *Mohamed* had mistakenly accepted them without the tendering of any proof whatsoever of their validity.<sup>108</sup> Instead, counsel for Pyke submitted that the purpose of the provision was

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103. *Ibid.*

104. *Ibid.* This assessment, the court believed, distinguished this case from *Mohamed*. In *Mohamed*, it was held that the prohibition against those under age sixteen from receiving welfare was a violation of s.15.

105. *Supra* note 94 at 943.

106. *Supra* note 101. *McKinney*, *supra* note 93.

107. The objectives stated by the AG were nearly identical at the SARB and Divisional Court hearings. At the Divisional Court the accepted objectives were:

A) in combination with other legislation, to ensure that the needs of children are met in a manner which is appropriate to their age and circumstances, either through an adult who can care for an under 18 year old in that person's home or through direct payment to the 16-17 year old where no such home is available;

B) to support the family unit and not to interfere with its integrity where the family unit is appropriate for an under 18 year old.

C) to assess the need for assistance appropriately by considering the family unit as a whole and the support obligations of others, along with individual requirements.

108. To support their contention that the government must demonstrate that their stated objectives are in fact the objectives of the legislation, counsel for Pyke relied on the Ontario Court of Appeal's decision in *R. v. M.(C.)*, in which it was held that it "...Is not enough for the government to assert an

to ensure that those in need received financial assistance, which was the conclusion drawn by SARB in the decision under appeal. The Court, however, was content to cite *Mohamed* as proof that these were the objectives of the regulation.

The court found that there is a rational connection between these objectives and the special circumstances test. In doing so, the Court impliedly rejected the submission of counsel for Pyke that the government had failed to demonstrate that granting welfare to teenagers would lead to family breakdown.<sup>109</sup> Counsel also challenged the traditional societal view of how family units should be kept together. Why is it, it was queried, that the family structure is encouraged to remain intact in the context of abusive parents but not in instances of divorce where one spouse is abused? These issues did not trouble the Divisional Court, which failed to address these arguments in finding a rationale connection. The Court also found that the government minimally impaired the section 15 rights of youth. In so holding, the Court drew upon Supreme Court jurisprudence that suggested that Courts should not second guess legislative line-drawing. Moreover, the Court rejected Pyke's assertion that some teenagers might be left with no financial resources, stating that "there are no legal gaps as to the ability of that age group to receive financial support."<sup>110</sup>

The Divisional Court's decision in *Pyke* is not being appealed. The limited financial and personnel resources of the organizations that typically launch challenges to this type of government legislation dictate that battles must be carefully chosen, and the *Ontario Works Act* has several onerous provisions regarding youth that could be constitutionally challenged instead. For example, the previously mentioned provision that prevents youth from applying for welfare more than once could be challenged under the auspices of sections 7 and 15 of the *Charter*. Nevertheless, considering the lack of appellate level equality jurisprudence dealing with youth, a successful appeal of *Pyke* would have been helpful in establishing a precedent that would be adopted in Ontario and strongly considered by other Canadian jurisdictions.

## 5) FACTORS HINDERING CONTINUED OPPOSITION TO YOUTH WELFARE POLICIES

In addition to the limited resources of those seeking to challenge youth welfare legislation, there are at least three practical difficulties in beginning a challenge to legislation that limits the rights of youth to social assistance. The first can be discerned from the written reasons as well as the nature of the questions posed by the panel of

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objective for limiting guaranteed rights under s.1; there must, in my view, also be an underlying evidentiary basis to support the assertion." *R. v. M.(C.)* (1995) 23 O.R.(3d) 629 at 639, 98 C.C.C. (3d) 481, 82 O.A.C. 68 (C.A.).

109. Counsel for Pyke relied on the 1988 provincial government's own *Transitions* report, in which the Social Assistance Review Committee, in which the committee reported that the prospects of family reconciliation would be greater if social assistance was granted to this age group, subject to conditions for the ongoing receipt of the assistance: *Supra* note 15 at 235.

110. *Supra* note 101.

the Divisional Court during the oral argument of the *Pyke* case. It is this author's opinion that the questions posed by the panel in particular demonstrate that the judiciary sometimes share the preconceptions of the general public when it comes to the issue of youth receiving social assistance.<sup>111</sup> As well, the written reasons evince the judiciary's traditional wariness of extending economic benefits beyond the levels stipulated by the legislatures.

A second practical limitation is that an attack on government regulations requires an appeal launched by a youth. However, the age of the clients poses a difficulty. A seventeen year old who is informed that he or she is ineligible for welfare support is unlikely to challenge a government official or seek the advice of a legal clinic. A teenager will be discouraged from challenging a law if told that court proceedings will last a year or more. Unless the applicant is aware of interim assistance, the apparent benefits to the youth are certainly less than clear. For youths concerned with sustaining themselves, legal proceedings would appear to be an inadequate solution, and many teens referred to clinics in order to appeal their assessment never actually contact those clinics.<sup>112</sup>

Third, youth, especially this segment of youth, have weak political voices. Lacking the franchise, and most often with no formal political affiliation, youth welfare applicants have little ammunition with which to fight their battles on a larger scale. If teachers, public servants, and health care professionals had difficulty making an impact on Ontario government policy, then convincing a few thousand youth that they would be successful is an impossible task. Moreover, public opinion is not supportive of youth concerns and can not be counted upon for assistance.

The *Ontario Works Act* renamed SARB the Social Benefits Tribunal.<sup>113</sup> More fundamental changes to this tribunal, however, constitute the fourth practical limitation on youth welfare challenges. The Social Benefits Tribunal's membership, like SARB's before it, is appointed by order of the Lieutenant Governor in Council,<sup>114</sup> and since the Harris government has gained power, the Tribunal's composition and authority have altered. There has been a rapid turnover in membership since 1995, and the new members have generally held more conservative social agendas.<sup>115</sup> Because of this, the likelihood that the Social Benefits Tribunal would come to a decision like *Pyke* has decreased. As well, the provincial government has placed a privative clause on the decisions of the Social Benefits Tribunal to discourage judicial review. Lastly and

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111. Notes of the author from Divisional Court hearing in *Pyke* (May 26, 1998).

112. *Supra* note 38.

113. *Supra* note 4, s.60.

114. *Ibid.*, s.61(1).

115. See *supra* note 25 at 191-192. While there has been little mention of this in the popular press, the changing make-up of SARB has been brought up several times in the Legislative Assembly. For debates on the topic see Ontario, Legislative Assembly, *Debates* (11 October 1995) at 215-217; (16 October 1995) at 257-258. For a rare comment in the popular press, see B Livesey, "Trial and Terror" *Eye [of Toronto]* [11 February 1999] 11.



most importantly, the *Ontario Works Act* has removed the appeal tribunal's ability to decide constitutional issues.

The popular press has generally failed to cover youth welfare since 1995. The last *Globe and Mail* article on this topic, for example, was published in July 1995. In a piece entitled "Teenagers a Prime Target for Harris Cuts," Margaret Philp expressed some concern over the wisdom of more stringent requirements for teenage welfare. The article pointed out that the number of youth on welfare had been shrinking both in real terms (from 7316 in 1990 to 6492 in March 1995), and in their percentage of the total welfare recipients (from 5.2 per cent in 1990, to 1.9 per cent in March 1995).<sup>116</sup> The author coldly recounted the Conservatives' strategy in regards to this issue: "The Tories took advantage of the public's instinctive distrust of teenagers and the widespread perception that 16- and 17-year-olds in Ontario have become increasingly dependent on welfare."<sup>117</sup> The danger of decreasing welfare for youths was also discussed:

Professionals who work with street youth warn that disqualifying 16- and 17-year-olds from welfare benefits will force many to live on the street. They fear that because teenagers this age are simply too old and often too hardened to live as ward's of children's aid societies, it makes no sense to regard them as too young to qualify for welfare.<sup>118</sup>

However, such views have been voiced faintly since 1995. What affect the changes in youth welfare policy have had are difficult to quantitatively analyse, but the growing numbers of "squeegee kids" on the corners of Toronto's major intersections is a sign that the changes may have had some negative consequences.<sup>119</sup>

## 6) CONCLUSION AND RECOMMENDATIONS

The present regulations and policies result in a discriminatory approach to sixteen-to-eighteen year olds who find themselves in need. The legislation fails to address the very artificial nature of distinctions based upon age, especially in regards to youth. One sixteen year old might be mature enough to live independently while another may not yet be capable of making informed choices. Imposing an even more stringent "special circumstances" test, as the current legislation does, fails to address the very special needs of this age group.

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116. M. Philp, "Teen-agers a Prime Target for Harris Assistance Cuts," *Globe and Mail* (14 July 1995) A6.

117. *Ibid.*

118. *Ibid.*

119. These youth are often derided in the press though the reasons they are forced into this work is rarely discussed. For example, see "Squeegee Kids Popping up all Over: Police are Cracking Down on the Wiper Brigades But Few Teens Fear the Fines," *Globe and Mail* (11 June 1997) A1; "Squeegee Kids Clean Up," *Globe and Mail* (12 June 1997); H. Stancu, "MPP vows to wipe out army of squeegee 'punks'" *Toronto Star* (21 June 1996) A2.

The story of youth welfare policy in Ontario has been tied closely to political events. The result has been a polarized, politicized debate, in which the issue of youth welfare has been used to score political points. The Conservatives have decried welfare fraud by teenagers, while connecting youth with family breakdown and crime. This is a popular position, and the fact that just a few thousand teenagers received welfare is rarely mentioned. Policy-makers have not only been forced to find solutions in the context of this political debate, but have had to deal with the inherent difficulties of determining an effective youth welfare policy. The needs of disadvantaged teenagers must be fulfilled, but at the same time youth must not be encouraged to leave family homes that are simply experiencing the normal turmoil of the teenage years. This is a simple-sounding goal, but it has, obviously, been very difficult to implement.

What, then, is the optimal solution to the dilemma of youth welfare? The use of special provisions for granting welfare to this group in most Canadian and many international jurisdictions indicates that limitations are to a certain extent desirable. The real question, therefore, is not whether limitations should be imposed, but what form those provisions should take and how they should be implemented. I will conclude this paper by offering two recommendations that could greatly assist in providing a counterweight to the politically-driven policies of the past five years. First, the burden of producing evidence of special circumstances should be lessened in some situations, particularly when teens will have difficulty meeting the evidentiary burden for demonstrating special circumstances. Government regulations should therefore recognize instances, for example, in which verbally abused youths have difficulty obtaining documentation of their parents' conduct. Secondly, there is a need to re-target counselling efforts away from repairing family integrity and towards helping youth. A child-centred approach is needed. Re-integrating teens as healthy members of society — not just into their familial relationships — requires this. Thus, counselling should be provided to youths, and they should be assisted in the continuation of their education.

The value of these suggestions is apparent to those who have contemplated this issue at length. How could such changes in policy be enacted in the current political and social environment? First, of course, it would require a governing political party which holds less radically conservative views on the role of the state in society. More importantly, it would require that a pool of public opinion be tapped that has thus far been unused in this debate. Polls consistently demonstrate that many Canadians profess a concern about child poverty and youth unemployment. It will take a brave government to challenge the prevailing views of youth delinquency and criminality, and to appeal instead to public sentiment by highlighting the struggle of some teens to obtain basic needs. The government must address the fact that these basic needs would be much more accessible were these individuals aged fifteen years or younger, or else over the age of seventeen years.

