EQUALITY RIGHTS

and

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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Equality Rights and the Physically Handicapped

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1. Introduction

A constitutional guarantee of equality rights for handicapped persons is profoundly novel even for Western democracies which are traditionally mindful

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of the need to protect fundamental individual rights. Yet the need for a society to restrain itself from excluding handicapped persons from full participation in life's opportunities is by no means new. This need received early recognition in the Bible, where, in the *Book of Leviticus,* Moses, the leader of the tribes of Israel is portrayed as proclaiming the precept, "you shall not curse a deaf person, nor place a stumbling block before a blind person."[1]

The goal of this chapter is to identify the core content of Canada's new constitutional right of equality before and under the law and the right to the equal protection and equal benefit of the law without discrimination which is conferred on physically disabled persons by the Canadian *Charter of Rights of Freedoms.* It seeks to provide courts, legislators, Ministries of the Crown, and members of the public with a sensible, principled, and workable method for discovering how Canada's Constitution fulfils an age-old need, through a new legal provision.

Although in some respects the inequities or inequalities confronting mentally handicapped persons may differ from those to which physically handicapped persons are subjected, there are many similarities in the situation of both minority groups. Accordingly, much of the discussion in this chapter could apply with identical force to persons with mental disabilities. In those circumstances, the terms "handicapped" or "disabled" have been used without the qualifying words "physical" or "physically".

2. Context and Purpose of Equality Guarantees

(a) Discrimination based on physical disability – what, how and why

Four kinds of barriers obstruct the full participation of physically handicapped persons in Canadian society. The first, and perhaps most intuitively obvious, are tangible structural barriers. Physical structures incorporated into our surroundings, either for useful purposes or for mere aesthetic benefit, may, in some circumstances, impede the ability of a physically handicapped person to engage in specific activities. The most obvious tangible structural barrier is the staircase, or single step which is designed to facilitate a person's movement from one level or floor to another, but which is unnavigable by persons with mobility impairments, such as those who use wheelchairs.

The second class is the intangible structural barrier. These include those impediments to full participation posed by organizational procedures which cannot be performed by a handicapped person. Deaf persons, having information which is of interest to persons with hearing, may be obstructed from communicating this information because their medium of communication may be sign language, instead of verbal communication. Similarly, a person with cerebral palsy capable of drafting written material by typewriter, may be obstructed from filling out a needed application form in the office of an employer or government department either because of the unavailability of a typewriter, or because of a policy requirement that such forms be completed on-site.

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1. Leviticus 19:13.

The third class is the attitudinal barrier. These encompass those stumbling-blocks to full participation which are posed by prevailing public beliefs and conventional wisdom regarding the capabilities of physically handicapped persons. Typical of this kind of barrier is a situation where a physically handicapped person is precluded from pursuing a desired job, or participating in a program or activity because the employer, or other person in authority, believes that the person's disability renders him or her incapable of performing the duties or responsibilities associated with the job, program or activity. If an employer's refusal to hire a disabled person is predicated on an actual, provable inability on the part of the employee to perform the job duties, then the barrier to employment is the disability itself, and not the attitudes of the employer. If, however, the handicapped job applicant *is* capable of performing the job functions, and the refusal to hire is based on the employer's misunderstanding or misappraisal of the job applicant's capabilities, then the barrier to employment is the employer's attitude towards the disability and not the employee's competence in relation to the job.

Although these three barriers are initially set out in separate classes for ease of illustration, they are not separable in principle or in practice. To some extent, the tangible and the intangible structural barriers to full participation in society by handicapped persons can be traced to prevailing attitudes towards disabled persons. Because architects have more often than not been unaware of the numbers of mobility-handicapped persons who might wish to have access to the buildings they design, they fail to take into account the considerations of wheelchair accessibility when drawing up blueprints. Since a significant proportion of public educational programming was initially designed at a time when handicapped children were not expected fully to participate in the ordinary educational process in their home community, these programs were designed to meet the needs of only one segment of the student population, namely those students who do not have any form of physical handicap.

Similarly, prevailing social attitudes towards physically handicapped persons have themselves been generated to some extent by the considerable number of tangible and intangible structural barriers to full participation by handicapped persons. Since buildings and programs are often designed in a manner which results in the exclusion of handicapped persons, disabled persons are not ordinarily present in these buildings nor involved in these programs. This reinforces the attitude that the handicapped either are very few in number, are predominantly institutionalized, or are simply not interested in full participation in community life.

A fourth barrier to the full participation of handicapped persons in society is not socially imposed. This is the functional barrier imposed by a physical disability. A blind person seeking to play tennis is precluded from playing since vision is a *sine qua non* of the sport. Similarly, a totally deaf person is precluded from listening to music. The actual barrier imposed by a particular disability is, however, not a fixed matter. The same physical disability can impose substantially different limits on different people, depending on their other faculties, abilities and interests. Moreover, the extent to which a particular physical

disability limits a person's ability to undertake particular tasks can be profoundly affected by his or her environment, including the availability of equipment designed to enhance capabilities. A partially-deaf individual unaided by a hearing aid is capable of undertaking fewer activities for which hearing is required than is the same person who has the benefit of a hearing aid. The extent to which one's physical disability imposes a true barrier to the undertaking of various tasks is constantly being reduced by the development of revolutionary aids and adaptive devices. Accordingly, it is often impossible to make categorical statements about the extent to which a particular disability limits the capacity of a handicapped person, except in extreme cases.

At the core of traditionally-held attitudes towards persons with disabilities is the belief that a disability renders one substantially incapable of enjoying life. Blindness, deafness, reliance upon a wheelchair and the like are typically perceived as perpetual tragedies unjustly imposed on the undeserving. Those "suffering" from these conditions deserve pity, for they have been robbed of the true fullness of life; they are not whole persons.

Accompanying this pervasive attitude of pity is often an attitude of patronization. Because it is expected that a handicapped person is capable of accomplishing very little, the smallest accomplishments are at times viewed by the public as major breakthroughs. A deaf person obtaining a job or a blind person simply crossing a street unaided are congratulated for "accomplishing" actions which a non-disabled person would take for granted. Most illustrative of this attitude are the periodic news articles reporting on the manner in which a person, "afflicted" with a particular disability, has graduated from university, acquired a particular job, or otherwise attained some achievement which the public expects to be extraordinary for a handicapped person. Such accomplishments would never be deemed newsworthy if attained by an able-bodied person. This combination of pity and patronization of handicapped individuals for accomplishing that which, in his or her own expectations, ought to be expected of them, is best described as well-intentioned cruelty. For both reactions are based upon a misapprehension of the true impact of a disability on a particular individual.

The attitudes of pity and patronization connote a sense of "warmth" and "good intentions" towards handicapped persons. However, they are sometimes also accompanied by attitudes which are not so readily associated with positive intentions. Xenophobia, revulsion and guilt are also acknowledged attitudes towards handicapped persons. In a society which places extraordinary emphasis on physical perfection in body, dress and style, persons with "visible disabilities", namely disabilities which are observable at a glance, fail to measure up to the standards set. Those who are disfigured, who use a prosthetic limb, whose muscular control is restricted or whose physical movements do not conform precisely to that considered "normal" in society can evoke a measure of fear or discomfort in the onlooker. Additionally, fear that the disabling condition might be contagious can make an onlooker wish to keep at a distance from a handicapped person. As well, the feeling that a handicapped person has been condemned to "suffer" under their disability, while the able-bodied onlooker is not

so "cursed", can result in a sense of guilt at the "maldistribution" of personal troubles in society.

Springing from the foregoing feelings is often an unarticulated expectation that handicapped persons ought to be classified as a "group" in an institutional sense. The expectation that a blind individual will primarily have friends who are also blind, that a deaf individual will only go to a school for the deaf, and that persons with cerebral palsy will be inclined to live together in a special home for persons with cerebral palsy has traditionally marked the beliefs of the public and the policies of government planners. It is not unusual for a handicapped person, graduating in a particular profession or occupation, to be asked whether they intend to practice their calling or profession principally for clients sharing their disabling condition. This leads to an unspoken assumption that handicapped children ought to be educated in schools for the handicapped, that employment opportunities for the handicapped ought to focus principally on special classes of jobs set aside for them, and generally that service agencies for the handicapped, public or private, ought to assume primary responsibility for all the needs, aspirations and concerns of persons with a disability. In this result, an attitude of beneficient segregationism towards the handicapped has traditionally prevailed. Emphasis on "mainstreaming" handicapped persons or fully integrating their participation in society has surfaced only recently, and without commanding majority acceptance.

In the face of such attitudes, it is hardly surprising that inequality and discrimination on the basis of disability occur at the hands of government as well as at the hands of employers, landlords, and service providers in the private sector.

At the same time, inequalities based on disability are often the result of circumstances which are different from those faced by certain other disadvantaged minorities such as racial and religious minorities. Historically, discrimination because of race, creed or religion can often be traced to majoritarian feelings of antipathy towards unpopular minorities. By contrast, malice or malevolence towards the handicapped is rarely the source of inequalities based on disability. Rather, prevailing public attitudes towards the handicapped tend to be those of pity and charity, rather than hatred or scorn. The only possible exception to this generalization is that traditionally faced by the mentally ill or mentally retarded who have at times been seen as in some sense sub-human. The fact that inequalities imposed on the physically handicapped might arise from the best of intentions on the part of the majority, as opposed to ill-intentioned inequalities suffered by certain other minority groups, does not make the inequalities faced by the physically handicapped any less severe or more easily justifiable. From the perspective of the minority group subordinated, inequality is odious whether or not the subordinator acts with a pure heart.

Through the lessons of history, or because of political action by minorities, society has become increasingly aware of problems of inequalities and discrimination. The subject of discrimination immediately brings to mind inequalities faced by racial, religious, ethnic and political minorities, as well as women. However, it is a surprise to most to be told that the physically and mentally

handicapped also experience pervasive discrimination. In the realm of equality rights, the handicapped have by and large been a forgotten minority. This is evidenced by the fact that in the evolution of anti-discrimination legislation in Canada, the handicapped have been the last minority to be afforded comprehensive statutory protection.

(b) Pre-Charter legal protection for equality rights of physically handicapped persons

The history of protection of the equality rights of handicapped persons in Canada prior to the *Charter*'s enactment indicates that section 15 of the *Charter* was addressed to fill a clear gap in the law. These protections, such as they existed, were to be found in the common law, in statute and quasi-constitutional statute law.

There is no general common law principle affirming the entitlement of handicapped persons to equality of rights under law. This should not be surprising since the primary common law values of freedom of contract, enjoyment of property, and freedom from imprisonment and unreasonable search and seizure, were those traditionally upheld by both British and Canadian courts. An express principle of equality rights for handicapped persons is a recent development and does not have its roots in the common law.

The fact that the common law lacks such a principle of equality follows in part from the fact that the common law did not provide relief either in contract[2] or in tort[3] for claims of discrimination generally.[4] There have been, it is true, instances where the common law has amended its rules in order to accommodate specific problems confronting the handicapped. In *Gallie v. Lee*,[5] for example, the House of Lords held that the contractual doctrine of *non est factum* applies in a case where a document is executed by a visually handicapped individual who did not understand its contents. Nonetheless, the common law is more noted for its affirmation of inequalities of rights for disabled persons. To take but one example, the common law right to be free from imprisonment is not applicable to persons with mental handicap. The Royal Prerogative, vested in the Crown, is a power making it possible to incarcerate the mentally ill without complying with the rules of natural justice.[6]

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2. The only exception here involves racially restrictive covenants on land which have been held to be void as contrary to public policy: *Re Drummond Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.); but see *Noble v. Alley*, [1951] S.C.R. 64, [1951] 1 D.L.R. 321.
3. *Bhaduria v. Bd. of Governors of Seneca College of Applied Arts and Technology* (1979), 11 C.C.L.T. 121, 105 D.L.R. (3d) 707 (Ont. C.A.); reversed [1981] 2 S.C.R. 181.
4. A narrow exception to this generalization is the common law principle in the municipal law context which provides that municipal bylaws in the economic regulation area may not be discriminatory, unless such is clearly authorized by enabling legislation. See, *e.g.*, *Re Bunce and Town of Cobourg*, [1963] 2 O.R. 343, 39 D.L.R. (2d) 513 (C.A.).
5. [1969] 1 All E.R. 1062, [1969] 2 W.L.R. 901 (C.A.).
6. See, *e.g.*, *R. v. Martin* (1854), 2 N.S.R. 322, at 324; *R. v. Saxell* (1980), 59 C.C.C. (2d) 176, at 183 (Ont. C.A.); and *Ex Parte Kleinys*, [1965] 3 C.C.C. 102, at 105; 49 D.L.R. (2d) 225, at 227 (B.C. S.C.).

A statutory right to equality under law without discrimination because of physical disability can be found in Canadian law no earlier than the 1970's. These legislative sources are the various Canadian human rights codes. None of these codes expressly referred to handicap as a proscribed ground of discrimination. Over the 1970's and early 1980's, however, amendments have resulted in some form of protection against discrimination on the basis of physical handicap in every jurisdiction except the Yukon.[7] Physical disability is included explicitly, or by implication, in all codes addressing handicap equality rights, but mental disability is included only in the statutes of Ontario, Quebec, Manitoba, N.W.T. and the federal Act.[8]

Federal and provincial human rights or anti-discrimination legislation which includes disabled persons as a protected class affords roughly similar equality rights to handicapped individuals with respect to employment, housing, and services. Typically, a general right of equality in connection with protected activities such as employment, housing and the enjoyment of services and facilities is created.[9] Thereafter, some form of exemption is provided, which enables employers, landlords and others to draw distinctions based on handicap,

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7. Alberta: *Individual's Rights Protection Act,* R.S.A. 1980, c. I-2. British Columbia: *Human Rights Code,* R.S.B.C. 1979, c. 186, as amended by S.B.C. 1981, c. 15, s. 104, S.B.C. 1981, c. 21, s. 123, and S.B.C. 1982, c. 7, s. 58. Canada: *Canadian Human Rights Act,* S.C. 1976-77, c. 33, as amended by S.C. 1977-78, c. 22, s. 5, S.C. 1980-81, c. 54, S.C. 1980-81-82, c. 111, and S.C. 1980-81-82-83, c. 143, ss. 1, 2. Manitoba: *The Human Rights Act,* S.M. 1974, c. 65, as amended by S.M. 1975, c. 42, s. 26, and S.M. 1982, c. 23. New Brunswick: *Human Rights Act,* R.S.N.B. 1973, c. H-11, as amended by S.N.B. 1976, c. 31. Newfoundland: *The Newfoundland Human Rights Code,* R.S.N. 1970, c. 262, as amended by S.N. 1974, Act No. 114, S.N. 1978, c. 35, s. 18, S.N. 1981, c. 29, S.N. 1981, c. 85, s. 13, and S.N. 1983, c. 62. Northwest Territories: *Northwest Territories Fair Practices Ordinance,* R.O.N.W.T. 1974, c. F-2, as amended by O.N.W.T. 1978 (2d) c. 16, O.N.W.T. 1980 (2d) c. 12, O.N.W.T. 1981 (3rd) c. 6, O.N.W.T. 1981 (3rd) c. 12. Nova Scotia: *Human Rights Act,* S.N.S. 1969, c. 11, as amended by S.N.S. 1970, c. 85, S.N.S. 1970-71, c. 69, S.N.S. 1972, c. 65, S.N.S. 1974, c. 46, S.N.S. 1977, c. 18, ss. 16, 17, S.N.S. 1977, c. 58, and S.N.S. 1980, c. 51. Ontario: *Human Rights Code 1981,* S.O. 1981, c. 53. Prince Edward Island: *Prince Edward Island Human Rights Act,* S.P.E.I. 1975, c. 72, as amended by S.P.E.I. 1977, c. 39, S.P.E.I. 1980, c. 26, and S.P.E.I. 1982, c. 9. Quebec: *Charter of Human Rights and Freedoms,* R.S.Q. 1977, c. C-12, as amended by S.Q. 1978, c. 7, ss. 112, 113; S.Q. 1979, c. 63, s. 275; S.Q. 1980, c. 11, s. 34; S.Q. 1980, c. 39, s. 61; S.Q. 1982, c. 17, s. 42; S.Q. 1982, c. 21, s. 1; and S.Q. 1982, c. 61. Saskatchewan: *The Saskatchewan Human Rights Code,* S.S. 1979, c. S-24.1. The only jurisdiction lacking handicap as a prohibited ground of discrimination is the Yukon: *Fair Practices Ordinance,* 1963 (2nd), c. 3.

8. See, *e.g.,* Ontario's *Human Rights Code* amendment which extended protection to handicapped persons in 1981 (S.O. 1981, c. 53). It was preceded in 1976 by the *Blind Persons Rights Act* (R.S.O. 1980, c. 44, enacted by S.O. 1976, c. 14) s. 2(1) of which held that no person shall "(a) deny to any person the accommodation, services or facilities available in any place to which the public is customarily admitted; or (b) discriminate . . . with respect to the accommodation, services, or facilities available in any place to which the public is customarily admitted." And s. 2(2) held that "no person . . . shall, (a) deny to any person occupancy of any self-contained dwelling unit, (b) discriminate against any person with respect to any term or condition of occupancy . . . ."

9. See, *e.g.,* Ontario *Human Rights Code,* 1981, S.O. 1981, c. 53, s. 4(2) "every person has a right to equal treatment with respect to employment without discrimination because of . . . handicap."

to the detriment of disabled persons, where, in the circumstances, the particular handicap poses a real and provable barrier to the handicapped person's effective participation in the protected activity.[10]

Though statutory human rights codes were enacted principally to eradicate discrimination in the private sector, especially in consumer and commercial activities, two features make their proscriptions relevant to the broader question of equality at the hands of government. First, each human rights statute which contains protection from discrimination because of handicap is binding upon the Crown.[11] Accordingly, in every jurisdiction, governmental agencies are prohibited from engaging in discriminatory conduct in those activities, such as employment, which are governed by the code. Secondly, some human rights statutes stipulate that the provisions of the code are paramount over other legislation in the same jurisdiction.[12] The effect of a paramountcy provision in a human rights statute is to ensure that where any other statute clashes with the dictates of the human rights code, the code is to prevail, so that the clash is necessarily resolved in favour of vigorous protection of equality rights.[13]

Parliament's attempt in 1960 to create a general right of equality before the law by way of the quasi-constitutional statute, the *Canadian Bill of Rights,* met with dismal failure. Section 1(b)'s guarantee of "equality before the law and the protection of the law" was given the same fatally narrow interpretation in the case of handicap-based discrimination as in decisions involving discrimination on other grounds.[14] This is best illustrated by the example of the application of the *Bill of Rights* to the *Criminal Code*'s provisions providing a separate, and less

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10. Compare the broader exemption in the *Saskatchewan Human Rights Code,* S.S. 1979, c. S-24.1, s. 16(7) which allows discrimination against a handicapped person in employment, where ". . . physical ability . . . is a reasonable occupational qualification and requirement for the position or employment", with the Ontario *Human Rights Code,* 1981, S.O. 1981, c. 53, s. 16(1)(b), which only permits an employer to reject a handicapped job applicant on the ground of his disability where ". . . the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap."

11. *Human Rights Code,* R.S.B.C. 1979, c. 186, as amended, s. 25; *Individual's Rights Protection Act,* R.S.A. 1980, c. I-2, s. 12; *The Saskatchewan Human Rights Code,* S.S. 1979, c. S-24.1, s. 43; *The Human Rights Act,* S.M. 1974, c. 65, as amended, s. 35; *Human Rights Code 1981,* S.O. 1981, c. 53, s. 46; *Charter of Human Rights and Freedoms,* R.S.Q., c. C-12, s. 54; *Human Rights Act,* R.S.N.B. 1976, c. 31, s. 9; *Human Rights Act,* S.N.S. 1969, c. 11, as amended, s. 15; *Prince Edward Island Human Rights Act,* S.P.E.I. 1975, c. 72, as amended, s. 3; and *Canadian Human Rights Act,* S.C. 1976-77, c. 33, as amended, s. 63(1).

12. See, *e.g., Individual's Rights Protection Act,* R.S.A. 1980, c. I-2, s. 1; *The Saskatchewan Human Rights Code,* S.S. 1979, c. D-24, s. 44; *Human Rights Code 1981,* S.O. 1981, c. 53, s. 46(2); and *Charter of Human Rights and Freedoms,* R.S.Q., c. C-12, s. 52.

13. Each paramountcy clause also provides that any other conflicting statute may only be afforded paramountcy over the *Code* if the conflicting statute expressly contains a legislative override clause stipulating expressly that it operates notwithstanding the human rights code with which it clashes. See for a discussion of the relationship between anti-discrimination legislation and government, A.F. Bayefsky, "The *Jamaican Women* Case and the Canadian Human Rights Act: Is Government Subject to the Principle of Equal Opportunity?" (1980), 18 Western Ontario L.R. 461.

14. See, *e.g.*, discrimination based on sex: *A.G. Can. v. Lavell,* [1974] S.C.R. 1349, 23 C.R.N.S. 197, and *Bliss v. A.G. Can.,* [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.

fair, procedure for putatively mentally handicapped persons involved with the criminal justice system.

The *Criminal Code* provides that persons who are unfit to stand trial on account of insanity are incarcerated, potentially in a psychiatric facility, until the provincial cabinet chooses to release the individual.[15] This procedure involves far fewer substantive or procedural safeguards for the mentally ill accused than are extended to other accuseds subject to pre-trial detention under the bail process.[16] Though the *Criminal Code* specifically restricts its 'fitness for trial' regime for accuseds with a serious mental disorder or handicap, it has been held that these provisions may be applied to an accused who is unfit to stand trial because of certain *physical* disabilities, such as deafness or deaf-muteness.[17]

The *Criminal Code* provides for a similar process of indefinite detention for accuseds found not guilty by reason of insanity on indictable charges.[18] This process was challenged under the *Canadian Bill of Rights* as a violation of the guarantees of due process, equality before the law, freedom from arbitrary imprisonment and freedom from cruel and unusual treatment or punishment in the case of *R. v. Saxell.*[19] Though the Ontario Court of Appeal quickly disposed of the case on other grounds, rendering it unnecessary to consider the *Bill of Rights* issue, it went out of its way to reject all *Bill of Rights* challenges. The equality rights challenge was rejected in the following words:

> The very large words of s. 1 signal extreme caution where the Court is asked to apply them in negation of substantive legislation validly enacted by a Parliament in which the major role is played by elected representatives of the people. . . . The right of the individual to equality before the law does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective.[20]

It might reasonably be assumed that a court, so desirous of expressing its approbation of the impugned law when unnecessary, would take a similarly unfavourable view of any challenges levelled against the *Criminal Code*'s fitness for trial provisions, sections 543-47, as applied, say, to the case of a deaf-mute accused.

Accordingly, it follows that with the exception of recent legislative initiatives in the area of discrimination in employment, housing and the provision of services, Canadian law provided no real protection for the equality rights of handicapped persons on the eve of the *Charter*'s enactment. It follows from this that *Charter* section 15, as applied to the handicapped, is a genuinely *new* and

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15. See, *Criminal Code,* R.S.C. 1970, c. C-34, ss. 543-47.
16. Compare *Criminal Code,* R.S.C. 1970, c. C-34, ss. 543-47 (fitness provisions) with s. 547 (bail provisions). See chapter by D. Vickers and D. Endicott.
17. See *R. v. Pritchard* (1836), 173 E.R. 135, and for a possibly contrary view, see *R. v. Hughes* (1978), 43 C.C.C. (2d) 97 (Alta. T.D.).
18. See *Criminal Code,* R.S.C. 1970, c. C-34, s. 16 & ss. 542-47.
19. (1980), 59 C.C.C. (2d) 176, 123 D.L.R. (3d) 369 (Ont. C.A.).
20. *Ibid.* at 181, 123 D.L.R. (3d) at 374, *per* Weatherston J.A.

unprecedented right in Canada.[21] Parliament ought to be taken as having been aware of this fact when it added, after deliberation, physical and mental disability to the list of enumerated grounds protected by section 15.

(c) Legislative history of the handicap amendment

Between October, 1980, when the patriation bill, including the draft *Charter,* was first introduced into Parliament, and April, 1981, when the final version was approved, four changes to the wording of section 15 took place. In the final version "every individual" replaces the original term "everyone". Where the original version used the phrase "equality before the law", and "equal protection of the law", the final version speaks of every individual being "equal before and under the law" and entitled to the "equal benefit of the law". In the final version the name of section 15 is changed from "Non-Discrimination Rights" to "Equality Rights". Lastly, and most importantly for our discussion, whereas the original 1980 version restricted the grounds of discrimination to several disadvantaged groups in Canadian society, the final version makes it clear that these groups are not exhaustive and explicitly extends protection to the eighth and ninth enumerated groups, namely persons with a physical or mental disability. The events leading up to the Parliamentary vote to put equality rights for physically and mentally handicapped persons into the Constitution provide unique insight into the purpose and intended effect of this unprecedented constitutional right. The addition of both physical and mental disability in section 15 are considered together, since they were adopted simultaneously, and debated by Parliament as a package.

(i) Chronology

The initial version of section 15 presented to Parliament in October, 1980, provided that "Every person has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex." It was accompanied by section 15(2) which provided the affirmative action exemption in the same language as the present text, except that it did not refer to physically or mentally disabled persons as a disadvantaged group. At this preliminary stage of the Parliamentary debate, section 15's equalitarian command did not address legal discrimination based on handicap. The finite list of protected classes of persons did not include those with disabilities, and the text, read together with the traditional *expressio unius est exclusio alterius* maxim made this omission fatal to any potential claims of handicap-based discrimination. The omission of disabled persons was deliberate. In response to a Committee member's question about the desirability of amending section 15 to include the handicapped, then Justice Minister

21. Compare *Charter* rights having their roots in Canadian legal tradition include, *inter alia,* s. 7, to the extent that it builds upon the common law rules of natural justice and the duty of fairness, s. 9 and s. 10(c) to the extent that they originate in the common law right of *habeas corpus,* and s. 11(d), to the extent that it springs from the common law and statutory right to a fair trial and the presumption of innocence.

Chretien answered in terms reflecting his staff's intention that this minority would not be afforded protection by section 15.[22]

This intentional exclusion from the *Charter* of handicap equality rights drew criticism from various corners of Canadian society. The case for a handicap amendment was made in three forums concurrently. First, it was advanced as part of the public debate over patriation, in public forums, the media, and letters and petitions directed at legislators.

The second forum was the Special Committee of the House of Commons on the Disabled and the Handicapped. This all-party committee ("the Parliamentary Handicap Committee") was struck in 1980 to inquire into the status and needs of handicapped persons in Canada, for the purpose of proposing reforms to law and policy. At hearings conducted across Canada during 1980, many witnesses argued for expanded legal protection against handicap-based discrimination by way of, among other things, a Constitutional provision to that effect.

Thirdly, the case for handicap rights was formally articulated in presentations to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada ("the Hays-Joyal Committee") which was convened to obtain public input and review the new Constitution's draft provisions with a view towards their improvement. Three principal advocates for the handicap amendment appeared before the Hays-Joyal Committee, the Coalition of Provincial Organizations of the Handicapped (COPOH), a federation of local handicapped persons' action groups, the Canadian Association for the Mentally Retarded (CAMR),[23] and the Canadian National Institute for the Blind (CNIB).[24] Other organizations, outside the sphere of rehabilitation agencies and disabled persons' advocacy groups, joined in support for the expansion of section 15 entitlements, reflecting a diverse sampling of the Canadian populace. These included the Canadian Jewish Congress, the Canadian Human Rights Commission, the Canadian Labour Congress, and the Royal Canadian Legion, among others.

Once testimony by witnesses representing a diversity of viewpoints on the proposed patriation of the Constitution was completed, the Hays-Joyal Com-

22. Mr. Chretien:

> There are, of course, some drafting problems which would arise. That is why I stated earlier that the Human Rights Commission will continue to exist as well as the Human Rights Act. Very often, rights which are being asserted at this time are very difficult to define in legal terms. There are many degrees of disability involved; some are physically handicapped, others are mentally handicapped. Fortunately, society is becoming increasingly more aware of the protection of those rights. However, it is very difficult to draft a precise legal wording which could be easily incorporated into the constitution and into the human rights charter.

Special Joint Committee of the House of Commons and of the Senate (hereafter the Hays-Joyal Committee), *Minutes and Proceedings of Evidence*, 1st sess., 32nd Parl., 1980-81, Issue No. 3, at 85.

23. This was a research, advocacy and service-providing agency serving persons with developmental handicaps. CAMR was accompanied by a spokesman for "People First", a federation of persons with mental retardation.

24. The CNIB is an agency providing rehabilitative and other support services to blind and visually handicapped Canadians. David Lepofsky was one of the CNIB's spokespersons before the Hays-Joyal Committee.

mittee began its clause-by-clause review of the *Canada Act Bill,* during which members brought several motions to amend the legislation. At the outset of this procedure, on January 12, 1981, the Justice Minister tabled a package of amendments which his government was prepared to accept, having considered the testimony presented to the Committee. He proposed two substantive changes to section 15. First, the entitlement would be to "equality before the law and to the equal protection of the law and the right to the equal protection and equal benefit of the law without discrimination." The second clause of section 15(1), which formerly read "without discrimination because of", was amended to afford protection to those classes not specifically enumerated in the *Charter.* This clause thereafter was to read "without discrimination, and in particular, without discrimination based on . . ." followed by the same seven listed minorities. Although the Minister had addressed the proposal that the handicapped be added to the list of protected classes, he specifically declined to give his approval.

In explaining why the handicapped amendment was not supported by the government, the Justice Minister gave what appeared to be contradictory reasons. On the one hand he stated that his government had left room for handicap protection to be added to section 15 by judicial decision: "If there is positive discrimination against handicapped and nobody is acting, in my reading of that section, the courts could intervene."[25] On the other hand, he gave three reasons why he thought that handicap protection was undesirable: these rights may not have "matured" in the minds of the public, there would be a problem in defining the population to be protected and the rights involved, and in any event statutory human rights codes provided a better method for protecting disability-based equality rights.[26]

It was clear from the beginning that the Justice Minister was not pleased with his own reply to the Hays-Joyal Committee.[27] In the days that followed, it became evident that both opposition parties, who together held a minority position on the Hays-Joyal Committee, supported a handicap amendment. The Justice Minister, in response to a question from a Committee member from his own party, indicated on January 16, 1981, that he was prepared to reconsider the government's position, in light of the fact that patriation was slated to occur during 1981, the International Year of the Disabled Person.[28]

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25. Hays-Joyal Committee, above note 22, Issue no. 36, at 32.

26. *Ibid.* at 31:

> But to start to enumerate more in that category where their rights are starting to be protected by legislation and so on, and if there is discrimination against handicapped and so on, we say that the court can intervene even if we do not want to enumerate them at this time because many of those rights are difficult to define. It is in the process of maturing, that is why it is not there.

And see Issue no. 37, at 22.

27. "Myself as a human, as a politician and as a man who has always been preoccupied with the disadvantaged groups in this society, I am not happy to give you that answer. . . ." *Ibid.*, Issue no. 37, at 23.

28. Mr. Bryce Mackasey:

> Finally, there is the possibility, Mr. Minister, of adding the category of disability, and can you be persuaded to reconsider and is there a possibility because of the work going on by the particular Committee of the Commons and the fact that there is international

After the Committee had finished its detailed scrutiny of *Charter* sections 1 to 14, its attention was turned again to the question of handicap equality on January 28, 1981. The Justice Minister informed the Committee that he was, at last, prepared to endorse the handicap amendment.[29] After a motion by Mr. David Crombie, a unanimous vote of the Hays-Joyal Committee that evening appended section 15(1) to include the words "or mental or physical disability". As well, this phrase was inserted in section 15(2)'s list of minority groups for whose benefit affirmative action programmes could still be pursued.[30]

(ii) Reasons for the amendment's adoption

Transcripts of the proceedings before the Hays-Joyal Committee reveal that when the first draft of the *Charter* was introduced in October, 1980, the Minister of Justice had been advised by his staff to exclude the handicapped from the protection of section 15. *Hansard* also reveals that members of the Committee who were sufficiently convinced by the witnesses who spoke in favour of the handicap amendment pressured the Justice Minister to reconsider the Government's position. As was already noted, it was clear that Mr. Chretien was unhappy with the "best advice" he was receiving from his advisors.[31]

The Committee was confronted by the fact that physically and mentally handicapped persons in Canada constitute a disadvantaged minority.[32] This had been the conclusion of the report of the Special Committee on the Handicapped

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recognition of the problems of disabled people; you have mentioned some groups in particular, leaving the rest open – would you reconsider with your officials all the ramifications of adding to Section 15 some recognition of the particular problems that this category of Canadians has to face, a fact which the public are now only beginning to realize? It would fall into the category of – it could almost be classified as a fundamental freedom.

Mr. Chretien: "I am willing to review that and see if it can be added. But I cannot give you any answer." Mr. Mackasey: "But there is still a possibility? You are still open-minded on it?" Mr. Chretien: "Bryce, you know I am a very open-minded man." (*Ibid.*, Issue no. 39, at 18).

29. "It is with great pleasure that I accept the amendment on behalf of the government. I do not think we should debate it." Hays-Joyal Committee, above note 22, Issue no. 47 at 91.

30. *Ibid.*, Issue no. 49, at 45.

31. At one point Mr. Robinson turned to the Justice Minister and said:

> [I] suggest to you that you have betrayed the hopes and the expectations of many, many Canadians in refusing to include as a prescribed ground of discrimination, disability. This Committee heard witness after witness appearing before us insisting that disabled Canadians, whether that be physically disabled or mentally disabled, should be entitled to protection from discrimination. This, Mr. Minister, is the international year of the handicapped.

(*Ibid.*, Issue no. 31, at 21-22.)

After some discussion, Mr. Robinson then asked whether the Justice Minister was ready to go back to his advisors and seriously consider the possibility of adding disability as an additional ground of discrimination. Mr. Chretien responded:

> You understand my problem. Yes, I will go back to my advisors. . . . There is nothing that would please me more to add that word there. But I have at the same time to make sure that we are not creating a problem that will be very difficult for the administration of the law, the judgment of the court, the legislature and so on.

(*Ibid.*, Issue no. 37, at 23.)

32. See, Hays-Joyal Committee, above note 22, Issue no. 12, at 27, Mr. Ron Kanary, Coalition of Provincial Organizations for the Handicapped (COPOH).

and the Disabled, chaired by M.P. David Smith. The recommendations of that Special Parliamentary Committee were frequently brought to the Committee's attention.[33] The Special Committee had found, as the result of hearings held across Canada during the summer of 1980, that the treatment of the handicapped was an area of "tragic neglect as far as human rights are concerned".[34] Hearing from over 400 witnesses, the Special Committee was presented with overwhelming support for the inclusion of the disabled and handicapped in human rights legislation.

Moreover, the Special Committee formally resolved to call upon Parliament to include the handicapped explicitly within the reach of the *Charter*. It resolved that "If Parliament decides to enshrine human rights in the patriated Constitution, the Committee feels that complete and equal protection should be extended to persons suffering from physical and mental handicap."[35]

The Hays-Joyal Committee was informed by witnesses that physically and mentally handicapped persons are regularly victimized by intentional and unintentional acts of discrimination. This discrimination creates a barrier to the handicapped person's ability fully to participate in Canadian society. Mr. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission, noted that fully 21 percent of all complaints to the Commission dealt with discrimination against the handicapped in employment.[36] Among the handicapped, some 800,000 Canadians, amounting to 10 percent of the total workforce, the unemployment rate is between 70 and 80 percent.[37] This has the effect, witnesses attested, of limiting the degree of participation by handicapped persons in Canadian society.[38]

More particularly, evidence before the Committee demonstrated that discrimination on the basis of disability and inequalities experienced by handicapped persons are imposed by various levels of governments in Canada. Provincial legislation regarding group homes and sheltered workshops, coupled with municipal zoning bylaws, were shown to have the effect of segregating and stigmatizing the handicapped.[39] The Committee was also informed of the exception in minimum wage legislation which sanctions the payment of unrealistically low sums of money for handicapped person's labour.[40] Legislation preventing blind persons from serving on juries, welfare legislation denying certain handicapped persons the right to personally receive welfare benefits, as well as provincial education legislation segregating handicapped children from

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33. See, *e.g.*, *ibid.*, Issue no. 10 at 7, 11, Mr. Dave Vickers, Canadian Association for the Mentally Retarded (CAMR); Issue no. 11 at 41, Dr. Noel Kinsella, New Brunswick Human Rights Commission; Issue no. 12 at 38 & 43, Mr. Jim Derkson, COPOH.
34. *Ibid.*, at 11, Mr. David Vickers, CAMR.
35. *Ibid.*, at 7.
36. *Ibid.*, Issue no. 5, at 17.
37. *Ibid.*, Issue no. 12, at 34, Mr. Neil Young (NDP-Beaches).
38. *Ibid.*, at 27, Mr. Ron Kanary, COPOH.
39. See, *e.g.*, *ibid.*, Issue no. 10, at 18-19, Hon. James McGrath (P.C.-St. John's East).
40. *Ibid.*, Issue no. 12 at 28, Mr. Ron Kanary COPOH.

mainstream education institutions, and the discriminatory effects of the federal *Immigration Act* were all brought to the Committee's attention.[41]

It was argued before the Committee that unless society's value of freedom from discrimination was itself equally applied, the handicapped would become a second-class minority, one for which discriminatory treatment was being seen to be of less significance, or less in need of prohibition, than that of other minorities. If the handicapped were not included in the protections given by the *Charter,* the signal sent to such bodies as the Human Rights Commissions across Canada would be that equality rights for the handicapped were less important than those of other minority groups.[42]

Further, it was pointed out to the Committee that the need for inclusion of the handicapped in section 15's protection was accentuated by the fact of the substantial numbers of the handicapped whose rights are involved. The handicapped were shown not to be a small minority, but rather to form a substantial component of Canadian society, although often hidden from view. Representatives of the CNIB reported 30,000 blind clients of that organization.[43] The handicapped represent at least 10 percent of the labour force.[44]

It was noted that Canada should entrench equality rights for the handicapped in its Constitution for the purpose of fulfilling international obligations incumbent upon Canada.[45] These international agreements – dealing with adequate housing, services, education and other facilities – were agreed to by the Canadian government. Witnesses argued that Canada should not fail to imple-

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41. *Ibid.*, Issue no. 25, at 8-10, Mr. David Lepofsky, CNIB. Several witnesses testified to the fact that public attitudes towards persons with handicaps pose a substantial obstacle to the equality and full participation in society of the handicapped. In the end, the problem is mainly one of attitudes, largely well intentioned pity of the 'sick', which create patronization, condescension and discrimination. (See *ibid.* at 5; Issue no. 12 at 36; and Issue no. 12 at 36, Mr. Neil Young.) These attitudes, and misconceptions of handicapped persons, are embodied in legislation, thus perpetuating the "freak syndrome" and making it difficult for handicapped persons to achieve independence, and full integration into Canadian society. (*Ibid.*, Issue no. 25, at 6, Mr. David Lepofsky, CNIB.) Despite these commonly held attitudes which are destructive to handicapped persons, several witnesses pointed to the fact that the inclusion of the handicapped into s. 15 would have the effect of articulating what are, if the general language of the Charter is any indication, the most basic and cherished values of our society. (*Ibid.*, Issue no. 12 at 28, Mr. Ron Kanary, COPOH: Issue no. 10 at 9, Mr. David Vickers, CAMR; Issue no. 11 at 42, Dr. Noel Kinsella, N.B. Human Rights Commission.) If equality of opportunity and treatment is to be an entrenched value in the Canadian society, then, it was argued that equality should be generally applied to all minorities adversely affected by discriminatory attitudes and practices. (*Ibid.*, Issue no. 25 at 7, Mr. David Lepofsky, CNIB.) A constitutional protection against handicap discrimination would, one witness suggested, set a tone so that other changes consistent with the value of equality could come about. (*Ibid.*, Issue no. 12 at 30, Mr. Jim Derksen, COPOH.)

42. Hays-Joyal Committee, above note 22, Issue no. 12, at 30, Mr. Ron Kanary, COPOH.

43. *Ibid.*, Issue no. 25, at 10, Mr. David Lepofsky, CNIB.

44. *Ibid.*, Issue no. 12, at 35, Mr. Neil Young (NDP-Beaches).

45. *Ibid.*, at 30, and Issue no. 10, at 9. See also "U.N. Declaration on the Rights of Disabled Persons", Dec. 9, 1975, General Assembly Resolution 3447 (xxx).

ment for its own handicapped citizens those rights it had, in concert with other nations, held out as crucial to a civilized state.[46]

The case for the inclusion of the handicapped was supported by the fact that patriation of the Constitution was to occur in 1981, a year which had been designated the International Year of the Disabled Person by the United Nations at the behest of, among other nations, Canada. This point was repeatedly brought to the attention of the Committee. Moreover, the Committee was told that inasmuch as the theme of the International Year of the Disabled Person was "equality and full participation", it would seem at least ironic for Canada to entrench a Constitution which failed to repeat this important principle.

The federal government, in opposition to the proposed handicap amendment, offered three principal arguments. First, it was argued that the expression "physical or mental disability", or any such phrase, should not be included in the *Charter* since these terms are too vague and will pose major problems of judicial definition.[47]

The second argument which stood in the way of the handicap amendment was that adding the handicapped to section 15 would be too expensive to implement. At no point was the argument expressly set out, and no statistical evidence was put forward. Rather, the government 'floated' the concern, one which may have seemed to the government not to require factual support. After all, once included, the handicapped amendment would seem to require new schemes of education, job training, housing, services, and so on.[48]

The final argument advanced by the federal government in opposition to the handicap amendment was that, given the statutory human rights schemes in place, and those to be developed in the near future, the handicapped simply did

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46. *Ibid.*, Issue no. 10, at 9, Mr. David Vickers, CAMR.

47. This had been Mr. Chretien's major difficulty from the outset. On November 12, when first asked about the possibility of including the handicapped to the list, the Justice Minister responded that "There are, of course, some drafting problems which would arise.... Very often, rights which are being asserted at this time are very difficult to define in legal terms.... It is very difficult to draft a precise legal wording which could be easily incorporated into the constitution and into the human rights charter." (Hays-Joyal Committee, above note 22, Issue no. 3, at 85.) Later, on January 12, 1981, the Justice Minister developed the argument in response to the many witnesses who, in the interim had refuted his claim that there were insurmountable definitional problems. Mr. Chretien noted that the Government now favoured an "opened up clause" so that the courts could intervene and provide protection where needed; the problem with adding the handicapped to the list was that these rights have not sufficiently "matured" in Canadian society, and therefore defining them would be difficult. (*Ibid.*, Issue no. 36 at 31.) Two days later, in response to Mr. Robinson's probing, the Justice Minister stated that the definitional problems arose not only because handicapped rights were still in the process of "evolving", but also that, "[t]here are many types of handicaps in this society.... We all have handicaps.... I am talking about a substance that is difficult to define satisfactorily, what is a handicap, to enshrine it in the constitution at this time." (*Ibid.*, Issue no. 37, at 22.) A related argument, mentioned by the Justice Minister on several occasions, was that, given that handicapped rights had not yet matured, or evolved, in the Canadian society, it might be best to leave the reference to the handicapped out of the words of s. 15 and wait for the provinces and the federal government to agree, at some later date, to amend the Constitution by adding handicapped rights expressly. (*Ibid.*, at 27.)

48. Hays-Joyal Committee, above note 22, Issue no. 12, at 38, Mr. Jim Derkson, COPOH.

not need Constitutional equality rights protection.[49] Earlier in the evidence the suggestion had been made as well that a "two-tiered" approach might be preferable, whereby certain rights of the handicapped, say the right to employment, could be entrenched in the Constitution whereas other rights to housing and other services might be best dealt with at the provincial level by regular legislation.[50] This suggestion was never pursued, however.

The problem of definition was responded to by several witnesses. The response was simply that, even if left undefined, the expression "handicapped" and its variants posed no greater definitional problems than did other vague terms already included in the *Charter* such as "religion".[51] Proponents of the handicap amendment also offered to demonstrate to the Committee that if it was desirable to include in the *Charter* a specific definition of handicap, several successful examples of such definitions could be found in existing Canadian legislation.[52]

The cost argument, although never expressly endorsed, was vigorously disputed by several witnesses.[53] The Justice Minister never provided evidence of the kinds of costs he or his government had in mind, leading one witness to state "We believe the cost argument which underlies much of the resistance or objections to the inclusion of disability in the constitution is not a real one."[54] Evidence before the Hays-Joyal Committee suggested that the cost argument was illusory because equality for the handicapped would in fact be cost-effective. Addressing the cost consequences of equality as it pertains to deinstitutionalization of disabled persons at present in institutional care, a witness noted that "most professionals, even most governments, address themselves to deinstitu-

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49. *Ibid.*, Issue no. 36, at 31, Mr. Chretien and Issue no. 31, at 22, 24, Mr. Chretien.
50. See the exchange between Mr. Irwin and Mr. Norman in *ibid.*, Issue no. 20, at 20-21.
51. *Ibid.*, Issue no. 25, at 11, Mr. David Lepofsky, CNIB: "Many terms are included, both in this *Charter of Rights* as proposed and in the *British North America Act, 1867*, which are much more vague than is the word handicap, or mental or physical handicap. We note that in section 15 they refer to discrimination on the grounds of religion. Mr. Chairman, I would invite anyone to define what religion means in a comprehensive manner." And compare similar remarks by Mr. Ron Kanary, COPOH, Issue no. 12 at 30. Similarly, it was pointed out that the *Charter* in s. 1 refers to "reasonable limits", while the *British North America Act, 1867* speaks of "criminal law", a concept never adequately defined despite 100 years of litigation. (Hays-Joyal Committee, above note 22, Issue no. 25, at 11, Mr. David Lepofsky, CNIB.)
52. Hays-Joyal Committee, above note 22, Issue no. 25, at 10, Mr. David Lepofsky, CNIB; Issue no. 12 at 30, 43, Mr. Ron Kanary, COPOH. While one witness suggested that it was unnecessary or undesirable to incorporate an actual definition clause into the *Charter*, (Mr. Ron Kanary, Issue no. 12, at 30.) another saw a specific benefit in including a definition which would extend the guarantee of equality not only to those with an actual disability, but as well to those who are perceived as having a handicap. (*Ibid.*, Issue no. 10 at 10, Mr. David Vickers, CAMR.) In support of this proposal, reference was made to the United States *Rehabilitation Act of 1973* which prohibits discrimination against a person with an actual physical or mental impairment which substantially limits one or more of such person's major life activities, a person with a record of such impairment, as well as a person regarded as having such an impairment. (See the similar definition of "handicap" in Ontario: *Human Rights Code 1981*, S.O. 1981, c. 53, s. 9.)
53. *E.g.*, Hays-Joyal Committee, above note 22, Issue no. 5, at 8, Mr. Fairweather.
54. *Ibid.*, Issue no. 12, at 39, Mr. Jim Derkson, COPOH.

tionalization, but we cannot accept these people, *i.e.*, the handicapped persons, within the community without support services, which, in the long run, could be a lot more effective and sometimes even less costly to the community as a whole."[55] Similarly, a witness for the Coalition of Provincial Organizations for the Handicapped noted that: "presently disabled people and their problems are often viewed through a very biased cloud of emotional responses. This has resulted in a situation which has become clear to the Special Committee on the Handicapped and Disabled wherein the people are institutionalized at 20,000 or 40,000 dollars a year, where they could be integrated in the community if they had, say, five thousand dollars worth of support services."[56]

The cost objection to handicap inclusion was challenged as well on the ground that it was premised on two problematic assumptions. First, it was noted that there is an inherent inequality in turning the cost argument against the handicapped. The Hays-Joyal Committee had not been asked to assess the cost of the guarantee of equality to other minorities or disadvantaged groups, neither had they undertaken a cost/benefit analysis of any other constitutional right set out in the proposed *Charter*. Why then, it was argued, should only handicap equality rights be subject to a cost/benefit attack?[57] Secondly, it was argued that,

> To say that the cost is too excessive is to assume that handicap inclusion is the absolute lowest priority of every government in Canada, that we have spent every last dollar of revenue we have taxed and collected and that there is no money left. If you were to look at the priorities of the various governments, provincial and federal, of spending, you might find that there are others that are lower priority than handicapped equality and you might find that it might be worth including the handicapped in the Constitution and perhaps let some more inconsequential programs go by the board. I do not think it is fair to simply say it costs too much, therefore we cannot do it.[58]

To the last of the government's argument, that an entrenched, Constitutional protection of handicap rights is not necessary, given the legislation protections in place and those to follow, the response was two-fold. It was argued that often it is the attitudes and actions of governments themselves, expressed in legislation, which perpetuates discrimination against the handicapped. A constitutional protection, which would enable courts to review provincial and federal legislation itself, is necessary to provide real protection for the handicapped minority.[59] On the other hand, legislative protection is, by the nature of legislation, vulnerable. As M.P. Svend Robinson put the point to the Justice Minister: "Legislation that is given today can be taken away tomorrow, Mr. Minister."[60] Only a constitutional protection can count as protection.

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55. *Ibid.*, Issue no. 10, at 13, Hon. Mr. Walter Dinsdale (P.C. – Brandon-Souris).
56. *Ibid.*, Issue no. 12, at 37, Mr. Jim Derkson, COPOH.
57. *Ibid.*, Issue no. 25, at 11, Mr. David Lepofsky, CNIB.
58. *Ibid.* at 12.
59. See, *e.g.*, Hays-Joyal Committee, above note 22, Issue no. 25, at 5-14, Mr. David Lepofsky, CNIB.
60. *Ibid.*, Issue no. 37, at 24.

(d) Purposes of Charter's guarantee of equality rights to handicapped persons

The purposes and policy underlying the *Charter*'s guarantee of equality for the handicapped are suggested by the context in which the handicap amendment was passed, the stated intentions of legislators, the evidence which compelled them to adopt the guarantee, the defects of the law prior to the *Charter*'s enactment which the *Charter* was designed to cure, and the nature of the inequalities experienced by handicapped persons at the hands of government. All this indicates that the core purpose sought to be achieved is a guarantee of equality of opportunity for handicapped persons in Canada, without obstruction imposed at the instance of governments or public institutions. When legislators, administrative officials, and other public institutions make decisions or take actions affecting the public, the handicap amendment is designed (a) to ensure that the handicapped not be excluded deliberately from the benefits of such initiatives, and (b) to require that the handicapped not be forgotten, or their needs neglected, when legislation and government programs are designed and implemented. Equality was intended to mean full participation for handicapped persons without governmentally imposed barriers. These barriers are objectionable whether imposed out of malice, motivated by patronization, or, as is usually the case, brought about because of benign neglect or forgetful omission. Thus, a liberal interpretation of the handicap amendment, eradicating the defects in pre-*Charter* law, will fulfill the traditional 'mischief rule' of statutory interpretation, as well as enable Canada to fulfill its obligations under international covenants to which it has subscribed.[61]

3. Defining Rights Conferred by Section 15

(a) General principles of Charter interpretation

A comprehensive definition of the rights conferred on handicapped persons by section 15 must first address the general principles to be applied when interpreting the *Charter*. A *Charter* claim is divisible into three discrete, successive steps: first, an applicant must establish on a balance of probabilities that one of his or her substantive *Charter* rights, found in *Charter* sections 2 to 23, has been infringed or denied. If the applicant is successful at this stage attention shifts to a second stage. Here, the onus lies with the party charged (the *Charter* defendant) with contravening the *Charter* to establish on a balance of probabilities that the contravention of section 15 was reasonable, prescribed by law, and demonstrably justified in a free and democratic society, within the meaning of section 1. If the defendant succeeds here, the *Charter* challenge fails. Otherwise, the action moves to its final stage, during which the plaintiff must show that the remedy which is sought to rectify the infringement of his or her constitutional right is "appropriate and just in the circumstances".[62]

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61. See discussion of these covenants in *ibid.*, Issue no. 10, at 9 and Issue no. 12, at 30.
62. *Re Skapinker* (1983), 40 O.R. (2d) 481, (sub nom. *Re Skapinker and the Law Soc. of Upper Can.*) 145 D.L.R. (3d) 502 (C.A.); affirmed [1984] 1 S.C.R. 387; *Re Fed. Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225, (sub nom. *R. v. Rauca*) 34 C.R. (3d) 97 (C.A.); *Que. Assoc.*

At each stage, a multiplicity of aids are available to assist in the interpretation of the *Charter,* despite the absence of Canadian jurisprudence delineating the breadth of the civil liberties set out there. The circumstances surrounding the *Charter*'s enactment, including the historic patriation debate, may be considered,[63] as well as the Parliamentary debates over the *Charter*'s wording.[64] One may also draw upon the wealth of experience with constitutional rights in the United States,[65] as well as the more recent jurisprudence emerging under international human rights covenants.[66] Though references may be made to decisions under the statutory *Canadian Bill of Rights,*[67] a court should be hesitant about construing the *Charter* as narrowly as its statutory precursor, since the *Charter,* unlike the *Bill of Rights,* forms part of the Canadian Constitution.[68] The *Charter* is to be liberally construed[69] whereas the *Canadian Bill of Rights* was interpreted strictly and narrowly because of its non-constitutional status.[70]

Finally, the *Charter* is treated in this chapter as restricting the actions of governments, although the discriminatory conduct of private parties might be characterized as "government action" if carried out in concert with government.[71] Government includes any governmental institution exercising one or more of the three traditional functions of government: executive (or administrative), legislative and judicial. Moreover, section 15 regulates any governmental activity governed by law. In the Canadian system of law and government, the word "law" does not simply refer to legislation. It refers to any rule having the force of law. This would include statute, regulation, by-law and rules enforced by the common law. And as section 15(2) extends immunity from *Charter* attack to any "law, program or other activity" which amounts to an affirmative action program, section 15(1) must also apply, not only to laws, but to programs and other activities of government. The presence of these terms

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of Protestant School Bds. v. A.G. Que. (No. 2) (1982), 3 C.R.R. 114, 140 D.L.R. (3d) 33 (Que. S.C.); *R. v. Carriere* (1983), 32 C.R. (3d) 117 (Ont. Prov. Ct.); *Reference re Constitutional Validity of S. 12 of the Juvenile Delinquents Act* (1983), 38 O.R. (2d) 748 (H.C.); *R. v. Oakes* (1983), 40 O.R. (2d) 660, 145 D.L.R. (3d) 123 (C.A.).

63. See *Que. Assoc. of Protestant School Bds.*, above note 62.
64. See *Re Fed. Republic of Germany and Rauca,* above note 62, and *Re Jamieson and R.* (1982), 142 D.L.R. (3d) 54 (Que. S.C.).
65. See, L. Tribe, *American Constitutional Law* (1978), and *Re Skapinker,* note 62 above.
66. See, *e.g., Re Mitchell and R.* (1983), 42 O.R. (2d) 481, 150 D.L.R. (3d) 449 (H.C.), and *Re Service Employees' Int. Union, Local 204 and Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392, 4 D.L.R. (4th) 231 (H.C.).
67. See, *e.g., R. v. Potma* (1983), 31 C.R. (3d) 231, (sub nom. *Re Potma and The Queen*) 2 C.C.C. (3d) 383 (Ont. C.A.).
68. See, *Constitution Act, 1982,* as enacted by *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1), and *R. v. Vermette (No. 4)* (1982), 1 C.C.C. (3d) 477, 3 C.R.R. 12 (Que. S.C.).
69. See, *e.g., Re PPG Indust. Can. Ltd. and A.G. Can.* (1983), 3 C.C.C. (3d) 97, at 109, 146 D.L.R. (3d) 261, at 264, *per* Seaton J.A. (B.C. C.A.), and *Re Skapinker* at S.C.C. (unreported, 3 May 1984).
70. *Curr v. R.*, [1972] S.C.R. 889, 26 D.L.R. (3d) 603, *per* Laskin J., and *Re Skapinker,* note 62 above.
71. Compare *Shelley v. Kramer,* 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

suggests that Parliament intended that section 15(1) would regulate any government program or activity, and not merely legislation.

(b) Interpreting the words "physical disability"

What is the meaning of the words "physical disability" in section 15?

At the outset, it should be noted that no significance ought to be attached to Parliament's decision to use "disability" instead of "handicap" in the *Charter*. There was no debate before the Hays-Joyal Committee on this issue, and various proponents of the handicap amendment used the expressions more or less interchangeably. Different proposals for the amendment of section 15 used one or the other of the two terms.[72] Canadian equal rights legislation uses both expressions.[73] Certainly, a physical handicap can be disabling at times, and a physical disability can be handicapping. Though there has been some debate among handicapped persons on the question of which term is more desirable in general, this debate has focused only on the issue of which term is the least pejorative and not on any supposed difference in the population referred to by each expression. In 1980, Parliament seemed to have resolved any such terminological controversy when it entitled its special committee to examine the needs of disabled Canadians the "Special Committee on the Disabled and the Handicapped".

When interpreting the words "physical disability" care must be taken to ask the right question. In a case of alleged disability-based discrimination, a court need not, and should not, engage in an isolated, abstract analysis of the meaning of these words. Rather, any consideration of what "physical disability" means should be taken together with a consideration of the phrase in which it appears. The real issue facing a court is what is meant by "discrimination because of . . . physical disability".

If a *Charter* case were to begin with a judicial examination of whether the *Charter* plaintiff has a physical disability within the meaning of section 15, the interpretation of these words would become a covert issue of standing, rather than a principal exploration of the norm of equality in the disability context. Because section 15(1) confers equality rights on "every individual", not merely on "every individual who has a physical disability", the only standing question open to the court at the outset of a section 15 case is whether the aggrieved party is an "individual".

In addressing the meaning of section 15's reference to physical disability, it is necessary first to consider whether these words have a settled legal meaning.

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72. For example, the Canadian Association for the Mentally Retarded proposed that equality rights be extended to persons with a "handicapped condition", while the CNIB recommended inclusion of the words "physical or mental handicap".

73. See, *e.g.*, *Human Rights Act*, S.N.S. 1969, c. 11, s. 11B(2), as amended by S.N.S. 1974, c. 46, s. 1, which uses the phrase "physical handicap" and the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 2(a). See also the (Ontario) *Human Rights Code 1981*, S.O. 1981, c. 53, which extends equality rights to persons with a 'handicap', which is defined to include those with a 'physical disability'.

They do not. The notion of physical handicap has been defined in different ways for different purposes. For the purposes of clarifying the right to equality of opportunity in employment, housing and access to goods, services and facilities, the Nova Scotia *Human Rights Act* defines physical handicap as "a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness. . . ."[74] In contrast, for the purposes of determining who is eligible for public assistance in vocational training by virtue of the fact that he or she has a handicap, the Ontario *Vocational Rehabilitation Services Act* defines a "disabled person" as "a person who because of physical or mental impairments is incapable of pursuing regularly any substantially gainful occupation. . . ."[75]

Even the more specific term "blind" has not been uniformly defined in Canadian legislation. For instance, the Regulations under the now moribund *Blind Persons Act* defined "blind" for the purposes of a particular social assistance payment as "a person is considered 'blind' if the visual acuity in both eyes with proper refractive senses 20/200 (6/60) or less with Snellen Chart or equivalent, or if the greatest diameter of the field of vision is less than 20 degrees,"[76] whereas the Ontario *Blind Persons' Rights Act*[77] defined "blind" as "a person who because of blindness is dependant on a dog guide or white cane". In short, under Canadian law, a person can be classified as physically handicapped for some purposes, but not for others.

In the absence of a settled legal meaning of "physical disability", the question arises whether the definition of this phrase should properly be undertaken by the courts, or whether it is more appropriately characterized as a medical expression open to a medical interpretation. The better view seems to be that in this context, the expression is legal and so properly open to judicial interpretation. A court, considering whether a particular condition amounts to a physical disability, might have some regard to medical or other expert testimony in difficult cases. However, it would be improper for Constitutional interpretation to be delegated to such experts. In other instances where a law's interpretation might be aided by the guidance of experts in disciplines other than law, courts have traditionally been prepared to consider such expert testimony, while leaving the ultimate question of determining legal rights to themselves.

Several factors can be taken into account in determining whether a condition amounts to a "physical disability" for the purposes of section 15. The first factor to consider is whether the condition at issue has already been recognized as a "physical disability" by a legislature in Canada in human rights legislation. Those conditions so far recognized are: blindness, or any measure of visual impairment; deafness, or any measure of hearing impairment; muteness or any measure of speech impairment; any measure of mobility impairment, including the need to use a wheelchair, guide-dog or other aid; any degree of amputation, disfigurement, physical malformation, lack of physical coordination, or other

74. S.N.S. 1969, c. 11, s. 11B(2), as amended by S.N.S. 1974, c. 46, s. 1.
75. R.S.O. 1980, c. 525, s. 1(b).
76. C.R.C. 1978, c. 371, s. 2(2).
77. R.S.O. 1980, c. 44, s. 1(1)(a).

physical dysfunction.[78] As well, various human rights codes have recognized non-visible physiological conditions as "physical disabilities" where they result in some impairment of life function, as in the case of epilepsy or diabetes.[79]

The fact that a legislature has recognized, or has refused to recognize a particular condition as a physical disability is not determinative of whether that condition is a disability under section 15 of the *Charter*. But if a legislature has acknowledged through an equal rights statute that physical disability includes a particular condition, such as epilepsy, then it should follow that the condition is included under section 15.

Severity ought not to be required in order to count as a form of physical disability. A number of conditions which are clearly forms of physical disability may not in all cases be severe. A person's vision might be substantially correctable by the use of glasses. But the fact of its non-severity does not detract from the fact that it *is* a form of physical disability. The severity consideration confuses the question of definition with the issue of equality. If a person's vision is only minimally defective, the complaint under section 15, if unconvincing, can either be rejected on the grounds of *de minimis,* or defended by a defendant under *Charter* section 1. The fact that a complaint under section 15 may seem trivial is not relevant to the issue of whether the *Charter* plaintiff truly has a handicap; it is rather relevant to the question of whether the *Charter* plaintiff has been subject to a denial of equality rights.

An important factor in determining whether a particular condition amounts to a disability is the principle that *Charter* guarantees should be given a broad and liberal construction, and not be interpreted in an unduly technical, contorted or restrictive manner. Thus, if a court is in doubt as to whether a particular condition counts as physical disability, it should resolve its doubt in the plaintiff's favour. Having done so, the court ought to turn to the core question under section 15, namely, whether the *Charter* plaintiff was denied equality rights on account of his or her physical disability.

Furthermore, a court ought not to worry about whether a particular condition amounts to a physical disability as opposed to a mental disability. It might technically be argued that certain sensory deprivations such as blindness or deafness, if caused by brain defects, are mental disabilities rather than physical ones. The court could resolve this easily by determining that the condition of the plaintiff is either a physical or a mental disability. Thereafter, since both conditions are enumerated grounds in section 15, the court could proceed to the real issue in dispute, whether there has been a denial of equality rights based on this condition.

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78. *Individual Rights Protection Act,* R.S.A. 1980, c. I-2, s. 38(j); *The Saskatchewan Human Rights Code,* S.S. 1979, c. S-24.1, s. 2(n); *Human Rights Code 1981,* S.O. 1981, c. 53, s. 9(b), *Human Rights Act,* R.S.N.B. 1973, c. H-11, as amended, s. 2; *Human Rights Act,* S.N.S. 1969, c. 11, as amended, s. 11(b)(2); *Prince Edward Island Human Rights Act,* S.P.E.I. 1975, c. 72, as amended, s. 11(2); and *Canadian Human Rights Act,* S.C. 1976-77, c. 33, s. 20.

79. See, *e.g.*, the definitions of disability in the *Canadian Human Rights Act,* S.C. 1976-77, c. 33, s. 20, and the *Human Rights Code 1981,* S.O. 1981, c. 53, s. 9.

Two further considerations are worth noting here. Firstly, "physical disability" refers not only to present but also to past disability. If, for example, an individual previously suffered from a degree of paralysis and was, at that time, denied government assistance or benefit because of the handicap, that individual may *now* still be the victim of discrimination because of a disability, even if the paralysis has abated. The timing of the disability is irrelevant to the question whether someone is being subjected to disadvantageous treatment because of it.

Secondly, the context of section 15 reveals that a *Charter* plaintiff can bring a complaint under section 15 whether or not he or she actually has a physical disability, so long as the *Charter* defendant who is charged with discrimination *believed* the plaintiff to have a physical disability. If, for example, a federal civil servant was fired from her job because she was allegedly an epileptic, that civil servant could frame an action under section 15 even if she was not in fact an epileptic. In presenting its case for inclusion of the handicapped in section 15, the Canadian Association for the Mentally Retarded specifically indicated the need for the protection to extend from actual to perceived disability.[80] Moreover, examples can be found in both Canadian and American anti-discrimination legislation which includes perceived disability.[81] The words of section 15 allow for this interpretation. Section 15(1) confers rights on "every individual" not "every physically or mentally disabled individual" and points to "discrimination because of disability" instead of "discrimination against disabled persons". This clearly suggests that perceived, as well as actual, disability is included in section 15.

A definition of physical disability based on the foregoing considerations can be suggested: Physical disability refers to any physical or physiological condition, whether visible or not, which imposes any limit or restriction on any activity, and includes such conditions as blindness, deafness, speech impairment, and so on, and also includes any history of the foregoing conditions, or any perception that such a condition exists.

(c) Section 15(1): The content of equality

The right to equality for physically handicapped persons conferred by section 15 is essentially a right not to have the laws of governmental agencies and institutions of Canada disadvantage an individual by virtue of the fact that he or she has a physical handicap.

(i) De jure discrimination

De jure discrimination is perhaps the most intuitively obvious form of deprivation of equality rights. It occurs whenever government, in undertaking a program or initiative, draws distinctions on the basis of a handicap, where that

80. Hays-Joyal Committee, above note 22, Issue no. 10, at 41.

81. See, *Human Rights Code 1981*, S.O. 1981, c. 53, s. 9(b) and the U.S. *Rehabilitation Act of 1973*, Pub. L. No. 93-112, 87 Stat. 355, ss. 504 (1973).

distinction operates to the detriment of those with the handicap who would otherwise be qualified to share equally the benefits or burdens of the program or initiative.

By way of example, consider two hypothetical statutes, the Car Drivers Act and the School Teachers Act. Assume the Car Drivers Act provides that no blind person may be licensed to drive an automobile, while the School Teachers Act stipulates that no blind person may be licensed to teach in an elementary or secondary school. On the basis of the definition of *de jure* discrimination given above, the School Teachers Act provision is inconsistent with section 15 while the Car Drivers Act provision is not.

The first element of the test of *de jure* discrimination is that the law, program or other governmental activity must be carried out in conjunction with some form of distinction or classification because of disability. Such classification or distinction can take a variety of forms. The most superficial form is a facial statutory classification, where a statute specifically and explicitly draws lines based on disability. Both the School Teachers Act and the Car Drivers Act would be examples of facial classification.

The second way in which a disability-based classification can be imposed is under a statute which is neutral with respect to disabilities on its face, but which allows the adoption of a policy embodying a classification based on disability, with the result that a discriminatory policy is instituted. An example of this "implied classification" would be a variation on the School Teachers Act. If that law simply stated that "no person shall be licensed to be a school teacher if that person is, in the opinion of the registrar of school teachers, unfit to perform as a school teacher" and if the registrar adopted a policy that blind persons would *never* be fit to teach school, then the law would embody a disability classification which was implied.

The only difference between disability-based classifications which are facial and those which are implied is one of evidence, not legal principle. In a case of implied classification, the *Charter* plaintiff must bring forward evidence to show that, as a matter of fact, the government officials responsible for administering the law have adopted a classification based on disability. This is more difficult where the policy is unarticulated. In that case, it may be necessary to accumulate enough examples of administrative decisions that, taken together, show a clear policy embodying a disability-based classification. If the registrar has refused every license application filed by a blind person, without reasons, and in each case the blind person was otherwise completely qualified, it would be open to a court to infer that the registrar has adopted a policy to classify on the basis of visual capability. If, on this evidence, the court was satisfied that such a finding of fact was warranted, then the *Charter* plaintiff would succeed in establishing this first step in the *de jure* discrimination argument.

The second constituent element of *de jure* discrimination is that the disability-based classification must operate to the detriment of the handicapped person. In order for the impugned classification to affect adversely the handicapped person, the classification must do so because the person has a disability. But, it is not enough, in any case, for the handicapped *Charter* plaintiff to show

that an impugned law or program classifies because of disability, and that the plaintiff suffers an adverse effect. The adverse effect must arise from the classification.

In answering the question, what amounts to adverse or detrimental effects, two factors must be borne in mind. First, whether or not the government imposed on the individual the detrimental effect for benign or punitive motives is irrelevant. The benignity of governmental motives is relevant only to arguments regarding affirmative justifications for government's action. These motives are irrelevant to the decision of whether the effect is or is not detrimental. Secondly, the adversity of the effect is a subjective matter to be judged from the perspective of the handicapped person; whether the rest of society views a condition as adverse is not at issue. Testimony before the Hays-Joyal Committee focussed in part on the fact that often people, acting through the government, do things to the handicapped person which are demonstrably harmful although people think these actions are helpful. Thus, when the courts consider whether an impugned disability-based classification generates a detrimental effect on the handicapped, the court must avoid the temptation to view governmental actions as always being helpful to the handicapped. At the core of the handicapped population's case for equality rights is the desire to be given more of an opportunity to appraise their own needs, that is, in opposition to official paternalism.

Assuming that the *Charter* plaintiff can show both that the impugned government action involves some classification, facial or implied, and that the classification operates to the detriment of the handicapped person, it remains to be ascertained whether the plaintiff's disability can legitimately render him or her incapable of undertaking the activity or of exercising the right to which the classification pertains. If the plaintiff's disability precludes use of the benefit denied then the government action involves no discrimination or inequality.

There is little doubt that various handicaps impose various barriers to the performance of a number of tasks associated with daily life, depending on a myriad of circumstances. Inequality occurs, and discrimination is imposed when handicapped persons are denied access to benefits, rights or responsibilities because of their handicap in situations where, in fact, their handicap does not itself impede the undertaking of the rights, responsibilities or benefits.

For example, a defence of the Car Drivers Act's denial of a driver's license to all blind persons could readily be demonstrated by evidence that the blindness poses an insurmountable barrier to the effective driving of a car. Accordingly, a section 15(1) challenge to the Car Drivers Act would necessarily fail for the reason that the impugned law is not discriminatory, even though it incorporates a disadvantageous distinction based on handicap. Similarly, a *Charter* challenge to the School Teachers Act's absolute ban on the licensing of otherwise qualified blind persons as school teachers would succeed under section 15(1) since there is ample evidence available to show that blind persons have successfully performed for years as competent school teachers.

Section 15(1) therefore entails, first, that no breach of government may adopt policies involving a disability classification unless there is a clear legislative mandate to do so. The Cabinet, Ministers and, especially, unelected

officials require a "clear statement" of legislative purpose before such classifications are allowed. Secondly, section 15(1) obliges legislatures not to draw harsh, inflexible conclusions about the capabilities of handicapped persons, except in circumstances where such conclusions are strongly supported by evidence. In other words, legislatures may not enact laws which purport to incorporate irrebuttable presumptions about the capabilities of the handicapped, where those presumptions would operate to the detriment of the handicapped. An irrebuttable presumption would be constitutionally impermissible in circumstances where it is at least possible that the handicap would not disqualify a person, viewed individually, from enjoying a right or benefit.

(ii) De facto discrimination

No less inimical to the Constitutional requirement of equality is government activity amounting to *de facto* discrimination. Indeed, in the handicap area, most offending government action takes the form *de facto* and not *de jure* discrimination. A government is guilty of *de facto* discrimination when it enacts a law, or undertakes a policy or other initiative, in a manner which substantially excludes handicapped persons from the full benefit of that activity, unless there is no other reasonable alternative available to government to provide handicapped persons equality of opportunity.

De jure discrimination in effect focuses upon a governmental decision to explicitly single out handicapped persons for the purpose of extending to them less benefits or more burdens than are extended to the non-handicapped. Yet, governmental action can also lead to the exclusion of handicapped persons from a benefit, right or other opportunity, otherwise available to the non-handicapped, where government has *not* imposed an *explicit* classification based on disability. *De facto* discrimination recognizes that it is the act of denying the handicapped equality of opportunity which raises the constitutional objection.

There are various ways of describing *de facto* discrimination. *De facto* discrimination occurs when government undertakes a program or policy which creates rights and benefits, or imposes duties where the operation of the program or policy excludes the handicapped, even though the government has no overt intention to discriminate. Alternatively, *de facto* discrimination occurs when there is no discriminatory purpose motivating a government action, yet the *result* is disadvantageous treatment of the handicapped. Yet another way *de facto* discrimination can be characterized is that it occurs when the government treats handicapped persons in an identical manner to non-handicapped persons in circumstances where a person's handicap renders him or her functionally dissimilar to the able-bodied. In other words, *de facto* discrimination occurs when equality would require the government to extend *different* treatment to those *dissimilarly* situated.[82] *Charter* section 15(1) requires that government *must* draw distinctions between its treatment of the handicapped and the non-

82. Of course, any dissimilarity in treatment must be rationally linked to the dissimilarity of the circumstances. Government cannot use a marginal dissimilarity between the handicapped and the able-bodied as an excuse for imposing grossly inferior treatment on the handicapped.

handicapped in those situations where a failure to distinguish between these two groups would result in a denial of equality of opportunity to the handicapped.

The line between *de jure* and *de facto* discrimination is not always clear. One can imagine circumstances which fall within both definitions. An example of this would be where government establishes a new job position within the civil service, and requires as a condition of eligibility the requirement that applicants present a Grade 12 diploma. Suppose the job involves only manual labour and a Grade 12 education is unnecessary. If individuals with a degree of mental retardation making them incapable of completing Grade 12 applied for the job, they would be disqualified from the competition despite their capabilities of actually discharging the essential job duties. The Grade 12 requirement could be attacked under section 15 involving discrimination based on handicap. It amounts to *de facto* discrimination since it results in the exclusion from the competition persons who are qualified to perform the job simply because they have a condition which made it impossible for them to complete Grade 12. The requirement has a discriminatory *effect* since it denies equality of opportunity to qualified handicapped job applicants. At the same time, the Grade 12 diploma requirement could be challenged as *de jure* discrimination. If it could be proven that this job requirement was imposed for the purpose of disqualifying otherwise qualified mentally retarded persons from applying for this job, then it could be attacked as embodying a carefully-disguised, though nonetheless deliberate, classification based on disability.[83]

The overlap between *de facto* and *de jure* discrimination in the handicap area is generated in large part by the source of handicap-based discrimination. Legislative and executive action which impede equality of opportunity for disabled persons often does not come about because of some concerted effort on the part of government to subordinate or subjugate handicapped persons. Rather, as was argued before the Hays-Joyal Committee, the handicapped are often overlooked, forgotten or neglected when laws and social programs are designed. If one characterizes government's ignorance or misunderstanding of the capabilities of handicapped persons as willful, then it would be easy enough to argue that a government which "forgets" to design a program in a manner which permits full and reasonable participation by the handicapped is a form of *de jure* discrimination. On the other hand, if this ignorance or misunderstanding is genuine and honest, then the government's action can be viewed as a form of *de facto* discrimination, since all that is required for *de facto* discrimination is the fact that the handicapped are excluded.

Some might argue that *Charter* section 15 does not embody a prohibition of *de facto* discrimination, but only *de jure* discrimination. But this is unsupporta-

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83. The impugned job requirement could be characterized as embodying an irrebuttable presumption that persons with a degree of mental retardation which precludes them from completing Grade 12 are *ipso facto* incapable of performing the job. An irrebuttable legislative presumption here would be one which stated that a handicapped person is always disqualified from a right or a benefit on the ground that he is incapable of enjoining the right or benefit. An example of such a presumption would be the hypothetical School Teachers Act provision which universally bars the blind from teaching.

ble. The words "without discrimination and in particular, discrimination based on . . . physical or mental disability" seem straight-forwardly to comprehend *all* forms of discrimination. These words do not empower a court to identify a particular kind of discrimination and then hold that such discrimination does not contravene section 15(1).

Moreover, the concept of *de facto* discrimination is neither new nor radical. It is enshrined in the Ontario *Human Rights Code* explicitly.[84] As well, the notion that a party may not do indirectly that which it is prohibited from doing directly is a familiar maxim of judicial decision-making. Most importantly, authority for the proposition that section 15 bans all forms of discrimination can be gleaned from the intention of Parliament when it determined that the handicapped should be included in section 15. Evidence and testimony before the Hays-Joyal Committee demonstrated that governments often simply forget the handicapped when drafting legislation or designing programs which are purportedly for the benefit of *all* Canadians. Especially illustrative of this tendency is the way in which governments design education programs for Canadian youth and the way they construct government buildings. Were section 15(1) construed to *permit* any kind of *de facto* discrimination, instances of the inequalities of opportunity at the hands of governments which had motivated Parliament to adopt the handicap amendment would remain unaffected by the *Charter*, a result which would contradict the framers' intention of including the phrase "equal benefit of the law", namely to counteract the *effects* of inequality of opportunity. In addition, inclusion of *de facto* discrimination in the definition of section 15 would be consistent with a liberal construction of the *Charter*, a mandate suggested by early *Charter* jurisprudence.[85]

(iii) Defining "qualified handicapped person"

Once a *Charter* plaintiff has established under section 15(1) that he or she has been treated adversely with respect to some right, opportunity, or duty, the *Charter* defendant is then given the opportunity to show that the plaintiff's disability renders him or her incapable of enjoying the right or opportunity, or performing the duty. If the defendant can show that the handicapped *Charter* plaintiff is not qualified in the circumstances, then no case of *de jure* or *de facto* discrimination has been made out.

The inquiry into the capability question is exclusively one of fact, to be determined by the persuasiveness and adequacy of the evidence presented. The factual inquiry focusses upon the capabilities of the particular *Charter* plaintiff, and the impact which the disability involved may have upon the plaintiff. At this stage it is not necessary, and at times it may well not be appropriate, for a court to lay down broad generalizations about the impact of particular disabilities on all persons who have them.

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84. *Human Rights Code 1981*, S.O. 1981, c. 53, s. 10 refers to "constructive discrimination".
85. See, *e.g.*, *R. v. Potma*, above note 67, and *Re PPG Industs. Ltd.*, above note 69.

In undertaking this factual inquiry, a governmental defendant might suggest that a court should not "second-guess" a legislative or administrative determination that a particular disability disqualifies an individual from a right, opportunity or duty. In other words, it might be argued that a court should defer to legislative or administrative decisions in this regard, and that only the grossest of errors by these bodies, malevolently made, should be reversed by a court.

This argument is unsound. If there is any stage in an equality rights case where a court is duty bound *not* to defer to legislative or administrative decision-making, it is here. If a court were to be duty-bound to defer to legislative determinations about the capabilities of handicapped persons when determining the qualification question, the result would be that a court would, in fact, lend endorsement to legislative stereotyping of handicapped persons. The court must look at the individual and the task involved and undertake a functional assessment. Courts are already empowered to do this kind of inquiry in the comparable area of human rights legislation which pertains to handicapped persons.[86]

The onus should always be on the *Charter* defendant to produce tangible evidence that the handicapped person is incapable of undertaking the right or performing the duty involved. This argument must always be based on a fair and accurate assessment of the handicapped person's actual capabilities. When determining whether a particular handicap renders a particular *Charter* plaintiff incapable of undertaking the opportunity sought, the inquiror should take into account the abilities of the *Charter* plaintiff having regard to the possibility that minor nondisruptive accommodations to this disability can often profoundly affect his or her ability. If one were to appraise the ability of a visually handicapped person to function in an employment setting, for example, without regard to the fact that everyday inventions such as braille, tape-recorded "talking books", large print books and even eye glasses and magnifying lenses can enhance the access of visually handicapped persons to printed material otherwise not readable, then one would be led to the false conclusion that visually handicapped persons cannot read. Based on this inaccurate conclusion of illiteracy, one would grossly underestimate the capabilities of visually handicapped persons in employment. On the other hand, by having regard to the impact which these nondisruptive aids and accommodations have, one can more accurately appraise the function capabilities of persons with that disability.

By analogy, if one were to appraise the capabilities of the corporate executive to perform his or her job, without having regard to the fact that everyday non-disruptive aids and accommodations are provided him or her – aids such as dictaphones, secretaries, telephones and so on – one would quite inaccurately be led to the conclusion that the corporate executive is not competent at doing much of the work associated with the job. By taking into account the availability of reasonable accommodations to a disability, one therefore is merely taking into

86. In Ontario, for example, if a government agency refused to hire a handicapped individual on the ground that the disability made it impossible for the individual to perform the essential duties of the job, the Supreme Court of Ontario is empowered to make a *de novo* inquiry into the correctness of this governmental decision (*Human Rights Code 1981*, S.O. 1981, c. 53, s. 41(3)).

account the fact that the world is a flexible place, and a person's capabilities should be assessed in the context of this flexibility. On the other hand, if one "froze" the world, appraising a handicapped person's functional capability without this flexibility, one would be disregarding perhaps one of the most fundamental problems which motivated the *Charter's* framers to place equality rights for the handicapped in the *Charter.* Evidence before Parliament showed how many of the obstacles impeding full participation and equality of handicapped persons in Canadian society are due to the fact that many public and private institutions have been designed without any thought being given to the ease with which handicapped persons could be accommodated.[87]

Society ought not to be able to construct its institutions in a manner which fails to accord with the needs of the handicapped for full participation (when such accommodations could be undertaken in a technically feasible, non-disruptive way), and then fall back on this neglect as a defence to the inequality of opportunity which handicapped people suffer as a result.

Clearly, when determining whether a reasonable accommodation to a handicapped person's circumstances is available, the current state of technology can become relevant. If no accommodating technology exists, or the existing technology is disruptive and inefficient, then the inability of the handicapped person is more readily traced to his or her disability, and not to the conduct of the *Charter* defendant. Otherwise, the *Charter* defendant's argument by way of disqualifying handicapped persons, and thus denying them the rights to which they are entitled under section 15 should not be successful in a *Charter* challenge.

(d) Section 15(2)

Section 15(2) immunizes from constitutional attack under section 15(1) any law, program or activity which has as its object the amelioration of the conditions of a disadvantaged group, including those who are disadvantaged because of "mental or physical disability". It comes into play only *after* it is settled that an impugned law, program or activity interferes with section 15(1) equality rights.

The onus of proof under section 15(2) should lie on the party seeking to deploy it as a means of insulating an impugned government action from constitutional attack. This allocation of onus is based on several legal principles. First, it accords with the time-honoured doctrine that "he or she who asserts must prove". It follows as well from an analogy between section 15(2) and section 1. These two provisions are analogous since both authorize government action which would otherwise be contrary to the *Charter,* and because both, as a practical matter, condition their exemption from government compliance with the *Charter* on substantive policy justifications. The onus of proof under section 1 rests upon the *Charter* defendant. Finally, this allocation of the section 15(2) onus to the *Charter* defendant is consistent with the general principle of Canadian law which provides that a party ought generally not be required to prove a

87. See especially, Special Committee of the House of Commons on the Disabled and the Handicapped, *Obstacles* (3rd Report, Feb. 1981).

negative. If the section 15(2) burden were assigned to the *Charter* plaintiff, then that party would be placed in the position of affirmatively proving that the government action which he or she impugns does not have, as its object, the amelioration of the conditions associated with a handicap. This burden would be pratically insurmountable, and accordingly, grossly unjust.

What is the purpose or objective of section 15(2)? This exemption from the equality requirement was included in order to sanction the power of governments to undertake programs, implement policies and enact laws which assist those groups in society whose social, economic or legal equality has traditionally been ignored. Section 15(2) is a safety valve which ensures that a court will not employ the Constitution in a manner which would thwart the goal of social and legal equality for disadvantaged groups in society. In other words, section 15(2) has as its core purpose the same objective as section 15(1).

The *Charter*'s framers felt that section 15(2) was rendered necessary by the U.S. Supreme Court's controversial decision in *Regents of the University of California v. Bakke.*[88] In that decision, the court struck down as racially discriminatory a state medical school admissions quota scheme which gave preference in certain cases to black applicants. The *Bakke* decision is of limited precedential value in the United States. The court split badly over the reasons for the result reached. There was no consensus among the nine Justices on the issue of whether the impugned admission policy was unconstitutional as contrary to the Fourteenth Amendment equal protection clause.[89]

Despite the legal force of the *Bakke* decision, concern was expressed in Canada over the possibility that equality rights might be asserted to prevent the amelioration of conditions of minorities. This led Canadian legislators to take strong action to prevent a repeat of *Bakke* in Canada. Statutory human rights codes now include strong anti-*Bakke* provisions authorizing affirmative action.[90] Similarly, *Charter* section 15 also includes an anti-*Bakke* provision. Though it can be argued that *Bakke* was wrongly decided, and that affirmative action programs which afford preferences to disadvantaged minorities with a view to redressing the residual effects of past discrimination are consistent with the requirement of equal protection or equal benefit of the law, this argument need not be made under the *Charter* given the express words in section 15(2).[91]

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88. 438 U.S. 265 (1978).

89. Only Justice Powell, one of nine judges, found that the affirmative action program, which involved quotas, was invalid because of a violation of the Fourteenth Amendment. Another 4 judges found the scheme invalid as being in violation of Title VI of the *Civil Rights Act.*

90. *Individual Rights Protection Act,* R.S.A. 1980, c. I-2, s. 13(1)(b); *The Saskatchewan Human Rights Code,* S.S. 1979, c. S-24.1, s. 47(1); *The Human Rights Act,* S.M. 1974, c. 65, as amended, s. 9; *Human Rights Code 1981,* S.O. 1981, c. 53, s. 13(1); *Charter of Human Rights and Freedoms,* S.Q., c. C-12, Part III; *Human Rights Act,* S.N.S. 1969, c. 11, as amended, s. 19; *Prince Edward Island Human Rights Act,* S.P.E.I. 1975, c. 72, as amended, s. 19; *The Newfoundland Human Rights Code,* R.S.N. 1970, c. 262, as amended, s. 15(1); *Canadian Human Rights Act,* S.C. 1976-77, c. 33, section 15(1); and *Northwest Territories Fair Practices Ordinance,* R.O.N.W.T. 1974, c. F-2, as amended, s. 14.

91. For discussion of the *Bakke* decision, above note 88, and the need to avoid its implications in Canada, see Hays-Joyal Committee, above note 22, Issue no. 7, at 17, & 22-23; Issue no. 11, at

The effect of section 15(2) turns on a number of questions of interpretation. When an impugned program is defended by invoking section 15(2), must it be proven that the purpose of the government action was that of ameliorating conditions of a disadvantaged group, or must it also be established that the government action will have the *effect* of accomplishing this goal? The better view is that the defendant must establish that the impugned program has some serious likelihood of achieving its ameliorative goal. Were it sufficient for the *Charter* defendant to show that the *purpose* of the impugned program was to benefit handicapped persons, then it would be nearly impossible for a *Charter* plaintiff ever to succeed in a section 15 argument, regardless of how odious the discrimination was. This is so because to satisfy a simple purpose test all that the *Charter* defendant might have to do is *assert* that the amelioration was the impugned program's goal.

In addition, if ameliorative legislative purpose were the sole test under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that "this Act has as its object the amelioration of the conditions of handicapped persons as a disadvantaged group". A Canadian court would be loathe to look behind this clear statement of legislative purpose if section 15(2) applicability depended *solely* on the legislative intent, and not the legislative effect as well. This result would not only emasculate section 15(1), it would also fly in the face of *Charter* section 33. Section 33 envisions a very specific procedure by which legislatures can opt out of their obligation to comply with section 15, namely, by the inclusion of a clause in the offending legislation which provides that the law operates "notwithstanding the *Canadian Charter of Rights and Freedoms*". If the above-mentioned statutory statement of purpose were sufficient to immunize a law from a section 15 attack, then the legislature would have a means for obtaining the same result as is provided by section 33, without having to resort to a politically embarrassing use of section 33, or to comply with section 33's requirement of re-enactment every five years.

The view that a government or other *Charter* defendant must provide a court with evidence before it can avoid compliance with one of the *Charter's* affirmative guarantees is not unprecedented. Should a government wish to defend an impugned violation of any *Charter* right by reliance on *Charter* section 1, it may be required to produce evidence to support its asserted justification.[92]

A final consideration here is who may raise and rely on a section 15(2) argument and in what kinds of cases. It might be argued that any *Charter* defendant may raise section 15(2) when confronted with any equality rights claim, having regard to the literal words of the exemption clause. However, the better view is that section 15(2) can only be relied on by a *Charter* defendant in a

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32-33, Issue no. 17, at 90; Issue no. 21, at 40-1; Issue no. 22, at 9, 31-32, 60-61, 70, 79-81, and 111; Issue no. 24, at 56-57; Issue no. 29, at 126, 145-46, and 149; and Issue no. 32, at 34-36 & 41.

92. See, *e.g.*, *R. v. Oakes*, above note 62; *Re Southam Inc. and R.* (1983), 41 O.R. (2d) 113, 146 D.L.R. (3d) 408 (C.A.); and *Re Seaway Trust and R.* (1983), 41 O.R. (2d) 501, 146 D.L.R. (3d) 586 (H.C.).

case where a law, program or policy is specifically directed to a particular class of persons with the aim of affecting, in some manner, the rights, benefits or duties of that class of persons, but *only* where the plaintiff in the case is not a member of that class. For example, where a program provides for enhanced employment opportunities for members of a particular racial minority who have been subjected to long-term and systematic discrimination, a *Charter* plaintiff who is not a member of that racial minority might challenge the program for being discriminatory. Clearly the impugned program is disadvantageous to the plaintiff and is disadvantageous on the grounds of the plaintiff's race. However, if the program was undertaken for the purpose of improving the employment opportunities of racial minorities traditionally victimized by employment discrimination, and if it has that effect, then it should be protected from attack under section 15(2).

In contrast, suppose the impugned program purports to assist the employment opportunities of disadvantaged racial minorities, but has the actual effect of harming their employment situation. If a member of that disadvantaged group, for whose benefit the impugned program was purportedly undertaken, challenges the program under section 15(1), then the government agency responsible for the program's operation might seek to defend it under section 15(2). The agency would argue that the law has as its object amelioration of the conditions of a disadvantaged group. This argument, however, would enable section 15(2) to be used *against* the very disadvantaged group which is seeking to benefit from section 15(1). If section 15(2) could be used in this manner, it would thwart not only its purpose, but the purpose of section 15(1) as well. The *Charter* defendant ought to be required to debate the issue of whether the section 15(1) requirement of equality has been met in the context of section 15(1) itself, or in other words, in terms of the meaning or definition of equality before the law, and equal protection and benefit of the law.

This proposed construction of section 15(2) is justified having regard to the legislative history of the provision. As mentioned above, this provision was enacted for the purpose of remedying the threat to equality rights protection posed by situations like those at issue in the *Bakke* case. There, a program designed to help racial minorities in the United States was thwarted by an allegation of discrimination by Mr. Bakke, a member of the white majority. The affirmative action program at the University of California at Davis Medical School was certainly not adopted to ameliorate his career opportunities. Rather, Mr. Bakke was seeking to use the equality guarantee of the United States Constitution which had been intended to protect disadvantaged racial minorities such as blacks in order to protect his interests. If a black American, challenging another University's admissions policy under the Equal Protection Clause of the United States Constitution, could lose his case because the University defendant argued that "our program which discriminates against you is designed with the purpose of helping you", then the guarantee of equality would be stripped of its utility. Section 15(2) must not be similarly misused.

Accordingly, in a section 15 case brought by a handicapped *Charter* plaintiff based on an alleged handicap discrimination, the *Charter* defendant should not be able to defend the attack on the basis that the impugned law, program or other

activity has as its object the amelioration of the conditions of handicapped persons. The only handicapped-related situations in which section 15(2) can be applied would be that in which the *Charter* plaintiff is a non-handicapped person who is not disadvantaged because of disability. Section 15(2) would then stand as a shield protecting programs designed to raise handicapped persons to a level of social equality from attack by persons who do not have a handicap.

(e) Construing Charter s. 1 in equality rights cases

A contravention of section 15 can withstand constitutional attack, only if the *Charter* defendant can establish by a preponderance of evidence that the contravention falls squarely within the protection of section 1.[93] The *Charter* defendant must prove that the contravention meets three substantive requirements derived from the words of section 1: it must be established that the contravention was prescribed by law; the contravention must have been undertaken in pursuance of social policy objectives which are so compelling that they justify a limitation on constitutional equality rights in a free and democratic society; and the contravention must involve a means to achieve its purpose which is "reasonable", in that it is effective, non-arbitrary and the least restrictive means for achieving the contravention's purpose.

Two justifications in particular, for a contravention of handicap equality rights *should not* be permitted to be advanced under section 1. First, a section 15 contravention cannot be defended under section 1 on the basis that the handicapped *Charter* plaintiff is disabled by his or her handicap from exercising the right or undertaking the activity in question. Though this may seem like a most obvious way to justify a governmental deprivation of a right, privilege or opportunity to handicapped persons otherwise available to members of society, it was argued above that in circumstances where a person's handicap provably deprives him or her of the possibility of exercising the right or undertaking the opportunity denied, no *discrimination* or denial of equality has occurred. It is not a contravention of section 15 to treat handicapped persons differently from non-handicapped persons in circumstances where the two groups are in fact differently situated.[94] In other words, once a section 15 case involving the rights of handicapped persons reaches the stage where section 1 is applied, it must be assumed that the handicapped *Charter* plaintiff is not prevented by the handicap from undertaking the rights, privileges or opportunities denied by government. Otherwise, the case would never have progressed to the stage where section 1 need be invoked.

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93. See *Re Southam Inc. and R., ibid.; Re United States of America and Smith* (1983), 42 O.R. (2d) 668, (sub nom. *Re Smith*) 34 C.R. (3d) 52 (H.C.J.); *Re Fed. Republic of Germany and Rauca*, above note 62; and *Que. Assoc. of Protestant School Bds.*, above note 62.

94. The difference of treatment must be proportional, however, or at least linked to the difference of actual circumstances of the two groups. A minor difference between blind persons and sighted persons in relation to one activity does not *ipso facto* justify a wholesale deprivation of *all* the rights of blind persons.

For similar reasons, it cannot be asserted by a *Charter* defendant under section 1 that the contravention was undertaken as an affirmative action program. This is because any consideration of the merits of the contravention as an affirmative action program must be considered in the arena of section 15(2), which is reached before section 1 is invoked.

Assuming that the *Charter* contravention was undertaken in pursuit of a policy objective so compelling as to provide a demonstrable justification for limiting handicap equality rights, two tests must be met for a *Charter* defendant to establish that the contravention is "reasonable": effectiveness and necessity.

It first must be demonstrated that the contravention has a substantial likelihood of achieving its stated objective. If a law is not effective at achieving its objective, it is hardly a "reasonable" measure of attaining its asserted goal. If a *Charter* defendant could invoke the protection of section 1 by demonstrating that the law has a laudatory purpose, but without showing that it in fact could achieve that purpose, it would be easy enough for governments to defend any discriminatory legislation from *Charter* attack.

If a *Charter* contravention is shown to be likely to achieve its objective, it is not conclusively "reasonable" unless it is also shown to be *necessary* to the attainment of its ends. If government can reach its demonstrably justified goals by means that involve a lesser interference with fundamental constitutional rights, then it is not necessary for government to undertake the action which conflicts with section 15. On the other hand, if the impugned *Charter* contravention is the means for achieving its objectives which imposes the least limitation on constitutional rights possible under the circumstances, then it is a measure which is *necessary* to the attainment of its goals. The necessity requirement of section 1 can be derived from the proposition that government ought not to infringe *Charter* rights where the infringement is frivolous, arbitrary, or out of proportion to the ends sought to be achieved by the infringements.[95]

Will it be possible for the government to argue that section 1 is available on the grounds that the costs of avoiding the infringement of section 15 rights is too high? In our earlier review of the Hay-Joyal Committee's debates, we noted that at several points the issue of cost was raised.[96] Although it is appropriate to bring up the question of costs in the context of a section 1 argument, cost itself cannot be an absolute defence to the infringement of section 15 rights. Rather, an argument based on the *present* cost of making changes in procedures or structures to remove the section 15 infringement may be sufficient to defer the finding of a constitutional violation. The court could order for instance, that the present cost counts as grounds under section 1 for limiting section 15 rights, but only until that day when the cost argument can no longer be made. Alternatively, a court could use its section 24(1) jurisdiction with flexibility, and having found a violation order that rectification be spread out over several years so as to defuse the argument that, if changes were to be required immediately, it would be too costly.

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95. See *Que. Assoc. of Protestant School Bds.*, above note 62.
96. See text accompanying notes 53 to 58.

(f) Remedies for the infringement of equality rights

Once it is established that a section 15 right has unconstitutionally been infringed, attention turns to the remedy by which the wrong done to the *Charter* plaintiff can be redressed. *Charter* section 24(1) states that a court, competent to entertain a *Charter* complaint, must direct that any constitutional wrong done to the *Charter* plaintiff be corrected, to the extent that the court's remedial jurisdiction allows it to so order.

In this regard, section 24(1) may appear to articulate an obvious truism. Yet, considering Canada's past experience with government infringement of individual rights, the proposition that an unlawful wrong must be judicially remedied has not been legally binding. In one case under the *Canadian Bill of Rights,* the court held that no affirmative remedy could be ordered to rectify the wrong done to an individual by government where the wrong amounted to an interference with rights conferred by the *Bill of Rights.*[97]

In pre-*Charter* constitutional law, the principal remedy available to an individual adversely affected by *ultra vires* government action was a declaration that the government acted unconstitutionally. Only recently, for instance, did monetary compensation become a conceivable remedy, at least in circumstances where a government had collected money pursuant to *ultra vires* taxation legislation.[98]

When a court endeavours to formulate the constitutionally-required remedy to which a successful *Charter* plaintiff is entitled, several principles ought to be borne in mind. First and foremost, the remedy must be effective and substantively meaningful. It must pay more than lip-service to the rights guaranteed to the plaintiff.[99]

The target of a constitutional remedy, as with any remedy known to the law, is to place the *Charter* plaintiff in the same position he or she would have been in had no infringement of his or her rights occurred, to the extent to which that is possible. In order to do this, a court already has available a battery of traditional remedies which ought in most instances to be satisfactory to ensure that the plaintiff's circumstances are remedied. Damages can be ordered to compensate for economic loss. *Mandamus* can be used to compel government to undertake those measures mandatorily required to comply with the *Charter. Certiorari* and prohibition can be deployed to quash or reverse decisions of judicial, quasi-judicial or administrative decision-makers in many instances. Injunctions, to the extent that they are useable against government officials, can be issued to restrain actions of *Charter* defendants which interfere with *Charter* rights. A *Charter* plaintiff need only bring the complaint to a "court of competent jurisdiction" within the meaning of section 24(1), a court, that is, which, apart from the *Charter,* has antecedent jurisdiction over the subject matter of the complaint, the parties to the proceedings, and the authority to issue the remedies which are sought.[100]

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97. *Hogan v. R.*, [1975] 2 S.C.R. 574, 48 D.L.R. (3d) 427.
98. *Amax Potash Ltd. v. Govt of Sask.*, [1976] 6 W.W.R. 61, 65 D.L.R. (3d) 159 (S.C.C.).
99. See, *R. v. Vermette,* above note 68, *per* Greenberg J.
100. See, *e.g., R. v. Seigel* (1983), 39 O.R. (2d) 337 (H.C.); *R. v. Brooks* (1982), 38 O.R. (2d) 545

The nature of a remedy relating to an infringement of equality rights may be different from remedies issued relating to other *Charter* rights. When any other rights under the *Charter* are infringed, a court may order that the offending branch of government stop infringing the rights, by either ceasing an unconstitutional activity, or by affirmatively undertaking an action (the payment of damages, for example) in order to rectify the *Charter* plaintiff's circumstances. In contrast, a remedy in the equality rights area will, in most cases, be a conditional order. If a handicapped person is denied a government benefit simply because he or she is handicapped, a court would not necessarily direct that the offending agency start conferring the benefit on the *Charter* plaintiff. Rather, the court would order that the government undertake either of two alternative courses: (a) to begin offering the benefit to the handicapped person, or (b) to cease giving the benefit to anyone, handicapped or not. The reason for this choice of remedy is that section 15 does not purport to create an affirmative constitutional right to government benefits. It only provides that once government has decided to provide a benefit, it may not do so in a manner which discriminates against the handicapped.

However, a court might in some circumstances order an affirmative remedy in a section 15 case unconditionally. If a handicapped person had been denied a government benefit contrary to section 15 for a year prior to the constitutional action being brought, a conditional order such as that described above would be satisfactory to prevent any future breach of constitutional rights. Yet, it would not redress the wrong done over the prior year. It might in that circumstance be appropriate and just for the court to order a back payment of the benefit for the prior year, regardless of the choice which government makes about the future of the benefits program. The only other option for the court would be to order that all other benefit recipients *repay* their benefits, an impossible result, both politically and administratively.

Another general principle of constitutional remedy provides that the court has discretion regarding the *kind* of remedy to grant. The words "appropriate and just in the circumstances", being open-textured, allow for this discretion. However, this discretion ought not to be confused with a plenary judicial power to change the substantive rights of the *Charter.* A court may not, for example, determine that handicap equality rights are not the most important rights guaranteed in the *Charter,* and that as a result, it is appropriate and just to award only nominal remedies for section 15 violations. The "appropriate and just" standard does not allow for the balancing of competing interests, the government on the one hand, the *Charter* plaintiff on the other. Any balancing must be carried out when section 1 is applied to the case. The *Charter*'s framers created section 1 to establish and confine the context in which such balancing of competing interests is carried out. It would be inappropriate to interject into the remedies phase of a case these concerns.

(H.C.); *Re Krakowski and R.* (1983), 41 O.R. (2d) 321, 146 D.L.R. (3d) 760 (C.A.), and *Re Seaway Trust and R.*, above note 92.

The last point is especially important when one turns to the issue of the cost to government of complying with a judicial determination that equality rights have been infringed. The issue of how costly it might be to revise existing programs, or design new ones, in order to respond to a violation of section 15(1) in the case of the handicapped person might seem to be relevant both at the stage of the section 1 argument and at the stage where the court is considering which remedy is "appropriate and just in the circumstances". There is no doubt, as we mentioned above, that it is proper for a court to consider this question of cost as it engages in the task of balancing the competing interests in the context of section 1 argument. But it would not be appropriate for a court to consider the question of cost when it determines whether a remedy should be given for a violation of section 15(1). To do so would be merely to reopen the section 1 argument which, by the time the court has reached section 24(1), has already been settled in favour of the *Charter* plaintiff. A balancing of cost as against the need to redress a constitutional wrong is a disguised balancing of interests, the individual's against the public's. Moreover, during the debate over the inclusion of handicapped persons within the protection of section 15, the cost question was thoroughly canvassed. The decision was made that the cost question did not outweigh the factors in favour of entrenchment. The decision whether a remedy can be denied in the equality rights area because of its costs consequences has already been made by the framers of the Constitution, and that decision should not be undone by the courts.

Section 24(1) gives the court discretion to fashion a remedy which is just and appropriate in the circumstances, and part of what may be taken into consideration when structuring that remedy is that it be the least costly, consistent with the scope of the right which has been violated. While a just and appropriate remedy may not be denied because of the cost to government which may result, cost may be an element in the kind of remedy which is fashioned. It would be unjust and inappropriate for a court to assume the perspective of the government which will be required to pay for the remedy ordered, but a just and appropriate remedy must also be a reasonable remedy in the circumstances.

4. Equality Rights Applied

Four hypothetical fact situations in which *Charter* section 15 claims based on disability might be advanced will be analyzed in order to demonstrate how the definition of equality can operate in practice. The hypotheticals are offered in an ascending order of analytical complexity. The analysis is not intended to provide an exhaustive appraisal of how such equality rights claims ought to be resolved; rather, they illustrate how evidence and argumentation in such claims would develop, with a view to identifying trends which should emerge in equality rights jurisprudence.

(a) The first hypothetical – Discrimination in relation to public employment

An individual born with the condition known as cerebral palsy applies for a job advertised as available in the policy-development branch of a government

ministry. The applicant has all academic and experience-related qualifications to make her at least as qualified for the job as any other applicant. Although her cerebral palsy causes her to walk slower than many, she is fully capable of travelling on foot or by public transit. Though her speech is somewhat impaired by her condition, one becomes accustomed to it after a short time. She is not capable of writing by hand, but can type by the use of a conventional typewriter, and can dictate on a dictaphone. Though found to be congenial, competent and interested at a job interview, she is refused the job by a letter stipulating that, "but for your handicap, you would have certainly gotten the job".

The first question which must be asked is whether allegedly discriminatory treatment with respect to public service employment is governed by section 15. Clearly, the decision by the Crown or its agents to determine whether an individual should be hired for public service is a form of government action and as such comes under the scope of the *Charter* by virtue of s. 32(1). One might go so far as to characterize public employment as a form of "benefit" offered by the government. It does not follow from this, however, that public employment is *per se* a constitutionally-guaranteed right under the *Charter*. If the government employed no one, it would not run afoul of section 15. However, section 15 does require that once government decides to open up a job opportunity, it must not engage in actions with respect to that employment which conflict with the requirements of equality.

Has the job applicant been denied equality rights guaranteed to her by section 15(1)? In support of her claim of *de jure* discrimination, the applicant could easily show that she was subjected to disparate or different treatment simply because of the fact that she has a disability. In the letter notifying her of the job refusal, the applicant was advised that the disadvantageous treatment (*i.e.*, the refusal of a job) to which she was subjected was conditioned solely on her disability.

To complete a case of *de jure* discrimination, the applicant must show that she was similarly situated apart from her disability as compared to other job applicants. This could be done by pointing to the fact that her academic and professional experience was demonstratively as good as, or better, than all other job applicants. Having proven this, the onus would shift to the *Charter* defendant (here the government ministry which refused to hire her) to show that even though the applicant was classified because of her disability to her disadvantage, her disability rendered her incapable of performing the essential job functions, and therefore rendered her subject to a job refusal without section 15 being breached. If evidence can establish that communicative or mobility limitations caused by cerebral palsy preclude effective discharge of job responsibilities in the circumstances of the particular position sought, then the *Charter* defendant could prove that there has been no contravention of section 15(1) at all. If, however, the *Charter* defendant fails to adduce sufficiently persuasive evidence to this end, or if the *Charter* plaintiff (job applicant) counters such evidence with persuasive evidence to show that she *is* competent to do the job in the circumstances regardless of her disability, then this fact situation would disclose a breach of section 15(1).

Assuming that it is established that the job refusal amounted to employment discrimination because of disability, it would be impossible for the *Charter* defendant to defend itself by reliance on section 15(2). Refusing a job applicant the job sought by virtue of the fact that the individual has a disability is certainly not oriented towards amelioration of the conditions of disadvantage associated with the condition of cerebral palsy.

Similarly, it is difficult to see how the *Charter* defendant could rely on section 1. The denial of equality rights was not "prescribed by law" in the sense that no legislation, regulation or other legal instrument specifically mandated the denial of constitutional equality rights to job applicants with cerebral palsy or other physical disability when they seek a position in the public civil service. The *Charter* defendant's actions cannot be characterized as "prescribed by law" simply because they are undertaken pursuant to a general right of the Crown to choose its employees, since such absolute unfettered discretion does not fit within the characterization of "law", at least according to one *Charter* case.[101] Moreover, it is questionable whether any social objective is so compelling that it authorizes a discriminatory refusal to hire a qualified handicapped person for a job in the civil service.

It might be argued under section 1 that it is "demonstratively justified" in a free and democratic society to refuse to employ someone in the public service if their handicap renders them incapable of satisfactorily performing the job. Such an argument cannot properly be made under section 1. This is because any argument dealing with the incapacity of a disabled person to undertake a right relates not to an argument under section 1, but rather to the first stage of the *Charter* case, where concern focuses on whether the handicapped person is being discriminated against at all. If the handicapped person is incapable of performing the job sought, then a job refusal does *not* amount to an act of discrimination contrary to section 15(1), and there is no reason to resort to *Charter* section 1. On the other hand, once it is clear that the handicapped person has been denied a section 15(1) right, all discussion of the job applicant's functional capacity on the job has been exhausted, and the issue should not be raised again under section 1 of the *Charter*.

The final question arising on this fact situation is whether the applicant can advance this *Charter* claim in light of the fact that relief might be available under the applicable statutory human rights code. In a jurisdiction where no statutory human rights code extends legal protection against employment discrimination on the basis of physical disability, this issue would not arise. In such jurisdictions, then, a *Charter* argument in the foregoing terms ought to succeed.[102]

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101. *Re Ont. Film and Video Appreciation Soc. and Ont. Bd. of Censors* (1983), 41 O.R. (2d) 583, 34 C.R. (3d) 73 (Div. Ct.).

102. As discussed above, all Canadian jurisdictions, except the Yukon, extend protection against employment discrimination based on physical disability. However, several jurisdictions do not extend similar protection against discrimination in employment based on mental disability. Accordingly, in such jurisdictions, the *Charter* may provide the only avenue for legal recourse in cases of public sector employment discrimination based on mental disability.

In a jurisdiction where an existing statutory human rights code provides redress against discrimination based on physical disability, the *Charter* defendant could argue that regardless of the merits of the *Charter* claim, a court should not entertain the *Charter* challenge until and unless the *Charter* plaintiff has exhausted the remedies available under the human rights statute. This argument is bolstered by two considerations. First, it is a settled principle of Canadian Constitutional law that a court ought not to undertake constitutional rulings unless the *lis* before it cannot be resolved other than by resort to constitutional considerations. In this case, if the ordinary human rights code would allow for full compensation or rectification of the *Charter* plaintiff, it is unnecessary for the court to intervene with the blunt instrument of constitutional review. Second, the traditional administrative law doctrine of "exhaustion of remedies" can be applied here. That doctrine provides that where a legislature has provided for a series of administrative appeals for challenging the legality or propriety of government action, as a general principle, a court should decline to use prerogative remedies to review the impugned government action unless all administrative remedies have been exhausted.[103] In this situation, where a legislature has established a sophisticated comprehensive scheme for adjudicating claims of discrimination in employment, and has included within the reach of this system a process of fact-finding, conciliation, formal adjudication and judicial review on the merits, the exhaustion doctrine should come into effect.[104]

(b) Hypothetical number 2 – Sheltered workshop employment

An individual, who uses a wheelchair due to his paralysis from the waist down, has worked for the past five years in a "sheltered workshop" for the handicapped run by a charitable, non-profit handicap service agency. His work involves light manual assembly of baskets, wicker chairs and like goods. The facility in which he works is fully accessible to persons using wheelchairs, and is equipped with washrooms and other facilities which can easily be used by a wheelchair-using individual.

Products produced in the workshop are sold by the non-profit organization to the public at commercial rates. Any profit collected on the operations of the workshop are used by the charitable institution to help finance services which it renders to the public generally and to handicapped clients in particular. The employee receives a monthly welfare payment of $320. He is paid an additional $75 per month as a wage for his 40 hours per week of labour.

The employee's income is considerably less than he would have received if he had been paid the minimum wage of $3.75 an hour (for his jurisdiction). The employer is exempted from compliance with the ordinary minimum wage requirements established by the province's *Employment Standards Act* under a special exemption clause intended to apply to sheltered employment for the handicapped. The exemption provision provides that the Minister of Social

103. The leading Canadian case on exhaustion of remedies is *Harelkin v. The Univ. of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14.

104. See, above note 101; and *Re Skapinker*, note 62 above.

Services may, on application, grant to any institution or agency or other employer a licence to pay employees less than the minimum wage where (a) the employee is handicapped (with a definition included); (b) the employee consents in writing to receipt of less than the minimum wage; and (c) the operation of the employment exists in part to provide employment opportunities to handicapped persons.[105]

The employee consented to receipt of less than the minimum wage in writing because he was advised by an employment counsellor that he should try out sheltered employment in order to see whether he could cope in a non-sheltered manufacturing employment setting. While at the sheltered workshop, the employee was offered minimal job rehabilitation or training programs, other than training to perform the particular tasks involved in the sheltered workshop in question. The employee has been afforded minimal opportunity to find outside employment, in part because of the fact that the economy is in recession. He wishes to challenge the constitutionality of his receipt of less than the minimum wage.

At the first stage of argument in this case, it is easy for the *Charter* plaintiff (the employee) to establish that the impugned provisions of the *Employment Standards Act* contravene "equal protection and equal benefits of the law" and involve discrimination on the basis of handicap. If the plaintiff were not handicapped, he would have been entitled to the legal guarantee that he be paid minimum wage as prescribed in the employment standards legislation. The legislation draws a bright line based on disability alone, does so explicitly, and does so to the detriment of the *Charter* plaintiff. The "detriment" involved is concrete and monetary; the *Charter* plaintiff derives a net income of combined salary and welfare which is less than it would have been had he been paid the minimum wage.

It might be argued by the *Charter* defendant that whereas the law involves a distinction based on disability, if one has regard to all of the circumstances, there is in fact no real detrimental effect imposed as a result of this distinction on the *Charter* plaintiff. Arguably, this employee would not have been able to obtain any job had it not been for the availability of sheltered employment as facilitated by the *Employment Standards Act*'s minimum wage exemption. Because the economy is in such poor condition, the only job available to the *Charter* plaintiff is that which is afforded by the sheltered workshop. In other words, with this legislation in place, the *Charter* plaintiff has a job with at least some income from employment (albeit only $75 per month); in the absence of such legislation, the

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105. Different minimum wage exemption schemes operate across Canada under different employment standards legislation. See, *e.g.*, Canada Labour Code, R.S.C. 1970, c. L-1, s. 37(1), which provides:

> For the purpose of enabling a person to be gainfully employed who has a disability that constitutes a handicap in the performance of any work to be done by him for an employer, the Minister may, upon the application of the handicapped person or an employer, authorize the employment of such a person at a wage lower than the minimum wage prescribed under section 35 if, having regard to all the circumstances of the case, the Minister is of the opinion that it is in the interest of such person to do so.

Charter plaintiff would be worse off, having no income from employment whatsoever.

Two problems with this defence render it unpersuasive. First, as an argument in the abstract, it fails unless the *Charter* defendant can advance evidence to show that no job is available for this *Charter* plaintiff at a higher wage and the only reason why the sheltered workshop hires him is because under the law they need to pay him no more than $75 a month. Absent such evidence, this bald assertion should fail. Second, this argument *assumes* that the economy remains static. In reality, economic conditions change, and changed conditions might enable the *Charter* plaintiff to find work. Moreover, this defence involves a misunderstanding of the concept of "detrimental effect". On its face, the law clearly deprives the *Charter* plaintiff of the legal guarantee that any employer must pay him at least the minimum wage, and this alone undeniably amounts to a detriment. The detrimental effect to which the *Charter* defendant points, however, in the foregoing argument is based not on the fact that the law draws a distinction between the handicapped and the non-handicapped. Rather, it is a detriment which inheres in the nature of *all* minimum wage legislation. Opponents of minimum wage legislation traditionally argue that the imposition of an artificial floor price in the labour market may generate unemployment. The *Charter* defendant, by pointing to this defect, does not undermine the detrimental effect of minimum wage exemptions for the handicapped; it amounts instead to a "red herring".

The *Charter* defendant might, at the first stage of the *Charter* case, argue that the *Charter* plaintiff does not "deserve" a minimum wage because he is not capable of producing at a rate which justifies $3.75 an hour on account of his disability. As before, this argument necessarily fails unless there is some cogent evidence advanced by the defendant in support of the claim. Assuming that the job in question involves manual labour which can be done as well sitting down (*i.e.*, in a wheelchair) as standing up, then it is impossible to see how the *Charter* plaintiff's paralysis impedes his ability to perform at the job.

The *Charter* defendant might also argue that the impugned program allowed this plaintiff to obtain job experience and training. However, the *Charter* plaintiff could rebut such a claim if he could show that the net effect on his employability has only been to either stereotype him or to place him in a ghetto-like job environment which renders non-sheltered employers uninterested in his capabilities.

At best sheltered workshops might be found not to be detrimental or discriminatory in specific instances where the defendant could show that the program is truly rehabilitative, and that handicapped employees are only subject to minimum wage exemptions to the extent that they effectuate rehabilitative goals. This in turn would require a more thorough process of review prior to proceeding to the issuance of minimum exemption licences. Before a licence could constitutionally be issued, it would be necessary for some sort of fact-finding hearing to be convened with adequate judicial review available to ensure the constitutionality of the process and result, for the purpose of determining whether, on the facts of the particular case, the granting of a minimum wage

exemption licence comports with the requirements of section 15 of the *Charter*. In other words, the granting of a licence must comply not only with the strict requirements of the statute, but it also must comply with the strict requirements of the Constitution.

In support of the claim that the minimum wage exemption contravenes *Charter* section 15(1), attention can be focused on the fact that Parliament was mindful of the conflict between minimum wage exemptions for the handicapped on the one hand and section 15 on the other, when it decided to amend the *Charter* in order to include equality rights for the handicapped. Several witnesses advocating inclusion of the handicapped in section 15 pointed to the existence of the minimum wage exemptions in various Canadian jurisdictions, and indicated that these were discriminatory against handicapped persons.[106]

Acknowledging that minimum wage exemption legislation clashes with the command of equality set out in section 15(1), the pivotal question in sheltered workshop cases is whether such legislation is immunized from a section 15(1) challenge by section 15(2). The *Charter* defendant might argue that minimum wage exemption legislation is enacted to "ameliorate" the conditions of disadvantage facing the handicapped. The handicapped face an extraordinarily high unemployment rate, as compared to the unemployment rate for the non-handicapped in Canadian society. Extra measures are needed to alleviate this. Therefore, by establishing sheltered employment the government is providing at least some employment opportunity, even if it is inadequate. Furthermore, the *Charter* defendant might argue that sheltered employment provides job training opportunities for a handicapped person who otherwise might be forced to subsist only on welfare. After such job training in the sheltered setting, the handicapped individual is capable of entering the non-sheltered work market with job experience.

Several arguments may be used to rebut any invocation of section 15(2) by the *Charter* defendant in this context. First, section 15(2) was not enacted to deal with situations such as this. As discussed above, section 15(2) was enacted to prevent members of the disgruntled majority, perceiving a case of "reverse discrimination", from challenging affirmative action programs designed to give extra assistance to a disadvantaged minority. In other words, section 15(2) was designed to immunize special programs which aid groups such as the handicapped from being challenged by the non-handicapped who would argue that they should also be given the same extra assistance.

In this instance, two features required for the invocation of section 15(2) are absent. First, the impugned law, program or other activity ought to provide some sort of "plus" to the disadvantaged group. In fact, however, the legislation in question does not provide the handicapped with a "plus", it rather creates a detriment, namely, the unavailability of the legal protection of minimum wage rights available to all other Canadians. To the extent that the minimum wage exemption might arguably provide a "plus" to the handicapped, the remedy for such alleged discrimination would in any event not have been the invalidation of

106. Hays-Joyal Committee, above note 22, Issue no. 10 at 8 & 17, and Issue no. 12 at 28 & 41-42.

the minimum wage exemption at the behest of the handicapped, but rather the invalidation of the minimum wage requirement for all of the non-handicapped. The elimination of the minimum wage exemption would then extend to all, regardless of handicap, the "right" to work for less than the minimum wage.

Second, the law here impugned cannot be defended under section 15(2) because the challenge is not raised by non-handicapped persons alleging "reverse discrimination". Rather, the challenge here is being brought by the handicapped who assert that the program involves discrimination against them, rather than discrimination against the non-handicapped. In other words, this is not a reverse discrimination case to which section 15(2) is targeted. The affirmative action exemption in section 15 was not intended to enable governments to continue with discriminatory practices simply by asserting that they were benign in intention.

Since the "ameliorative objectives" defence will fail under section 15(2) the only way in which the minimum wage legislation could be protected from a finding of invalidity is under *Charter* section 1. The *Charter* defendant would assert that the objective of the legislation is to provide job training and employment opportunities for handicapped persons. The defendant would argue that this is so important an objective that it justifies an overriding of section 15 rights. The proposition that constitutionally entrenched equality rights of handicapped persons, which were included in the Constitution to protect the handicapped against subordination, can be abridged for the very purpose of "helping" handicapped persons avoid subordination may initially not seem problematic. To "deny equality" for the purposes of "attaining equality", which is all this argument amounts to, however, becomes difficult to accept once the net effect of the legislation is thoroughly understood. For the purposes of the following, however, suppose we assume that this legislative objective is "demonstratively justified".

The question would then arise whether the means of a minimum wage exemption is a "reasonable" method for achieving this objective. In order for the *Charter* defendant to succeed under section 1 here, the same kind of evidence would have to be advanced as was referred to above in connection with section 15(2), namely, evidence to show that this means will have the end it is asserted to have. A bald assertion of good intention should be an adequate defence to legislation, especially once it has been determined that that legislation has a discriminatory detrimental effect on handicapped persons.

Assuming that the *Charter* defendant could establish by sufficient evidence that the minimum wage exemption is likely to achieve its stated objective, the defendant would then need to prove that this program is that method for achieving enhanced employment opportunities for the handicapped which imposes the least burden on constitutional equality rights necessary to achieve that end. This would be a trying task for the defendant in this situation, since a multiplicity of employment-enhancing programs can be implemented by government effectively, without the need of interfering with the equality of rights of handicapped persons. Perhaps the most obvious would be to retain the "sheltered workshop" centre, to require that employees who are handicapped be paid

at least the minimum wage, while at the same time providing government wage-subsidies for handicapped employers in order to ensure that the workshop administrators can continue to afford to administer the operations. In this hypothetical, such subsidies may not be as costly to the public purse as might initially seem evident. These wage subsidies would be in part offset by the withdrawal of welfare payments to the employees involved, who, by virtue of their receipt of minimum wage would be disentitled to welfare.

Other government programs which could achieve enhanced employment opportunities for the handicapped without interference with section 15 rights could include stronger enforcement of anti-discrimination programs found in human rights codes, expansion of vocational rehabilitation programs,[107] and adoption of affirmative action programs targeted at generating enhanced employment opportunities for the handicapped.

A *Charter* defendant might wish to claim that because the minimum wage exemption does not go into effect unless the handicapped employee consents, the law only burdens constitutional equality rights of those who are prepared to surrender these rights, and therefore this is the "least drastic alternative" in the circumstances. But this is hardly a convincing argument. Given the present almost complete lack of employment opportunities, as well as programs designed to increase employment potential, the handicapped person is faced with very few options indeed. If the sheltered workshop scheme is the only viable scheme in place, the handicapped person is clearly forced to assent to it, whatever drawbacks it involves. It would be unfair to use the facet that the handicapped person has very few options to deny him or her a constitutional remedy.

(c) Hypothetical number 3 – Education rights of a blind student

A 10-year-old child living with her family in a large metropolitan area, and attending the local public school, is involved in an accident at the end of the current school year, which results in almost total and permanent blindness. She is advised by school officials that because of her blindness, she will be required to attend the provincially-run residential school for the blind situated several hundred miles from her home city. On contacting her local school principal, her parents are advised that the school's staff has never dealt with a blind student, and is not capable of supporting the needs of a blind student should the child attend the local school, especially if the school is not provided with any special education support or additional funds from the local board of education or the provincial ministry of education. The child's parents wish the child not to be taken out of their home and forced to go to school several hundreds of miles away. Moreover, the child's parents wish the child to be educated in a school attended by sighted children for fear that education in a school attended exclusively by blind children will not adequately meet the child's educational and social needs. Though the province is legally-bound to provide education for all

107. See generally Ontario's *Vocational Rehabilitation Services Act*, R.S.O. 1980, c. 525, as an example of such a program.

children through high school, no legislation requires or stipulates the manner in which the education of a blind or otherwise handicapped child must be undertaken. On behalf of the child, the parents apply for a court order directing that the child be provided with an education in her local school appropriate to meet her needs, based on the claim that provision of education for the child in a residential school for the blind hundreds of miles away amounts to a denial of the child's constitutional equality rights guaranteed under the *Charter.*

The essence of the *Charter* plaintiff's claim here is that she has been denied equality of opportunity with respect to education, and that section 15 bars government from denying her this right particularly if the denial is predicated on the fact that she has a physical handicap. To determine whether this claim is legitimate, the court would first note that providing education is a government activity which, given section 32, comes within the scope of the *Charter.* As a result, the provision of education must comply with section 15's requirement of equality.

Do these facts disclose a contravention of section 15(1)'s requirement of equal opportunity in education? We shall consider the case for *de jure* discrimination first.

Has the *Charter* plaintiff been treated differently with respect to education because of her blindness? The facts disclose that the educational system in the province provides one set of schools for sighted children, and a separate school for blind children. Put another way, in the province, sighted children are entitled to be educated in their home environment with a heterogeneous student population, while blind children are obliged to travel to a residential school away from their family and to be educated in the unusual environment of a student body made up exclusively of blind children. This alone ought to amount to a case of classification based on disability, whether it is the result of a legislative directive requiring such classification,[108] or by virtue of educational policy either established at the provincial or local school board level.

To establish that this blindness-based classification amounts to *de jure* discrimination contrary to section 15(1), it would be necessary for the *Charter* plaintiff to show that this classification works to the detriment of blind persons such as the plaintiff. To this end, evidence might be adduced showing that education of disabled students in a segregated setting imposes an adverse social and educational effect on such children. Evidence could also be adduced demonstrating that removal of children from their local neighbourhoods and families during the critical childhood years has an adverse impact on a child's development of family ties and peer relationships. Finally, the case for the plaintiff would be bolstered if evidence disclosed that the educational program at the residential school for the blind was in fact inferior to that provided at the local neighbourhood school in the child's home city.[109]

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108. For a number of years, some provincial legislation specifically exempted blind children from the mandatory obligation to attend schools. See, *e.g., The Public Schools Act,* R.S.O. 1970, c. 385, subss. 4(1)(b) and 51(3)(c).

109. For the U.S. research involving these factual concerns see E. Zigler and S. Muenchow,

The *Charter* defendant, presumably the Department of Education or local school board, might seek to defend the legislative or policy classification of educational opportunities for blind children by arguing that blind children are not capable of being educated in the local school setting. As disclosed by our facts, the local school's staff has no experience with the education of a blind child in a sighted school setting. In support, they would adduce evidence of the burdens imposed on school teachers of dealing with the special needs they would assert arise from participation of a blind child in the class.

At this stage of the *Charter* case, however, only a limited amount of such evidence would be admissible. At this first stage of the *Charter* case, when one is seeking to determine whether *de jure* discrimination has occurred at all, the *Charter* defendant is entitled to prove the plaintiff's disability precludes her from exercising the right asserted. In this case, the defendant would be entitled to assert that blind children are not capable of being educated effectively in the sighted classroom setting. However, the defendant is *not* entitled to defend the adverse classification of blind children on the grounds that the local school is not capable of providing the educational opportunities demanded by section 15. Evidence that the local school is not at present experienced with the education of blind children in an integrated sighted school setting is *not* relevant to the capabilities of a blind child. To determine the capabilities of a blind child, for the purpose of determining whether the classification is discriminatory or not, one must look exclusively at the individual plaintiff's ability to learn in the presence of sighted children. To that end, the plaintiff and defendant would each advance evidence on this point. The plaintiff's evidence ought to be more compelling, since in Canada, the United States and elsewhere, extensive experience has shown that blind children, not otherwise handicapped, are capable of profiting from education in the sighted school setting.[110]

The *Charter* defendant might argue in addition that no *de jure* inequality exists, because it is not the intention of either the provincial education ministry or the local school board to provide inferior educational opportunities to blind children. However, such a defence is not tenable. To make out a contravention of section 15, a *Charter* plaintiff need not show that the defendant deliberately sought to subordinate a protected minority. Rather, all that need be shown is that the classification works to the detriment of handicapped persons.

The *Charter* plaintiff's claim is bolstered by the legislative history of the handicapped amendment. One of the principal examples of inequalities at the hand of government suffered by handicapped persons presented to the Hays-Joyal Committee during debate over the patriation of the Constitution was that experienced by handicapped children in Canada's educational system.[111] It was as a result of evidence such as this that Parliament determined that Canada's guarantee of equality in its Constitution must be amended in order to include

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"Mainstreaming: The Proof is in the Implementation" (1979), 34 American Psychologist 993; E. Meyen, *Exceptional Children and Youth: An Introduction* (2nd ed. 1982); W. Sailor and D. Guess, *Severely Handicapped Students*, Chap. 2 (1983).

110. Zigler and Muenchow, above note 109.

111. See, *e.g.*, Hays-Joyal Committee, above note 22, Issue no. 10, at 10, and Issue no. 25, at 9.

equality rights for handicapped persons. Consequently, a court ought to be particularly sensitive to the claims of *Charter* plaintiffs which concern discrimination in the area of educational opportunities of handicapped children.

American experience with equality of educational opportunities for handicapped children can also be cited in support of the case for *de jure* discrimination. In 1954, the U.S. Supreme Court held that separation of black and white racial groups into two separate school systems contravened the Fourteenth Amendment's guarantee of equal protection of the laws.[112] There, the highest American court pointedly rejected the proposal that a constitutional guarantee of equal protection could be satisfied by "separate but equal" educational facilities. The "separate but equal" principle had previously been accepted by American courts,[113] but decades of American experience revealed that this doctrine served only to camouflage a widespread discriminatory practice inconsistent with the guarantee of equal protection.

This equal opportunity in education concept laid down in *Brown v. Board of Education* was applied in the context of educational opportunities for handicapped children by U.S. federal courts in the late 1960's and early 1970's. In two cases, American courts held that mentally handicapped children were denied equal protection when they were provided only with an inferior educational program in a segregated school for the handicapped in circumstances where it was not necessary.[114]

As a result of these decisions, the U.S. Congress enacted the *Education of All Handicapped Children Act of 1975*,[115] in order to codify in legislation the obligations of government with respect to the equality of educational opportunity for handicapped children derived from the Fourteenth Amendment. That law provides that handicapped children have a right to a free public education in the least restrictive environment suited to the child's needs. The statute provides for an administrative process for determining appropriate placement of handicapped children having regard to their individual circumstances.[116] Associated with the administrative process is the possibility of ultimate resort to the courts, if needed.

Turning to *de facto* discrimination, it could be claimed by the *Charter* plaintiff that, if the defendant is correct in saying that blind children are *different* from sighted children with respect to education, the obligation lies with government to treat blind children differently in order to ensure that they are provided with an equal educational opportunity. This is because to treat blind children in a manner which is identical to the manner in which sighted children are treated would result in excluding blind children from equality of educational oppor-

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112. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
113. See *Plessy v. Ferguson*, 163 U.S. 337 (1896).
114. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.C. D.C. 1972); *P.A.R.C. v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (1972).
115. Pub. L. No. 94/142, 89 Stat. 773 (1975).
116. Regarding the interpretation and application of the *Education of All Handicapped Children Act, ibid.*, see L. Burdorf, *The Legal Rights of Handicapped Persons* (1980); and Sailor and Guess, above note 109.

tunities. The requirement of section 15 in this context would be to acknowledge that blind children are different from sighted children with respect to education, and then to treat them differently in order to provide them with an equal educational opportunity. On these facts, the *Charter* defendants have gone part way in satisfying their obligations. They have provided a separate school program at a residential school for the blind some hundreds of miles away. However, if evidence can show that this amounts to an inferior education (as discussed above in connection with *de jure* discrimination), then it would follow that the differential treatment afforded these children has not achieved the goal of equal educational opportunities, and government will not have met its obligations.

Accordingly, the *Charter* plaintiff would claim that the requirements of equality demand that a new form of "different treatment" be afforded blind children: the opportunity to attend the local school in their neighbourhood, but with sufficient support from itinerant teachers, experienced with the education of blind children, in order to enable them to succeed at profiting from instruction in a sighted school context. If evidence could show that this could be undertaken in a reasonable, non-disruptive manner, with the result that equality of educational opportunities would be afforded, then a case for *de facto* discrimination would be made out.

If the *Charter* plaintiff succeeds in making out a case of either *de facto* or *de jure* discrimination, the question then arises whether the educational opportunity actually afforded the blind child is nonetheless defensible under section 15(2). The *Charter* defendant might argue that the special residential school for blind children is designed to meet the special needs of blind children, and thus falls within the requirements of section 15(2).

Several arguments show that this invocation of section 15(2) ought not to succeed. First, as discussed above, section 15(2) should only be invoked to protect a program which is challenged under section 15(1) by a plaintiff who is *not* a member of the disadvantaged group who gains preferential treatment under the affirmative action program. In this case, section 15(2) would come into play if a sighted child claimed that the provision of special educational opportunities for blind children amounted to discrimination based on physical ability or disability against the sighted. Obviously that is not the case here, since the *Charter* plaintiff is herself blind.

Is the inequality of educational opportunity found in this fact situation saved from constitutional challenge by section 1 of the *Charter?* If the special school for the blind is established under specific legislation or regulations, and if the power of the local neighbourhood school to refuse to accept the *Charter* plaintiff and to refer her to the school for the blind is undertaken pursuant to a specific statutory authority, then the requirement under section 1 that the *Charter* breach be "prescribed by law" has been met. If, on the other hand, the practice of providing separate schooling for blind children has been established only pursuant to administrative policy either at the provincial or local school board level, then it is not "prescribed by law", and hence is indefensible under section 1, regardless of its reasonableness and demonstrable justifiability.

For the purpose of the following discussion, it is assumed that the "prescribed by law" requirement has been met in this situation.

For what purpose is the inequality of educational opportunities for blind children, set out in this fact situation, undertaken; and is this purpose so compelling as to justify infringement of the equality rights of blind children guaranteed by the *Charter?* Three possible purposes can be asserted to justify the impugned government action as "demonstrably justified in a free and democratic society".

First, the *Charter* defendant might argue that denial of equality rights in this situation is justified because it will result in blind children receiving a better education. This claim, however, cannot succeed if a court has already concluded that the educational opportunities afforded to the *Charter* plaintiff contravene section 15(1). To reach such a finding, the court of necessity had to determine that the child was being disadvantaged with respect to education in a manner which would not be the case had she been afforded equal educational opportunity. To raise this policy objective under section 1 in the second stage of the *Charter* case would amount to an attempt to re-litigate the issue already decided at the first stage of the *Charter* case, where the interpretation of section 15(1) was in issue.

Second, the *Charter* defendant might claim that segregated education for blind children is justified by the need to maintain an appropriate and effective educational setting in the local schools for the majority of children who are sighted. The presence of blind children in the local schools would take up the time of school teachers which would otherwise be available to the sighted majority. Parents of sighted children will invariably object to the presence of handicapped children in their child's school. This amounts to the argument that the costs associated with the provison of equal educational opportunities for blind children in the local school setting are prohibitve, and that the administrative problems imposed by the administration of such a program are too disruptive. The inequality of educational opportunites are therefore undertaken not for the purpose of subordinating handicapped children, but simply because it is too expensive to do otherwise. As discussed above, legislative history of the handicapped amendment to section 15 suggests that cost arguments ought not automatically to settle the section 1 argument. Moreover, arguments of administrative convenience alone should be difficult to accept as so compelling as to justify interference with fundamental constitutional rights. The answer to a claim of administrative inconvenience is that the *Charter* defendant will be required to re-order its administrative priorities, and to allocate more time and resources to resolve problems of administrative convenience posed by the equality rights of the handicapped.

Although the mere claim that accommodation to the needs of the handicapped will be costly and will cause administrative inconvenience ought not automatically to count as demonstrably justified grounds for interference with *Charter* rights, such claims, if supportable, will be legitimate ingredients in an overall section 1 argument on the part of the *Charter* defendant. One must, however, also consider whether the means chosen to achieve these cost-saving

goals, which are themselves demonstrably justifiable, are "reasonable" within the meaning of section 1. To establish the reasonableness of the *Charter* defendant's method of cost-saving, it is first necessary for the defendant to present evidence showing that it is less costly to operate a special residential school for the blind than it would be to integrate blind children into the local school system where possible, with itinerant teaching support. If the *Charter* plaintiff could prove that mainstreaming is more cost efficient than segregated education, or even that the establishment of a special class for blind children in the plaintiff's home metropolis within a school in that community is more cost efficient than the transportation of the plaintiff and others to a special residential school hundreds of miles away, then the defendant's cost argument would fail.

Into the "costs" calculation goes the short-term costs of mainstreaming versus segregation and the cost of operating alternative educational systems. As well, one must take into account the long-term costs of mainstreaming as opposed to segregation. If, for example, the *Charter* plaintiff could establish by evidence that in the long term, children educated in a segregated educational school setting are more likely to run into problems obtaining employment when they grow up, and are therefore more likely to be welfare recipients than those who are mainstreamed at an early age, then one must add into the cost calculation the comparative long term welfare burden to the public arising from alternative educational systems.

Even if the preponderance of evidence demonstrated that the costs of providing comprehensive equality of opportunity with respect to education for blind children was prohibitive, it would not follow from this that the *status quo* in the educational system would meet the standard of "reasonableness". The "least restrictive alternative" requirement of section 1 would require government to undertake those improvements to educational opportunities for handicapped children which are feasible without undertaking prohibitive costs. Therefore, changes to the educational system which are more than the *status quo* could become constitutionally required.

Additionally, if costs are prohibitive in one particular year, it does not follow from this that in the long run costs will remain prohibitive. The *Charter* plaintiff could argue that whereas immediate comprehensive change is not economically feasible, change over an extended period of time (*e.g.*, five yers) might not be as prohibitive. In this result, section 1's reasonableness requirement would not immunize government from the requirement to provide equality of educational opportunity for handicapped children. Rather, it would provide government with time to implement orderly, cost effective changes.

What remedy at the third stage of the *Charter* case would be appropriate to rectify the infringement or denial of equality rights on these facts? It is at this point that regard might be had to the wealth of American experience with the formulation of remedies to rectify inequalities in educational opportunities with respect both to race and disability-based discrimination. At a minimum, it would be necessary for the court to lay down basic goals to which the *Charter* defendants must work and a general timetable within which these goals ought to be achieved in order to meet the requirements of section 15. While Canadian

courts may not wish to undertake the aggressive remedial stance which American courts have assumed to promote racial equality in education, it would be highly unlikely that such would be called for in any event. It is highly doubtful that the equality of educational opportunities for the handicapped in Canada, enforced by a court pursuant to the mandatory requirements of the *Charter*, would run into the same overwhelming political opposition in legislatures and departments of education that racial equality confronted in the legislatures of the southern United States. The controversial American experience with racial equality in the schools ought therefore not to cause Canadian courts to fail to enforce the requirement under section 24(1) that victims of inequality be afforded a just remedy.

In the final analysis, the claim of discrimination with respect to educational opportunities may be one of the most powerful claims of inequality ever to be advanced under the *Charter*. Experience of handicapped persons has shown that where the educational opportunities of handicapped children are unequal or inadequate, the adverse ramifications will affect these handicapped individuals for the rest of their lives. To the extent that equality of educational opportunity is for the first time enforced in Canada, the *Charter* will have had the lasting positive effect desired by its drafters.

(d) Hypothetical number 4 – Physically inaccessible government facilities

Traditionally, government buildings were not built to be accessible to persons whose physical disabilities constitute an impairment to mobility. Many buildings have steps which lead up to them, have stairways for obtaining access to floors or rooms within the buildings, have doorways which are too narrow for a wheelchair to pass through, and lack amenities such as washroom facilities which are accessible to persons travelling in a wheelchair.

These physical barriers to access were not constructed for the purpose of excluding physically handicapped persons from the opportunity of availing themselves government services and facilities. Neither were they constructed without ramps or accessible washrooms for the purpose of saving money, since in general, the construction of an accessible building[117] does not involve a significant or substantial increase in costs of construction, so long as it is decided at the design stage of the building that the building is to be made accessible to the handicapped.[118] Rather, government buildings, like buildings constructed in the private sector over the years, were traditionally built with an absence of wheel-

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117. In this section, the expression "accessible" refers only to the concept of accessibility of persons without mobility-handicap, through the incorporation of ramps, widened doorways and the like. For a general review of the accessibility needs of mobility-handicapped persons, see P. Cluff, "Housing and Architectural Barriers" in *Human Rights for the Physically Handicapped and Aged* (1977).

118. In this fact situation, there is no need to give serious consideration to a defence based on s. 15(2). Even the broadest interpretation of that provision could not conceivably include within its reach the offering of government services and facilities in inaccessible buildings as an operation undertaken to ameliorate the disadvantageous conditions associated with a mobility-handicap.

chair-accessibility out of "benign neglect": architects and designers simply never thought of providing access for the handicapped.

Assume that a particular government determined that all new buildings must be physically accessible. However, no policy directive is issued with respect to existing facilities. Therefore, physical renovation or "retro-fitting" of existing government buildings is only undertaken where the government officials responsible for the particular facility decide to undertake such an activity, and where their existing budget can cover the cost. Could a group of persons who use wheelchairs challenge the constitutionality of physically-inaccessible government buildings under section 15?

In determining whether the previous construction of non-accessible government buildings contravenes section 15, two issues can be settled quickly. First, in this fact situation, it is clear that there is no *de jure* discrimination. The facts disclose that the construction of buildings was not undertaken for the purpose of excluding the handicapped. Therefore, resolution of the *Charter* claim will depend on determination of whether such construction of buildings amounts to *de facto* discrimination. Second, it is equally clear that section 15 can be applied to test the legitimacy of government building access since the availability of government services and facilities is governed by the *Charter.* These activities fall within section 32(1) of the *Charter.*

Does use by government of physically inacessible buildings amount to a *de facto* violation of equality rights? It does have the effect of excluding handicapped persons from the service and facilities offered in those buildings, except in circumstances where either (a) the *Charter* plaintiffs would in any event make no use of the building in question or (b) the services, facilities or information available in inaccessible buildings are also conveniently obtainable on equal terms through other facilities which are *accessible.* In other words, a physically inaccessible building is not itself a breach of the *Charter.* There must be a disadvantageous result accruing to the handicapped individual for there to be a possibility of *de facto* discrimination. To meet the requirement of "actual exlusion", the *Charter* plaintiff need only approach the front of a government building to which he or she desires access or declare an intention to do so for the purpose of developing a factual record on which a *Charter* challenge could be based. The individual need also establish that no convenient, effective alternative method of achieving his or her objective for attempting to enter that building is available elsewhere. If the individual required the assistance of government officials which could as easily be provided over the phone, then no breach of the *Charter* has occurred.

A *Charter* defendant might argue that even though the *Charter* plaintiff has suffered an adverse impact, this impact is not imposed by reason of the plaintiff's disability. Rather, it is imposed by reason of factors wholly unrelated to the disability in question, such as the standard practices of architects at the time the building was designed or budgetary restraints in relation to retro-fitting of such buildings. However, this argument misconceives the notion of *de facto* inequalities. The fact that a government action has a discriminatory result is sufficient to establish *de facto* discrimination, regardless of the good intention of

the government in undertaking the activity. In cases of *de facto* discrimination, there need be no intention to exclude handicapped persons.

The *Charter* defendant might argue that there is no denial of equality as that term is used in section 15(1) on these facts since the disability of mobility-handicapped persons renders them disqualified for the right involved. Because they are incapable of entering these buildings, they are incapable of availing themselves of the services therein. This defence cannot succeed because it misconceives the defence of incapacity. It is no defence to say that the individual is incapable of getting in the building itself, if, but for this accessibility barrier, the individual would have been capable of undertaking the particular tasks, duties or responsibilities associated with government services inside the building.

The *Charter* defendant may also argue that the costs associated with the provision of equality of opportunity in the building access area are so steep that it would be improper to construe section 15(1) as obliging government to assume these costs. The cost argument must automatically fail at this first stage of the *Charter* case. This is because the question under consideration at the first stage of the *Charter* case is whether the *Charter* plaintiff has been denied access to a particular government or service, not whether provision of the service in a discriminatory way accords with existing government financial priorities. At the first stage of a *Charter* case, the issue under consideration is the meaning of a particular guarantee to a constitutional right. The meaning of a right cannot vary depending on its cost.

Turning to section 1 of the *Charter* it is doubtful whether section 1 can ever be invoked in defence of a section 15 challenge to inaccessibility of buildings within which government offers services or facilities to be public. This is because such inaccessibility is not "prescribed by law" as is required by section 1. No statute or regulation has specifically mandated that inequality of opportunity for handicapped persons with respect to these services may occur. Whereas "building code" legislation might be in place which does not require physical access to the handicapped, such legislation does not meet the requirement of "prescribed by law". Building code legislation does not *mandate* a limitation of *Charter* rights. It merely fails to affirmatively oblige compliance with the *Charter*. If the government could comply with the section 1 requirement that *Charter* limits be "prescribed by law" simply by pointing to the fact that no legislation has compelled either compliance or non-compliance with the *Charter*, then the very purpose of the "prescribed by law" requirement would be wholly subverted.

Even though failure to comply with the "prescribed by law" requirement disentitles a *Charter* defendant from any reliance on section 1, no matter how "reasonable" or "demonstrably justified" may be the contravention of section 15, it is nonetheless instructive to consider the merits of a claim that limitation of access to services or facilities by virtue of physical access barriers is reasonable and demonstrably justified in a free and democratic society.

At the second stage of the *Charter* case, where the applicability of section 1 is in issue, it must be ascertained whether a demonstrably justified purpose is served by the exclusion of mobility-handicapped persons from government

services and facilities offered in inaccessible buildings. A *Charter* defendant might assert that it is "demonstrably justified" in a free and democratic society to limit equality of access to government services by mobility-handicapped persons by virtue of physically inaccessible buildings for two reasons. First, government buildings in which such services and facilities are provided were built, or otherwise acquired, at a time when no government official could reasonably expect that the Constitution would demand equality of opportunity with respect to such services for the mobility-handicapped. Secondly, the cost of retro-fitting existing facilities, or moving existing government services to new, physically accessible facilities would be inordinately high.

The cost consideration, *standing alone,* cannot constitute a "demonstrable justification" under section 1. If the guarantee of equality to the handicapped in section 15 is to be meaningful, government, in establishing its budgetary priorities, cannot intentionally leave the handicapped at the bottom of the list. Moreover, the *Charter's* framers, in deciding to include the handicapped in section 15, have rejected the legitimacy of the argument that the equality rights of the handicapped are too costly for Canadian society to bear. It is not now open for a court to reverse this decision through automatic rejection of handicapped equality claims in the physical access area brought under section 1.

In order for *Charter* defendants to use considerations of cost for a section 1 argument, they must prove by evidence that providing equality of opportunity to mobility-handicapped persons would in fact be too costly. Where a building can be retro-fitted at low costs, the section 1 argument should fail. Where the service or facility offered in that building could be cheaply located in other parts of the building accessible to the mobility-handicapped, the section 1 argument should fail. In short, whenever low-cost alternatives can be devised, the *Charter* defendant ought not to be allowed to rely on the general argument of costs.

Where evidence shows that what is required to secure equality of opportunity for handicapped persons in the case of a particular government service or facility is very expensive, section 1 would still not provide the *Charter* defendant with an absolute and permanent defence to a section 15 claim. Section 1's reasonableness requirement requires that for a *Charter* infringement to be constitutionally defensible, the infringement must be the least restrictive means for accomplishing the end in question, here, the end of saving money. To establish that denial of physical access to the service or facility to mobility-handicapped persons is the least restrictive means for achieving the end in question, the *Charter* defendant would have to demonstrate that a reasonable assessment of its budgetary priorities would not free up money to provide at least provision-access modifications. Moreover, this cost defence would only justify a temporary retention of physical access barriers. A particular physical modification may be too costly to undertake in a single year, but, if the cost of that modification were spread over several years, the cost defence would tend to lose its force.

The result of this challenge to physical access barriers could be remedied in the following ways. The *Charter* would require that all new government buildings or rental facilities acquired by government for the purpose of administering

services and facilities available to the public be physically accessible to handicapped persons. All old buildings in which services and facilities are afforded to the public must be made accessible to the handicapped, either by structural changes, allocation of alternative facilities for use by handicapped persons, or by the adoption of other procedures which will result in true equality of opportunity for mobility-handicapped users of these services and facilities. Where such accommodations can be effected at low costs, they would be required to be implemented over a short period of time. Where a substantial amount of money is involved, a longer period, possibly years, would be permissible to facilitate orderly change.

Since the requirement of physical access to the handicapped by section 15 is far-reaching, it is reasonable to expect that emphasis could initially be placed on the modification of two important classes of government facilities. First, services or facilities which are intensively used by persons with disabilities should be modified. These would include educational, social service, and government information facilities. Second, government facilities of fundamental democratic significance, such as legislative buildings, court houses, and voting areas should be modified as required.

8

Mental Disability and Equality Rights

*David Vickers**
and
*Orville Endicott***

1. Introduction

When Parliament decided to include protection for persons with a mental disability in the *Charter,* it was at long last embarking on the process of reversing age-old discrimination against individuals in this group. As the ancient attitudes based upon ignorance and fear change, and actions based upon tolerance and understanding begin to take their place, the barricades which persons with a mental disability face every day of their lives will start to come down. Most importantly the *Charter* guarantees that persons who live with a mental disability now have the right to live in the community and can expect all the protection and support the law can provide to enable them to exercise that right.

To be mentally disabled is to be assured that throughout life you will be viewed as "different". Whether the label is mentally ill, mentally handicapped or mentally retarded, or couched in more specific, professional terminology such as Down's Syndrome, schizophrenia or Prader Willes' Syndrome, the label sets the

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problem of discrimination in motion.[1] Consequences flow from unfounded assumptions about the nature of mental disability.

This was expressed in poignant terms by Ms. Barb Goode when she spoke to the Special Committee on the Disabled and the Handicapped:

> Mentally handicapped people don't feel comfortable talking to "normal" people, I think it's because we are afraid someone will put us down. That's something we learn very early. It's difficult to get people to treat us like average human beings. You know there are a lot of folks called "normal" who act differently and no one says anything. But if a handicapped person acts differently, they say something. We get put down because of it.
>
> Then there are other people who want to keep us from making mistakes. Everyone else is allowed to make mistakes, but not us. Most people want to help us, and that's great, but sometimes they try too hard. It's like a baby learning how to crawl before it can walk. We have to be able to fall down before we can get anywhere.[2]

Persons who are mentally disabled have traditionally been devalued individuals in Canadian society. History has seen large numbers institutionalized for life upon the erroneous assumption that custodial care was the only appropriate course of action. They have been the subject of ridicule, massive segregation, community insensitivity, needless sterilization and unfounded stereotyping.

The *Canadian Charter of Rights and Freedoms,*[3] with its provision of equality rights for persons with a mental disability, presents the opportunity for a nation to proceed upon a different course. With the recognition of equality rights in the Constitution, it is possible to begin with a new perspective and a different attitude. To proceed with a basic presumption of individual ability, rather than a presumption of individual disability, would be a giant step towards the removal of the consequences of the label.

2. Mental Disability and Equality Rights

(a) Physical or mental disability

The words "physical disability" and "mental disability" as they appear in subsection 15(1) have not been defined. But experience to date with the disability cases under federal and provincial human rights legislation indicates little concern with definition and scope in the disability context.[4] *Webster's 3rd New International Dictionary*[5] defines the word "mental" in part as: "of or relating to mind" and the word "disability" as "the condition of being disabled". Together,

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1. This chapter will not discuss the significant difference between mental illness and mental retardation. The presence of either is a mental disability.
2. Special Committee on the Disabled and the Handicapped, *Obstacles* 117 (1981).
3. *Constitution Act, 1981,* as enacted by *Canada Act, 1982* (U.K.), 1982, c. 11.
4. W. Tarnopolsky, *Discrimination and the Law in Canada* 307 (1982).
5. *Webster's 3rd New International Dictionary of the English Language* (1968).

a mental disability would be the condition of being disabled by reason of or relating to the mind.

Perhaps the drafters could have ignored the descriptive words "physical" and "mental". Doubtless they were added so as to proceed with an abundance of caution; discrimination based upon disability, whether physical or mental, is prohibited. In our opinion, it would be entirely counterproductive for courts to seek to define properly what may be a mental disability as opposed to what may be a physical disability. As the guarantees are provided for individuals with both types of disabilities, the mental or physical nature of the disability appears to relate more to the issue of an appropriate remedy rather than to the question of whether there has been a denial of equality rights.

(b) Disability or handicap

Any discussion of subsection 15(1) will inevitably draw comparisons with federal and provincial human rights legislation.[6] The *Charter* will force a review of all human rights legislation to ensure that it meets the standards imposed by its provisions and, in particular, by section 15.[7] An analysis of human rights legislation reveals that there is no consistency in the language from one jurisdiction to another and that the words "disability" and "handicap" are both used. Some legislation prohibits the discriminatory act because of handicap[8] while others prohibit the discriminatory act because of disability.[9] Still others define the one by reference to the other.[10]

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6. For a comparative discussion, see above note 4, at 304-11.
7. See pp. 25-30 below.
8. See, *e.g., Charte des droits et libertés de la personne,* R.S.Q. 1977, c. C-12, s. 10, as amended by S.Q. 1978, c. 7, s. 112, which reads, in part, "le fait qu'elle est une personne handicapée ou qu'elle utilise quelque moyen pour pallier son handicap."
9. See, *e.g., Canadian Human Rights Act,* S.C. 1976-77, c. 33, ss. 3(1) and 20, as amended by S.C. 1980-81-82-83, c. 143, ss. 12 & 14. S. 3(1) reads, in part, "For all purposes of this Act, ... disability ... [is a] prohibited ground of discrimination". S. 20 reads, in part, " 'disability' means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug".
10. See, *e.g.,* Ontario *Human Rights Code, 1981,* S.O. 1981, c. 53, s. 9(b), which reads:

    9. In Part I and in this Part, ...

    (b) 'because of handicap' means for the reason that the person has or has had, or is believed to have or have had,

    (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,

    (ii) a condition of mental retardation or impairment,

    (iii) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, or

    (iv) a mental disorder.

The demands advanced by some advocates for persons with a disability have been contained in the slogan, "disabled but not handicapped". With respect, that is not only a misuse of the English language but it reinforces the very bias that must be removed if discriminatory acts against persons with a handicap are to become a part of history.[11] A person with a mental or physical impairment is a person with a handicap.[12] That mental or physical impairment, the handicap, may not necessarily result in a disability. Disability must be related to functional ability. When individuals are not able to do something because of their handicap, they are disabled in relation to the function which they seek to perform.

(c) Disability – real or perceived

On many occasions, a handicap is not a disability until it is so perceived by others. Many persons who are blind are able to read. Similarly, many persons who are developmentally delayed are able to read. It is the third party perception of the handicap that creates a presumption of disability. As one author has said:

> One of the most important elements in delineating who is and who is not handicapped is a social judgment; a person truly qualifies as handicapped only as a result of being so labeled by others. And the decision to impose or not to impose the *handicapped* label is ultimately grounded upon perceptions of an individual's role in society.[13]

A disability, either real or, as is so often the case, perceived or presumed, ought not to form a basis for discrimination. This is supported by the case of *Andruchiw v. Corporation of the District of Burnaby,*[14] in which a Board of Inquiry under the British Columbia Human Rights Code stated:

> Clearly, an employer will be in violation of the Code if it refuses to employ a person on the grounds of physical handicap *or the perception of physical handicap* unless reasonable cause exists for the refusal.[15]

In *Barnes v. Washington Natural Gas Company,*[16] Ringold J. held that a plaintiff claiming not to be handicapped had a cause of action for discrimination on grounds that he was discharged under the erroneous belief that he was handicapped. In Ringold J.'s words:

> It would be an anomalous situation if discrimination in employment would be prohibited against those who possess the handicap but would not

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11. For a discussion of the use of the words "disabled" and "handicap", see *The Legal Rights of Handicapped Persons* (R. Burgdorf ed. 1980), p. 4.
12. Above note 6.
13. Above note 11, at 10.
14. (1982), 3 C.H.R.R. D/663.
15. (Emphasis added). *Ibid.* at D/666.
16. 22 Wash. App. 578, 591 P. 2d 461 (1979).

> include within the class a person "perceived" by the employer to have a handicap.[17]

Where the intention of Parliament was to prohibit discrimination based upon, *inter alia,* disability, it would be an anomalous situation indeed if the prohibition were not seen to prevent discrimination based on both the perception or presumption of disability, as well as actual disability.[18]

(d) Discrimination

The use of the words "every individual" in subsection 15(1) underscores the basic nature of equality rights. It begins with a statement of equality and says that individuals are entitled to the "equal protection and benefit of the law without discrimination and, in particular, ... without discrimination ... based on mental ... disability". It is a concern with individual rights, not group rights; a concern to ensure that no individual is denied equal protection and benefit of the law so that he or she suffers from discrimination.

As the *Charter* provides no definition of discrimination, the courts will have to grapple with that task. One of the major elements in the definitional question is whether "intent" is a necessary ingredient of discrimination.

Two decisions presently pending before the Supreme Court of Canada are relevant to that issue. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.,*[19] the Ontario Court of Appeal, in confirming the decision of a Board of Inquiry[20] under the *Ontario Human Rights Code,* concluded that as the Code at the relevant time prohibited discrimination "because of" certain specified grounds, a clear reference to motivation and proof of intent to discriminate on a prohibited ground was essential to a finding that the Code had been contravened. In *Canadian National Railway Company v. Canadian Human Rights Commission,*[21] the Federal Court of Appeal, in a 2-1 decision, reached a similar conclusion in an appeal from a decision of a federal tribunal established under the *Canadian Human Rights Act.*[22]

The Board of Inquiry decision in *O'Malley v. Simpsons-Sears Ltd.* had concluded, in contrast:

> The Code, then, is properly interpreted as extending its prohibition to a discriminatory result flowing from a superficially non-discriminatory condition of employment. This conclusion leads directly to the second question posed earlier. Where such a discriminatory result occurs, the only way in which it can be eliminated is to change the general term or condition of

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17. 591 P. 2d at 464, *per* Ringold J.
18. Two examples of cases in Canada which involve presumptions about disability are: *Supt. of Family and Child Services v. R.D.* (1983), 42 B.C.L.R. 173 (S.C.), and *Clark v. Clark* (1982), 40 O.R. (2d) 383, (sub nom. *Re Clark and Clark*) 17 A.C.W.S. (2d) 488 (Co. Ct.).
19. (1982), 38 O.R. (2d) 423, (sub nom. *Re Ont. Human Rights Comm. and Simpsons-Sears Ltd.*) 138 D.L.R. (3d) 133 (C.A.).
20. *O'Malley v. Simpsons-Sears Ltd.* (1981), 2 C.H.R.R. D/267.
21. (1983), 4 C.H.R.R. D/1404 (F.C. App. D.).
22. *Bhinder v. C.N.R.* (1981), 2 C.H.R.R. D/546.

> employment or else make some special accommodation for the employee affected. The question is: how far is an employer required to go in accommodating the religious beliefs of such an employee in order to avoid a contravention of the Code?[23]

Whatever the final result in these cases, in the context of section 15 it seems even clearer that discrimination should be "properly interpreted as extending its prohibition to a discriminatory *result*". Section 15 addresses in positive terms the individual's rights to equal protection and equal benefit of the law. On its face it does not require proof of intention to deprive anyone of such rights. It imposes a burden to accommodate, a burden to ensure that there is no unequal application of the law and, thus, proof of intent to discriminate becomes irrelevant.

American courts have developed three standards of review under the equal protection clause of the Fourteenth Amendment, strict, intermediate and minimal.[24] While some parts of section 15 appear to have been developed from American concepts, there is nothing to suggest that the same process or standards of review are required under section 15. But, if our courts follow the American trend it can be argued that those enumerated heads set out in section 15(1) should call for strict scrutiny. Under the U.S. *Bill of Rights*-jurisprudence, this would mean that once it has been determined that a difference has occurred in the treatment of certain categories of persons, the onus is on the party against whom the discrimination alleged to show that such distinctions are essential to the maintenance of some compelling state interest. The standard of proof in meeting that onus is correspondingly more rigorous than that applied in situations where discrimination is less "inherently suspect". It is submitted that disability should require the same degree of strictness when it is reviewed as a ground of discrimination as any other expressly prohibited ground. There is no justification for applying a variable standard of review between enumerated heads. In any case, section 1 in the *Charter* provides a variable standard of review, namely the degree to which a limitation of rights is reasonable in a free and democratic society, for the application not only of section 15 but of every other section. Review under section 1 should then focus on issues arising in the individual case, avoiding any predetermined relative strictness of scrutiny for the ground of discrimination complained of.[25]

(e) The Charter: our value system

The *Charter* is an expression of our Canadian value system. To define and elaborate those values it is helpful to look to our international obligations. The

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23. Above note 20, at D/268-69.
24. W. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. B. Rev. 242; M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L. Rev. 131.
25. The role of s. 1 in relation to the question of standards of review of alleged discrimination in relation to disability is outlined in the Lepofsky and Bickenbach chapter and in more general terms in the Bayefsky chapter. See also M. Gold, above note 24, at 147 ff.

preamble to the *Universal Declaration of Human Rights*[26] addresses "the inherent dignity and . . . the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world". Similar language is found in the preamble to the *International Covenant on Economic, Social and Cultural Rights.*[27] Article 25 of the *Universal Declaration of Human Rights* says that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The Declaration is an expression of values to which we, as a nation, subscribe. In addition, Articles 12 and 13 of the *International Covenant on Economic, Social and Cultural Rights* recognize the right of everyone "to the enjoyment of the highest attainable standard of physical and mental health" and "the right of everyone to education". These international obligations can assist us in the interpretation of the equality rights provision in the *Charter.*[28]

A detailed analysis of the legislative genesis of mental and physical disability can be found in the previous chapter written by David Lepofsky and Jerome Bickenbach. The interest generated by the International Year of the Disabled Person had a large part to play in achieving equality rights for the disabled by incorporating "disability" into the *Charter,* as did the voices of many Members of Parliament and advocacy groups.[29] While these observances and pronouncements do not form part of the legislative history of section 15 in the narrow sense, they can be brought to the attention of the courts as a means of recreating the general historical context which led to the Constitutional entrenchment of legal equality. Decisions based on section 15 clearly should represent continuity with a movement which has touched all free and democratic societies over the past several decades.

In short, the courts of Canada will have the task of ensuring that section 15 is interpreted in a way which is responsive to the political will that inspired it. All parties in the House of Commons in June of 1982 joined in a statement which is indicative of that will:

> The single point that the Committee wants to make here is that Canada has always prided itself on its humane foundations of government. It is precisely in times of economic, political and social strain that the true humanity of a people is proved. In those times, in these present times, a country decides whether it is a nation which includes everyone, or whether it is an

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26. G.A. Res. 217A (III), 3 U.N. GAOR 77; U.N. Doc. A/810 (1948).
27. G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49; U.N. Doc. A/6316 (1966).
28. For a detailed examination of how to use international law and its jurisprudence in Canadian courts see: M. Cohen & A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 Can. B. Rev. 265.
29. See, *e.g.,* above note 2 and below, note 30.

economically segregated society, which includes as full members only those who can pay the price of admission.

The question of the usefulness of individual human beings in Canadian society will be a central issue of legislative debate as technological change around the world exerts more pressures on the institutions of the Government.

If anything, it is the disabled in Canada who have done a favour for the rest of the population. Their very condition forces all individuals in Canadian society, and especially those who have political and economic power, to ask themselves: What is the value of Canada unless it continually expands the participation of Canadians? What will be the future of Canada, if it does not?[30]

3. Section 15 and Deinstitutionalization, Forcible Confinement, Segregated Education and Exclusionary Zoning

(a) Deinstitutionalization

Our national appetite for institutional care has begun to wane. The massive movement from institution to community will create additional demands for support at the community level. The gradual shift to community living is occasioned by three factors:

1. Personal growth and the ultimate reintegration of a person into society can best be achieved in a community setting.
2. Care in a smaller, home-like environment is more humane.
3. Care in a community setting is more cost effective.[31]

In *Clark v. Clark,*[32] the issue was whether the respondent, Justin Clark, was a mental incompetent as alleged by his father, the applicant. Justin Clark had been a resident of an Ontario institution for many years. He was placed there at the age of two when it was assumed that his severe cerebral palsy was accompanied by irremediable mental retardation. By the time of the mental incompetency hearing, he had reached the age of twenty, and had learned the Blissymbolic language. This gave him an increased feeling of competence and also a means of providing evidence that he was in fact competent. As an adult, he decided that it was time to leave and to live with friends in Ottawa. His family disagreed and brought a proceeding to have him declared mentally incompetent and subject to his father's guardianship.

In the judgment, it is recorded that on February 2, 1965, following a psychological examination, Justin Clark was described as follows:

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30. Special Committee on the Disabled and the Handicapped, *Obstacles: Progress Report* (1982), p. 7.
31. G. Tuoni, "Deinstitutionalization and Community Resistance by Zoning Restrictions" (1981), 66 Mass. L. Rev. 125.
32. Above note 18.

> He is a boy who has no meaningful speech but he seems to comprehend very simple questions and attends selectively to his external environment. He obtained a basal mental age of six months and a potential intellectual level prognosis of possibly mid-imbecile level.[33]

He was then two and a half years old.

Matheson Co. Ct. J. found in 1982 that Justin Clark had "proved himself over a long number of years as a model patient. By now he is able to communicate effectively. He is fully aware of his surroundings and knows where he is and where he is going." He concluded:

> Sir William Blackstone in Book the First of *Commentaries on the Law of England* stated in 1809 that the principal aim of society is to guard and protect individuals in the proper exercise of their individual rights. Such rights he characterized as *absolute*. I believe a courageous man such as Justin Clark is entitled to take a risk.
>
> With incredible effort Justin Clark has managed to communicate his passion for freedom as well as his love of family during the course of this trial.
>
> . . . .
>
> We have, all of us, recognized a gentle, trusting, believing spirit and very much a thinking human being who has his unique part to play in our compassionate interdependent society.
>
> And so, in the spirit of that liberty which Learned Hand tells us seeks to understand the minds of other men, and remembers that not even a sparrow falls to earth unheeded, I find and I declare Matthew Justin Clark to be mentally competent.[34]

The case is a graphic illustration of dramatic change occasioned by a refusal to limit the expectations of Justin Clark. Assessed in 1965 as "possibly mid-imbecile level", in 1982 he is seen as "a thinking human being who has his unique part to play in our compassionate interdependent society". This change in society's perception of Justin Clark occurred at the same time as society articulated a changing perception of all persons who are handicapped, by specifically including them in the prohibited grounds of discrimination enumerated in section 15.

Three years later, Justin Clark lives in an ordinary home of his own choosing. He goes to a regular city high school in order to develop his knowledge and life skills for use in the world from which he was excluded for nearly two decades. He receives the attendant services he needs because of his physical handicaps in his own home and community.

The significance of section 15 for the thousands of persons in Canada who are still confined to institutions because of their mental retardation or psychiatric problems can be assessed in terms of three interrelated issues:

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33. *Ibid.* at 386.
34. *Ibid.* at 392.

(1) How people initially get into institutions;
(2) What happens to them (or fails to happen) while they are there; and
(3) Whether there is justification in our society for having institutions for the confinement of persons on the basis of their mental disabilities.

In some cases, people enter institutions because other people make that choice for them. For those involuntarily committed because their behaviour constitutes a danger to themselves or others, there are procedures under provincial law to ensure evidence to support the placement and periodic review.[34.1] No such due process, however, was accorded Justin Clark when he entered the institution as a child or at any stage during his stay there until, after he became an adult, his parents sought a court order declaring him mentally incompetent in order to require him to continue to live there. The so-called "voluntary" admissions to institutions in effect create a class of people who, because of presumed mental disability, are deprived of their liberty without any kind of a hearing as to whether such deprivation is necessary or serves their best interests. No impartial person assesses the motivations of those who seek and condone the placement, although their interests may conflict with those of the person whose liberty is at stake. Often families agree to institutional placement of their members who have mental disabilities because of inadequate resources to meet the needs of such persons in their own homes and in their natural communities. It could be argued that such lack of resources effects unequal benefit of the law.

The second issue in relation to the institutionalization of persons who have a mental disability is the failure of such service systems to provide the positive experiences which enable individuals to grow in ability and understanding, and also the negative experiences of abuse, neglect and deprivation which are inevitably associated with large segregated congregate-care facilities. The constitutional attack on institutions in the U.S. courts has focussed on the double aspect of this issue – the right to habilitation and the right not to be subjected to dehumanizing experiences and conditions. The result of most of the leading cases is not clear-cut,[34.2] but American courts have played an active role in protecting the rights of residents to be free from inhumane conditions and to receive habilitative services in a setting which is less restrictive of their freedoms.

Perhaps the ultimate issue is whether such institutions should exist at all. The evidence is building that persons with mental disabilities can achieve greater dignity, security and personal development when they live and are served in community settings. It indicates that once people leave the institution and enter a more normal living situation with non-disabled persons as peers and

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34.1. The ability of these procedures to withstand scrutiny under section 15 will be considered under the sub-heading which follows.

34.2. There has been litigation against institutions in virtually every State in the U.S., in most cases leading to consent orders and on-going judicial monitoring of a phasing-out process. The most notable cases have been *Wyatt v. Stickney*, 344 F. Supp. 373 (Alabama, 1972), *New York State Association for Retarded Citizens v. Carey*, 706 F. 2d 956 (the "Willowbrook" case, 1983), and *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (Pennsylvania, 1977).

role models, their behaviour becomes more appropriate and their skills improve. People respond to being treated as equals by demonstrating how equal they really are.

A defendant institution may attempt to place before the court an argument that the care provided in such a facility "has as its object the amelioration of conditions of disadvantaged individuals", and so falls within the affirmative action exception in section 15(2). Such an argument would be subject to counter-attack on two fronts. First, the evidence is likely to reveal that institutional confinement does not, in fact, ameliorate the condition of those admitted, but on the contrary creates, on balance, greater disadvantage than the individual would experience in a non-institutional setting. Second, section 15(2) is not intended simply to preserve any "law, program or activity which has as its *object* the amelioration of conditions of disadvantage", regardless of the standard by which "amelioration" might be measured. The context, established by the Charter heading "Equality Rights", implies that those effects which can be viewed as "amelioration" will be those which enhance the equality of the disadvantaged individual. If institutionalization *per se* is deleterious to the well-being of the individual, it is not the type of service which section 15(2) is designed to protect.

Finally, a section 1 defence of institutional confinement by reason of mental disability must be considered. Can it be "demonstrably justified in a free and democratic society" to congregate large numbers of mentally disabled persons in one place, making their alienation from society more acute? Demonstrable justification would be difficult where it was shown that persons with similar disabilities live in the community to their own advantage and without interfering with the rights and safety of others.

(b) Forcible confinement

Various federal and provincial legislative schemes provide for the forcible confinement of mentally handicapped persons. Provincial "mental health" statutes provide for regimes of civil commitment.[35] By such legislation, an individual can be involuntarily confined in a psychiatric medical facility for a prescribed period of time, on the ground that the person has a mental illness, and meets other legislative criteria such as dangerousness.[36] The Federal *Criminal Code* provides for a scheme of "criminal commitment".[37] Under this legislation, accused persons may be subject to indefinite confinement in a prison, psychiatric facility, or other designated place, either because the individual has been found unfit to stand trial, or because he or she has been acquitted on indictable offence charges on account of insanity.[38]

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35. See, for example, *An Act to Amend the Mental Health Act*, S.O. 1978, c. 50.
36. For example, the Ontario *Mental Health Act* requires that for forcible commitment an individual be mentally ill and dangerous either to himself or others. *Ibid.* S.O. 1978, c. 50, s. 3.
37. See *Criminal Code*, R.S.C. 1970, c. C-34, ss. 532-547.
38. See with respect to unfitness to stand trial *Criminal Code*, R.S.C. 1970, c. C-34, ss. 542, 543; regarding the insanity offence *Criminal Code*, R.S.C. 1970, c. C-34, s. 16.

These legislative schemes share the common feature that they all involve measures whereby individuals can be deprived of their liberty, (for a designated short period or during an indefinite and possibly life-long period), in large part because they have, or have had a mental disorder, actual or perceived. Such schemes to varying degrees will be open to constitutional challenge under various *Charter* provisions.[39]

In particular, challenges can be made with respect to some of these schemes on the grounds that they deny a detained individual the equal protection and equal benefit of the law without discrimination because of mental disability. Such challenges could be broken down into two categories. First, the procedures for detaining and releasing an allegedly mentally disordered individual could be challenged.[40] To the extent that a deprivation of a person's liberty is carried out without adequate prior notice or without a judicial or quasi-judicial hearing to determine whether the civil or criminal commitment was authorized in the particular circumstances, it could be argued that the procedure for detaining a mentally disordered person is different from the procedures used for detaining a non-mentally disordered person under, for instance, the criminal law or parole regulations. This different treatment is based solely on the fact that the detainee is allegedly mentally disordered. It can operate to the detriment of the allegedly mentally disordered person in the commitment context, since, in the absence of fair procedures for accurately determining the propriety of detention, the allegedly mentally disordered person might be detained against his or her will and without legal justification.

One example can illustrate this point. Canada's *Criminal Code* provides for pre-trial detention of suspected criminals. The general mechanism for such pre-trial detention is called the bail process. The bail process has the objective of ensuring that the accused will appear for trial and will not abscond, and the protection of the accused and the public prior to trial. The *Code's* bail provisions provide an elaborate procedural regime for determining when an accused person should be released prior to trial and when he or she should be detained, consistent with these objectives. Pre-trial detention cannot be carried out for more than an extremely short period of time without a judicial bail hearing. Ordinarily, the bail hearing is conducted with the burden of proof on the Crown, save in exceptional circumstances. Bail determinations are subject to appeal to higher

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39. To the extent that they do not provide for a fair and accurate procedure for assessing the need for confinement, they might be challenged as contravening section 7's guarantee that no deprivation of the right to liberty shall occur "except in accordance with the principles of fundamental justice". (Compare *Re Cadeddu & R.* (1983), 41 O.R. (2d) 481; *R. v. Nunery* (1982), 40 O.R. (2d) 128.) Under Charter section 9, the involuntary confinement of a mentally disordered person could be challenged both as procedurally and substantively unjust, since that provision provides that no person shall be subject to arbitrary detention or imprisonment. Where the duration of involuntary confinement or the quality of treatment afforded to the detained individual while confined are suspect, a claim could be made that the detained individual was subject to "cruel and unusual treatment or punishment" contrary to section 12 of the Charter.

40. The section 15 procedural challenge would be articulated concurrently with a challenge to such procedures based on section 7. See footnote 39.

courts. The criteria for determining whether an individual should be released on bail or should be detained are clear and specific.[41]

In contrast, the *Criminal Code* provides a separate and unequal regime for the pre-trial detention of allegedly mentally disordered persons, namely those who are believed to be "unfit" to stand trial on account of "insanity".[42] The provisions are aimed at achieving objectives substantially the same as those for the bail provisions, namely the protection of the public and of the individual prior to trial, and ensuring that the trial would be able to begin at a time when the accused will be present in both the physical and psychological sense. However, the procedures for determining whether an individual is unfit to stand trial on account of insanity, whether he or she should thereby be detained, and whether he or she is subject to being released thereafter, include virtually none of the protections with respect to the bail procedures. To be found unfit to stand trial, a special hearing must be convened pursuant to the *Code's* fitness provisions.[43] The criteria for determining whether an individual is unfit to stand trial are extraordinarily vague (unfit to stand trial or unfit to conduct his or her defence on account of insanity) in contrast with the clear and specific criteria applicable to a bail determination. Once an individual is found unfit to stand trial, he or she is placed under a warrant of the Lieutenant Governor.[44] From then on, it is the Lieutenant Governor of the Province in which the person is detained who has sole discretion to determine whether or not this individual should be detained or be permitted to stand trial. Even if individual detainees could go to court and prove beyond any possible doubt, reasonable or otherwise, that they have recovered their fitness to stand trial, they need not be returned to court unless the Lieutenant Governor decides to do so. Unlike a bail revocation, an unfitness finding can amount to an indeterminate life sentence as far as the *Code's* authorizing provisions are concerned.

The *Code* establishes a permissive though not mandatory procedure for reviewing the status of persons who have been found unfit to stand trial. By *Code* section 547, the Lieutenant Governor of the Province in which the individual resides *may* (but need not) establish an Advisory Review Board of lawyers and doctors to periodically review the case of the detainee. The *Code's* provision does not require that these annual reviews include any sort of hearing at which individual detainees have a right to appear, know the case against them, or make submissions.[45] Moreover, if the Lieutenant Governor in his or her discretion, establishes an Advisory Review Board, and if, in its discretion the Advisory Review Board holds a hearing, and if, in its discretion the Advisory Review

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41. The *Criminal Code*'s (R.S.C. 1970, c. C-34) bail provisions mandating these procedures are found in ss. 457, 457.3-457.8 and 459.
42. See, e.g., *Criminal Code* R.S.C. 1970, c. C-34, ss. 542-547.
43. *Criminal Code* R.S.C. 1970, c. C-34, ss. 542, 543.
44. See *Criminal Code* R.S.C. 1970, c. C-34, s. 545(1).
45. See *Re Able & Dir., Penetanguishene Mental Health Center & Advisory Review Bd.* (1979), 24 O.R. (2d) 279 where it was held that if a hearing is convened, the Review Board must provide detainees with some notice of the case which they have to meet including some disclosure of the substance of the medical evidence laid against them.

Board recommends to the Lieutenant Governor that the detainee should be released, it does not follow therefrom that the accused will in fact *be* released. The Lieutenant Governor according to the *Criminal Code's* authorizing provisions is under no legal obligation either to review the report of the Advisory Review Board, or to accept its findings, or to provide the detainee with notice of the report and an opportunity to make submissions thereon. In contrast, as mentioned above, a detention without bail for any other accused is subject to appeal to the courts, and those courts have the power to release the individual if detention is found to be unjustified.

It might be argued that these different, and less fair, procedures for pre-trial detention of mentally disordered persons, as contrasted with pre-trial detention of non-mentally disordered persons, are necessary or more suited to the needs or interests of a mentally disordered person. However, such an argument operates on the assumption that findings of fact with respect to mentally disordered persons are somehow different in nature than are findings of fact with respect to non-mentally disordered persons. Such an observation, if true, would have led Parliament to revoke the insanity defence as a criminal matter, and would have substituted it for some post-trial medical determination process. Parliament has not done this. Instead, Parliament has determined by *Criminal Code* section 16 that a criminal court is fully capable of making findings with respect to the mental disorder of accused persons, and the risk of probable dangerousness which may flow from such a finding of mental disorder. Put more simply, courts have always been capable of making findings of fact with respect to the medical status of individuals, including the mental health of individuals. There is no reason why in the particular circumstances of unfitness to stand trial, such a capability should suddenly evaporate.

Along with the challenges which can be levelled at the *procedures* for detaining an allegedly mentally disordered person, a section 15 challenge could be mounted to certain of the *substantive* detention provisions as well. While civil commitment legislation is clearly open to such challenges as well, the example of the criminal commitment process under the *Criminal Code* of Canada provides a good example of the kind of discrimination based on mental disability which would be challengeable.

The *Criminal Code* provides that persons who are guilty of certain crimes can go to jail for certain fixed periods of time. While certain crimes are associated with either statutory minima or statutory maxima with respect to imprisonment, courts ordinarily retain some discretion over the extent of time which a criminal should spend in prison. In contrast, the *Code* provides that a person who is charged with an indictable offence and found not guilty thereof on account of insanity is *automatically* incarcerated for an indeterminate period.[46] The court which finds the individual not guilty by reason of insanity *must* incarcerate the individual pending the pleasure of the Lieutenant Governor. The Lieutenant Governor of the Province in which the individual is detained is then empowered under *Code* section 545(1) to either order that the individual be

46. See *Criminal Code* R.S.C. 1970, c. C-34, ss. 542 and 545.

detained in strict custody, or order release either unconditionally or upon conditions. This discretion is absolutely unfettered, according to the statutory language. Detention can continue for the rest of the individual's life unless the Lieutenant Governor in his or her discretion, decides to release the individual earlier.

It follows then that a person could be subject to considerably longer detention if found unfit to stand trial on account of insanity, than if the individual were convicted of the very same crime. It might well be provable that the individual acquitted on account of insanity is absolutely no danger to the public, but that the convicted individual *is* still a danger to the public 5 years after the date of the verdict. Nevertheless, convicted individuals would necessarily be entitled to release from jail regardless of the fact that they remain a danger to the public, whereas individuals acquitted on account of insanity have no right to release even though they are no danger. Indeed, in the case of the individual acquitted on account of insanity, even if the Lieutenant Governor determines in his or her absolute discretion that the individual acquitted on account of insanity *is* no longer a danger to the public, the Lieutenant Governor still retains the right to detain the individual in custody for an indeterminate period of time. This is because there is nothing in the *Criminal Code* which *requires* the Lieutenant Governor to release individuals once they have recovered and once they are no longer any danger to the public.

This differential treatment between a mentally disordered individual who is acquitted on account of mental disorder, and a convicted criminal who is not mentally disordered is linked solely to the fact that one has, or has had, a mental disability whereas the other has not. Section 15 will allow for an assessment of the legitimacy of the policy rationales for a deprivation of liberty where that rationale involves discriminatory policy based on an enumerated ground set out in section 15(1).[47] To justify such differential treatment, it would be necessary, under *Charter* section 1, to show that the mere presence of a mental disability automatically justifies so sweeping a differentiation between all mentally disordered persons and all others. Certainly it is doubtful that modern evidence can justify so wide a classification of all mentally disordered persons regardless of their circumstances.

(c) Segregated education

Whatever the extent to which subsection 15(1) is invoked in litigation over the continued confinement in institutions of persons with mental handicaps, be it in the civil or the criminal context, changes in government attitude and policies will mean that many hundreds of individuals, currently institutionalized, will be leaving and eventually returning to their local communities. How the social service support network responds to the needs of this large group

47. This latter challenge focuses not on the procedure for detention, but on the simple fact and justification of detention. This challenge arguably could not be brought under Charter section 7 since that provision may focus only on the procedure for the deprivation of liberty.

of people will provide many tests for the provisions of section 15 in relation to segregated education and exclusionary zoning.

The bedrock of personal growth is an appropriate education. Each province approaches the right to education from a different perspective. For example, the analysis of the issue in Quebec requires a consideration of a number of statutes. The Quebec *Charter of Human Rights and Freedoms*[48] makes the following provision:

> 40. Every person has a right, to the extent and according to the standards provided for by law, to free public education.

The issue becomes whether the Quebec *Education Act,*[49] read together with *An Act to Secure the Handicapped in the Exercise of Their Rights*[50] and, in particular, Chapter 3 thereof relating to Educational, Vocational and Social Integration, provides equal protection and benefits to persons who are disabled. That statutory package is far more comprehensive than that of its closest rival, the Province of Saskatchewan, which says:

> [E]very person between the age of six and twenty-one years shall have the right to attend school in the division in which he or his parents or guardian are residents, and to receive instruction appropriate to his age and level of educational achievement and in courses of instruction approved by the board of education in the school or schools of the division. . . .[51]

On the other hand, British Columbia's *School Act*[52] makes no attempt to define an *appropriate* education as a matter of individual entitlement:

> 155.(1)
> The Board of each school district shall:
>
> (a) except as otherwise provided in this Act, provide sufficient school accommodation and tuition, free of charge to:
>
> (i) all children of school age resident in that school district: . . . .

For much of our Canadian history, children with a mental disability received no education despite the existence of education legislation. The past 25 years has seen a marked improvement in providing a reasonable level of education to persons with a disability. Nevertheless, the vast majority of such children still attend school in segregated settings. They are denied the opportunity to interact on a daily basis with others in a more normal environment.

What will be the impact of section 15(1) upon the rights of persons with a mental disability to a free and appropriate education in an integrated setting, measured against the variety of approaches demonstrated by Canadian legislation?

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48. R.S.Q., c. C-12, s. 40.
49. R.S.Q., c. I-14.
50. R.S.Q., c. E-20.1.
51. The Education Act, R.S.S. 1978 (Supp.), c. E-0.1, s. 144(1).
52. R.S.B.C. 1979, c. 375, s. 155(1).

In the fall of 1952, the Supreme Court of the United States had cases on its docket from Kansas, South Carolina, Virginia and Delaware. While these cases were premised on different facts from different locations, each raised the issue of whether racial segregation in public schools was constitutional and whether the Court's previous opinion in *Plessy v. Ferguson*[53] should be allowed to stand. All cases were argued together. In its historic judgment in *Brown v. Board of Education of Topeka,*[54] delivered by Warren C.J., the Court said:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . .
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[55]

Comparisons can be drawn with the American experience. It is equally true to say of Canada that "today, education is perhaps the most important function" of provincial governments. Every Canadian jurisdiction has entered the field and made provision by statute for public education. Section 23 of the *Charter* contains a provision for citizens of Canada described in sub-paragraphs (a) and (b) to "have the right to have their children receive primary and secondary instruction in that language in that province". Apart from the interesting threshold question of whether that provision provides a right to education, all provincial education legislation must now be read in the full light of the equality rights guaranteed by subsection 15(1).[56]

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53. 163 U.S. 537 (1896).
54. 347 U.S. 483 (1953).
55. *Ibid.* at 493-95.
56. See p. 3 above.

Our international obligations provide a point of reference. As a nation we have accepted the principle of the right to an education.[57] Subsection 15(1), in part at least, should be interpreted as far as possible as a mechanism by which our international undertakings have been fulfilled.

If separate educational facilities based on race are inherently unequal because they deprive individuals of the equal protection of the laws guaranteed by the Fourteenth Amendment, can it be argued that separate educational facilities based on disability are, to a similar extent under subsection 15(1) of the *Charter* inherently unequal? The resolution of this question does not turn upon judicial interpretation of what might be "appropriate" under Saskatchewan legislation or what might be "sufficient" under British Columbia legislation. The question is whether the provincial legislation provides equal protection and benefit of the law as required by the *Charter* under section 15 (subject to section 1). Is specific legislation, which permits segregated educational facilities, discriminatory with respect to persons with a disability? It is our submission that specific legislation establishing programs of education exclusively for persons with mental handicaps cannot relieve the provinces of all the obligations contained in the general education statutes. This is not to say that special education programs are necessarily unconstitutional. But the existence of separate provisions for students who are handicapped does not displace application of the provisions for all other students to handicapped students. Equal benefit under section 15 of the general education legislation implies that the recipients of that benefit should receive it in integrated settings, and continue receiving it until they attain the same level of knowledge and skill as non-handicapped students or until they attain their full potential. Such a right would then be subject to the reasonableness limitation of section 1.

In determining the potential of section 15 as a tool to achieve genuine equality of opportunity, it is important to determine the role of the limits which an individual's actual handicap may impose. First, the concept of equal benefit looks to the end result rather than the means to the end. In other words, social spending is not just meant to be equated on a "dollars per person" basis. For example, where a person has a handicap which has the effect that he or she requires twice as long to acquire a given skill, then society should be prepared to expend the funds required to enable the individual to acquire that skill to the same level that a non-handicapped person could acquire it at public expense. Currently, many children who have mental handicaps are receiving appreciably *less* instruction than non-handicapped children with the result that the gap between the capabilities of those who are handicapped and those who are not grows wider during the critical developmental period of their lives.

Whereas the equality provisions in section 15 may not serve to require a general redistribution of wealth, the resources of society will have to be redirected in ways which will bring about greater equality of opportunity by minimizing the disparity in the skills and earning potential of people. This

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57. *Universal Declaration of Human Rights*, above note 26, Art. 26; *International Covenant on Economic, Social and Cultural Rights*, above note 27, Art. 13.

redistributive aspect is clearly one in respect of which section 1 limitations would have relevance; at some stage it becomes manifestly unreasonable to expect that persons with severe handicaps will be able to match some skill levels of those without handicaps and therefore unreasonable that resources should be allocated to achieve that unrealistic goal. Section 1 is not the only safeguard in this matter, however. Personal aspirations of those who are handicapped will usually fall within realistic limits.

(d) Exclusionary zoning

One of the major impediments to living in a community can be the roadblocks established by municipal zoning by-laws. Living in a home that is, in all respects, a family-like environment is critical in the habilitation or rehabilitation of many individuals.

The process of deinstitutionalization reflects the theory of "normalization";[58] in order to achieve maximum individual growth all persons should be entitled to live and be educated in "the least restrictive alternative", the alternative which is least restrictive to their individual growth and development.[59] Thus group homes and half-way homes are commonplace in Canadian society. They run the full range of foster homes and group homes for children, for juveniles in conflict with the law, for persons who are mentally handicapped or mentally ill and for adult offenders in the criminal justice system. For the elderly, the opportunity to live in small numbers in a "shared" home is, at times, the only way to escape the confinement of a large community-care facility. Municipal by-laws which restrict the areas of the municipality where such homes are permitted often impede the equal opportunity for small numbers of dependent persons to live in a less restrictive environment.

Whether property has been put to profitable or non-profitable use has been a significant factor in past zoning cases. In *R. v. Brown Camps Ltd.*,[60] the Ontario Court of Appeal ruled in 1969 that the defendant corporation was carrying on a business, contrary to the zoning by-law which restricted the use to single family dwellings. Even though the by-law permitted unrelated persons to reside together "as a housekeeping unit", the Court characterized the defendant's use of the property as commercial, on the ground that the young people living in the house were in fact participating in a profit-making treatment program.

In *City of Charlottetown v. Charlottetown Association for Residential Services*,[61] the Prince Edward Island Supreme Court was asked to consider whether a community-based residential living environment for six persons with a mental disability, living under the supervision of a house parent, offended the zoning by-law which made provision for one-family and two-family dwellings. A one-family dwelling was defined as "a detached building having independent exterior walls and designed or used exclusively for residence purposes by not more

58. W. Wolfensburger et al., *The Principle of Normalization in Human Services* (1972).
59. See above note 11, at 278.
60. [1970] 1 O.R. 388, [1970] 2 C.C.C. 363 (C.A.).
61. (1979), 29 Nfld. & P.E.I.R. 81, 100 D.L.R. (3d) 614 (P.E.I. S.C.).

than one family". A two-family dwelling was "a building containing two self-contained family housekeeping units, constructed one above the other. . . ." In his judgment, McQuaid J., after finding that the home was not operated for profit, said:

> I am satisfied from the evidence that this dwelling is used "*exclusively for residence purposes*". No professional training is provided to the occupants while they are in the residence and no rehabilitation program is conducted there. A living arrangement is all that is provided . . . .[62]

He relied upon Rogers' *The Law of Canadian Municipal Corporations*[63] and concluded that in the proper construction of a municipal by-law, the question to be addressed is, "What is the mischief and defect which the by-law attempts to cure and for which the common law fails to provide?"[64] He then concluded:

> The zoning by-law under consideration is obviously designed to protect the residential character of the neighbourhood and the question I must ask myself is whether or not the residential character of the Inkerman Boulevard area is being detrimentally affected or that the objective of the by-law is being frustrated by reason of the fact that seven mildly or moderately retarded adults are living together in a family setting at number 36. In my opinion, that question must be answered in the negative.[65]

The result in this case might have been different if C.A. R.S. had been a profit-oriented society. Secondly, the case also relies on the finding that "no rehabilitation program is conducted there". Clearly from the evidence, however, there was a program of habilitation, one designed to teach normal living skills to persons not familiar with such skills. There is no real distinction between habilitation and rehabilitation. Moreover, to deny that the living situation was part of a program designed to teach home skills would help defeat the objectives of community living.

The notion of regulating *who* might use property, as opposed to regulating the *use* of property, was the subject of the decision of the Supreme Court of Canada in *Bell v. The Queen*.[66] In that case, the appellant had been convicted of using a residence in the Borough of North York contrary to the municipal zoning by-law. That by-law restricted the use of a "dwelling unit" to one family. The unit had been used by two unrelated persons. The issue was whether a by-law of the Borough of North York defining family as "a group of two or more persons living together and inter-related by bonds of consanguinity, marriage or legal adoption . . . ." had been properly enacted pursuant to the provisions of the *Planning Act*.[67] On appeal to the County Court, His Honour Judge Hogg had acquitted the appellant and concluded that it was "open to the municipality to

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62. *Ibid.* at 91, 100 D.L.R. (3d), at 622.
63. Vol. 1, 468-69 (2nd ed. 1971), cited in *ibid.* at 92, 100 D.L.R. (3d) at 622.
64. Above note 61, at 92, 100 D.L.R. (3d), at 622.
65. *Ibid.* at 92-93, 100 D.L.R. (3d) 622.
66. [1979] 2 S.C.R. 212, 98 D.L.R. (3d) 255.
67. R.S.O. 1970, c. 349 (now R.S.O. 1980, c. 379).

determine how a dwelling is used but not who can use that dwelling".[68] The Supreme Court eventually upheld the acquittal.[69] In his majority judgment, Spence J. said:

> I am in exact agreement with His Honour Judge Hogg when he said that the by-law in question restricted the occupation to "family" and then defined "family" by reference to consanguinity, marriage and adoption only, and so was not regulating the use of the building but who used it. . . . In all four courts in argument, the dire result of such a restrictive provision as to the occupation of property was pointed out. . . . In view of the many possible inequitable applications of the definition of "family" which I have mentioned above, I am of the opinion that the by-law in its device of adopting "family" as being the only permitted occupants of a self-contained dwelling unit comes exactly within Lord Russell's words as to be found to be "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men" and, therefore, as Lord Russell said, the legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is *ultra vires* of the municipality under the provisions of *The Planning Act.*[70]

City of Charlottetown v. Charlottetown Association for Residential Services[71] gives support to the notion that unrelated persons with a disability should be allowed to live in homes in residential areas heretofore restricted to "family". *Bell v. The Queen* goes a step further by stating that under the Ontario legislation, zoning by the personal characteristics of people is unjustified.

It will be argued that the decision in *Bell* turned upon the specific provision of the *Planning Act* of Ontario. But, absent that legislation, subsection 15(1) of the Charter permits the argument that the zoning of property based on the personal characteristics of the user can be inherently discriminatory towards persons with a mental or physical disability. In the language of *Bell v. The Queen,* such provisions would be "oppressive" and "an interference with the rights of those subject to them as could find no justification in the minds of reasonable men."[72]

In *Smith v. Township of Tiny,*[73] the Township of Tiny passed a zoning by-law that defined family as "one or more human beings related by blood or marriage, or common-law marriage or a group of not more than three human beings who need not be related by blood or marriage, living together in a single

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68. Cited by Spence J., above note 57, at 17, 98 D.L.R. (3d) at 259 (decision at Co. Ct. unreported).
69. Above note 66; reversing (sub nom. *R. v. Bell*) 15 O.R. (2d) 425, 75 D.L.R. (3d) 755 (C.A.), which had followed an earlier decision of the Supreme Court of Canada in *Polai v. Corp. of Toronto,* [1973] S.C.R. 38, 28 D.L.R. (3d) 638.
70. Above note 66, at 220-23, 98 D.L.R. (3d), at 262-63, (*per* Spence J.)
71. Above note 61.
72. Above note 66, at 223, 98 D.L.R. (3d), at 263.
73. (1980), 27 O.R. (2d) 690, 12 M.P.L.R. 141 (H.C.); affirmed 29 O.R. (2d) 661, 114 D.L.R. (3d) 192 (C.A.); appeal denied 29 O.R. (2d) 661n, 35 N.R. 625n.

housekeeping unit". Robins J. was able to distinguish *Bell v. The Queen* by noting that in the latter case, family was restricted by reference to consanguinity, marriage and adoption only. The Township of Tiny had enlarged its definition to include "three human beings who need not be related by blood or marriage". Nevertheless, it remains a by-law which would in the result still discriminate against persons with a disability because unlike a normal family, they could not live together in a group larger than three in number.

The pitfalls of a stereotypical approach to persons with a mental disability are demonstrated by the American case of *Village of Belle Terre v. Boraas.*[74] In that case, the zoning by-law under review restricted land use to one-family dwellings and prohibited occupancy of a dwelling by more than two unrelated persons as a "family", while permitting occupancy by any number of persons related by blood, adoption or marriage. Douglas J.[75] expressed the opinion of the majority of the court and found no violation of the equal protection provisions of the Fourteenth Amendment. Applied to a group of persons with a mental disability and measured against the protections of s. 15(1) of the Charter this zoning by-law would be discriminatory in the same manner that the zoning by-law of the Township of Tiny would be discriminatory. Persons with a mental disability, like others, also appreciate "family values, youth values, and the blessings of quiet seclusion and clear air (which) make the area a sanctuary for people". The point is made by Marshall J. in his dissent in *Village of Belle Terre v. Boraas:*[76]

> The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The town has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.
>
> This is not a case where the Court is being asked to nullify a township's sincere efforts to maintain its residential character by preventing the operation of rooming houses, fraternity houses, or other commercial or high-density residential uses. Unquestionably, a town is free to restrict such uses. Moreover, as a general proposition, I see no constitutional infirmity in a town limiting the density of use in residential areas by zoning regulations which do not discriminate on the basis of constitutionally suspect criteria. This ordinance, however, limits the density of occupancy

74. 416 U.S. 1 (1974).
75. *Ibid.*, at 8-9.
76. *Ibid.*, at 16-17.

> of only those homes occupied by unrelated persons. It thus reaches beyond control of the use of land or the density of population, and undertakes to regulate the way people choose to associate with each other within the privacy of their own homes.

Douglas J. in *obiter,* said that a by-law that segregated on the basis of race would "immediately be suspect"[77] and, that in Seattle, "a proposed home for the aged poor was not shown by its maintenance and construction 'to work any injury, inconvenience or annoyance to the community, the district or any person' ".[78] Thus, he left open the argument that a group home for persons with a mental disability would be an acceptable use because it would not "work any injury, inconvenience or annoyance to the community, the district or any person."[79]

Where municipal zoning is designed so as to limit the use of land to residential purposes, its limitations must not discriminate against potential users who may have a disability. If such is the result, then there has been a denial of the equal protection and benefit of the law afforded by subsection 15(1) and the burden falls on the municipality to justify its legislative conduct and to demonstrate that the policies that it seeks to enforce are demonstrably justified in a free and democratic society under the terms of section 1.

4. Section 1 Review

(a) A large and liberal interpretation

In their approach to this new legislative field, courts should pay heed to the dictum of Lord Sankey L.C., in *Edwards v. Attorney-General for Canada,* that the Constitution is a "living tree capable of growth and expansion within its natural limits".[80] "Narrow and technical construction" of section 1 will defeat the notions of equality expressed by the language of subsection 15(1). Conversely, "a large and liberal interpretation" of the section will contribute to the full realization of the potential of section 15.

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77. *Ibid.,* at 6.
78. *Ibid.,* at 7.
79. Different jurisdictions in the United States have utilized varying methods to overcome the unacceptable results of exclusionary zoning. See also J. Trail, "Exclusionary Zoning of Group Homes" (1982), 43 Ohio St. L.J. 167, where the author says, at 189:

> Local zoning laws excluding foster children, mentally ill, or the mentally retarded are subject to an equal protection attack. Classifying the retarded or mentally ill on the basis of an immutable characteristic present at birth appears to treat these people as a separate class of citizens. The need to protect the politically impotent from a stigma of inferiority may demand that laws affecting this 'discrete and insular minority' receive strict scrutiny by the court. Even if the claim of suspect classification fails, the interference with fundamental rights may warrant strict scrutiny of laws diminishing the exercise of those rights.

For a review of some U.S. jurisdictions, see Note, "Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning" (1981), 6 Vt. L. Rev. 509; see also P. Albee, "Deinstitutionalizing the Mentality Retarded in Maine: The Inevitable Face-off with Zoning" (1983), 35 Me. L. Rev. 33.

80. [1930] A.C. 124, at 136, [1929] 3 W.W.R. 479, at 489.

Notwithstanding the disclaimer of the Ontario Court of Appeal in *Re Southam Inc. and The Queen (No. 1)*,[81] that, "we are left, at present to a certain extent wandering in unexplored terrain in which we have to set up our own guide-posts in interpreting the meaning and effect of the words of s. 1 of the Charter",[82] a considerable jurisprudence has already begun to develop.

(b) The burden of proof

There emerges from the early jurisprudence a clear consensus that the onus or burden of proof under section 1 lies upon those who seek to impose the limitation on the fundamental right or freedom guaranteed by the *Charter*.[83]

It appears clear that those who would seek to limit the right to equal protection and benefit of the law granted to persons with a disability must have the burden of proof. Where litigation involves an argument based on subsection 15(1), the court will have to make a preliminary, *prima facie* determination that the plaintiff has apparently received less protection or benefit under the relevant law than would ordinarily be extended to other citizens. The onus for establishing that fact would be on the plaintiff. Once the court has made such a determination, the onus shifts to the defendant to show that the qualifying words of section 1 apply, rendering the discrimination lawful. Thus, if separate schools for children with a disability are discriminatory under subsection 15(1), the burden falls upon the local school board to justify the limits it would place in the relevant education legislation in terms of section 1. Similarly, the burden would fall on the local municipal authority to justify a zoning by-law that was discriminatory to persons with a disability.

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81. (1983), 41 O.R. (3d) 113, 146 D.L.R. (3d) 408 (C.A.).
82. *Ibid.* at 129, 146 D.L.R. (3d) at 424.
83. See for instance, *Re Southam and R. (No. 1) Ibid.* at 124, 146 D.L.R. (3d) at 419:

> Section 1 guarantees those rights and, although the rights are not absolute or unrestricted, makes it clear that if there is a limit imposed on those fundamental rights by law, the limits must be reasonable and demonstrably justified in a free and democratic society. The wording imposes a positive obligation on those seeking to uphold the limit or limits to establish to the satisfaction of the court by evidence, by the terms and purpose of the limiting law, its economic, social and political background, and, if felt helpful, by references to comparable legislation of other acknowledged free and democratic societies, that such limits are reasonable and demonstrably justified in a free and democratic society.

In a similar fashion, the onus or burden was placed on the Crown in *R. v. S.B.* (1982), 40 B.C.L.R. 273, 1 C.C.C. (3d) 72 (S.C.); in *Re Ont. Film and Video Appreciation Soc. and Ont. Bd. of Censors* (1983), 41 O.R. (2d) 583, (sub nom. *Ontario Film and Video Appreciation Soc. v. Ont. Bd. of Censors*) 34 C.R. (3d) 73 (Div. Ct.); appeal dismissed *Re Ont. Film and Video Appreciation Soc. and Ontario Censor Bd.* (1984), 45 O.R. (2d) 80 (C.A.); in *Que. Assn. of Protestant School Bds. v. A.G. Que. (No. 2)* (1982), 3 C.R.R. 114, 140 D.L.R. (3d) 33 (C.S.); appeal dismissed (1983), 1 D.L.R. (4th) 573 (C.A.); as well as on the Federal Republic of Germany, in *Re Fed. Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225, (sub nom. *R. v. Rauca*) 34 C.R. (3d) 97 (C.A.); and on the Upper Can. Law Society in *Re Skapinker* (1983), 40 O.R. (2d) 481, (sub nom. *Re Skapinker and the Law Soc. of Upper Can.*) 145 D.L.R. (3d) 502 (C.A.).

It appears that the presumption of constitutional validity does not apply to legislation being evaluated under the *Charter.* At least it is not available after it has been shown that there has been interference with a guaranteed right or freedom.[84] The words "demonstrably justified" are words of common understanding and usage and they place a significant burden on the proponents of the limiting legislation. According to *Re Federal Republic of Germany and Rauca,* the standard to be met by the party seeking to justify limitations is a high standard.[85] Statutory exceptions which are arbitrary and/or unreasonable will contravene the guarantee of rights and freedoms contained in the *Charter.*[86] The stereotypical assumptions about persons with a mental disability already discussed in this chapter would not be a sound basis to impose limits on the equality rights of such persons.

(c) Prescribed by law

A consensus appears to be developing that the limitation sought to be imposed must have some legal force and cannot be vague and undefined.[87] In *Federal Republic of Germany v. Rauca,* Evans C.J.H.C. said:

> The phrase "prescribed by law" requires the limitation to be laid down by some rule of law in a positive fashion and not by mere implication. The rule of law containing the limitation will normally be statutory although it is possible that it may be found in delegated legislation or in the form of a common law rule.[88]

(d) Free and democratic society

The issue here is whether the limitation is one which could be expected to be found in a free and democratic society. The question is not whether the law itself springs from a free and democratic society, as appears to be the approach of Deschenes C.J.S.C., in *Quebec Protestant School Boards v. A.G. Quebec (No. 2).*[89] Section 1 rather disallows the assumption that since Canada is a free and democratic society the limitation imposed must be reasonable within the context of that kind of society.

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84. *Re Ont. Film and Video, ibid.* at 589, 34 C.R. (3d) at 81.
85. Stated Evans C.J.H.C. in *Fed. Republic of Germany v. Rauca* (1983), 38 O.R. (2d) 705, at 716, 141 D.L.R. (3d) 412, at 423, "The notion of justification is qualified by the word 'demonstrably' which means in a way which admits of demonstration which in turn means capable of being shown and made evident or capable of being proved clearly and conclusively".
At the Court of Appeal, "demonstrably justified" was defined as placing "a significant burden on the proponents of the limiting legislation." (Above note 83, at 246, 34 C.R. (3d), at 121 (*per curiam*).)
86. *R. v. Oakes* (1983), 2 C.C.C. (3d) 339, 32 C.R. (2d) 193 (Ont. C.A.).
87. See, *e.g., Re Ont. Film and Video Soc.,* above note 83, at 592-93, 34 C.R. (3d), at 83-84.
88. Above note 85, at 716, 141 D.L.R. (3d) at 423 (H.C.).
89. Above note 83, at 146-47, 140 D.L.R. (3d), at 66-67.

(e) Reasonable limits

In the context of defining "reasonable limits", the courts have already signalled that the analysis of the limitation is to be objective;[90] limitations cannot be arbitrary or unreasonable;[91] and a comparative study of the legislation of other free and democratic societies is in order.[92]

In addition, after determining that the legislation meets a desirable social objective, the court must ask if that objective actually necessitates differential and more restrictive treatment of the group in question. Once that is established, the question then shifts to whether it is based upon ulterior motives which are offensive to the equality rights guaranteed to persons with a disability.

If that test is to be applied, what is the social objective, for instance, of denying children who are disabled equal opportunity to an appropriate education in an integrated setting? Similarly, what social objectives could be achieved by denying a community residential setting to persons with a disability?

The analysis of the legislative objective may require for instance, that the proponent of the limitation bring forth such evidence as may have been available to the legislative body when the limitation was imposed.[93]

An argument often heard by persons with a disability is an economic argument. Of course, governments should not be required by the courts to spend more on social programs than they are prepared to raise by taxes or borrowing. But the funds that are available cannot be withheld from some members of society in a discriminatory manner. In other words, if a given benefit would cost $1,000 in the case of an average individual citizen and there are 1,000 citizens who require that service, then all are entitled to the services, and a budget of $1,000,000 is required to make the service available to all who require it. If it costs $2,000 to fulfill that entitlement in the case of a person with a disability, then it is submitted that subsection 15(1) will prohibit withdrawing the service from the handicapped person. If the $1,000,000 budget limit is retained, then all must suffer some diminution of the benefits so that the person with a handicap is not deprived of it altogether. That person may in fact experience less than a full advantage of the service in question by reason of fiscal restraints, but *only*, in our submission, if everyone else also foregoes some of that service proportionately. Thus, if education is to be provided by legislation to all persons, then limitations

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90. *R. v. S.B.*, above note 83, at 281, 1 C.C.C. (3d), at 81; *Re Fed. Republic of Germany and Rauca*, above note 83, at 241, 34 C.R. (3d), at 115-16.

91. Above note 86, at 262-63, 32 C.R. (2d), at 218.

92. See *R. v. S.B.*, above note 83; *R. v. Oakes*, above note 75; *Que. Assn. of Protestant School Bds.*, above note 83; and *Re Southam*, above note 81.

93. See *R. v. Oakes*, above note 86, at 363, 32 C.R. (3d), at 219, where Martin J.A. said:

> In deciding whether such a rational connection exists the courts should attach due weight to Parliament's determination, if Parliament has addressed the question. Where empirical data might validate an inference that would not appear to be warranted by common experience, I would be prepared to examine any information made available to Parliament in enacting the reverse onus legislation and which might tend to establish a rational connection between the proved fact and the presumed fact. No such material was put before us in this case.

upon the education of persons with a handicap or disability are not valid upon the basis of economic objectives unless society places corresponding limitations on everyone else.

The kinds of limits which the courts ought to permit to stand in the way of full equality for all Canadians are those which are truly necessary in the circumstances. Examples can be found in the area of employment rights, where the concept of *bona fide* occupational requirements has been used to protect an employer from having to hire persons whose disabilities would clearly make it impossible for them to perform the essential tasks involved in the job, even after reasonable accommodations have been made to assist them to do so. Similarly, limitations may have to be imposed by law on the freedom of persons whose behaviour is so maladaptive that serious harm is likely to befall them or be caused by them. In such a case, however, the reasonable limit should have to be one which represents the least restrictive alternative by which such harm could be avoided.

5. Remedies

Section 24 invites our courts to become creative and innovative in the remedies they are prepared to fashion in response to violations of the *Charter*. It would be unwise to attempt to fashion limits on the task of designing remedies now imposed by the *Charter* upon the Canadian judiciary. Law is a process, a continued search for what is an acceptable community consensus. Judges, called upon to decide whether rights or freedoms have been infringed, must not be dissuaded from doing what is "appropriate and just in the circumstances" merely because it has not been done before. That is not the legislative mandate contained in subsection 24(1) of the *Charter*.

Brown v. The Board of Education of Topeka was first argued before the Supreme Court of the United States in December 1952. It was reargued exactly a year later, after the court asked for further argument on two points.[94] One of those points was the kind of decree which could and should be issued to bring about an end to racial segregation, if such segregation were found to violate the Fourteenth Amendment. In its second decision, *Brown v. Board of Education of Topeka,*[95] the Supreme Court dealt with the manner in which relief was to be accorded. Stated Chief Justice Warren:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts

94. Above note 54. In its first judgement, the Court said, at 495:
> On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question – the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.

95. 349 U.S. 294 (1955).

> will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
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> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . .
>
> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. . . . During this period of transition, the courts will retain jurisdiction of these cases.[96]

In the language of subsection 24(1), i.e., "such remedy as the court considers appropriate and just in the circumstances", will occasionally require careful working out over time. This may require direct intervention in the administration of the relevant public service, especially where those "circumstances" involve a long history of discriminatory practices and counterproductive segregated service systems. No simple or single dictum from the bench will immediately put things right. The concept of courts retaining jurisdiction has a limited application in the Canadian judicial system (as, for example, in custody and maintenance matters in the family courts). Subsection 24(1) should considerably expand the utility of that concept both in terms of the range of issues to which it is germane and also the measure of on-going control which the courts will be required to exercise. The American system of special court masters who mediate the court's intentions to the parties and monitor the movement towards full compliance is deserving of careful consideration in elaborating remedies in *Charter* cases in Canada.

A consideration of issues such as segregated education and exclusionary zoning as they relate to persons with a mental disability should lead to a consideration of the "least restrictive alternative" both in defining acceptable limitations on equality rights, and in fashioning appropriate remedies. The search to find the least restrictive alternative is an invitation to focus on the individual and to fashion a remedy in the tradition of the Courts of Equity. The social support mechanism required by persons with a mental disability will vary according to the needs of each individual. There is no stereotypical person with a mental disability. In a case dealing with the use of local library facilities by a

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96. *Ibid.* at 299-301.

person who is sightless, it becomes apparent that the solution lies in the development of a braille service. Such a service would, of course, be a support to all persons who are sightless. Similarly, provisions in a public transit system for wheelchair accommodation would meet the needs of all persons confined to such a supporting device.

The nature and extent of mental disabilities vary widely.[97] In the field of education it will not be sufficient simply to desegregate. Such a remedy is far too simplistic. Any remedy must begin a process which sets in place a continuing mechanism of support so that the person may live lifelong with the least restrictive alternative. That process begins within the local neighbourhood school. Equality rights for persons who are mentally disabled must provide them with the opportunity to participate to the maximum extent possible in the life of their community and in the manner which is uniquely appropriate for each individual. In the final analysis, equality rights have meaning and worth, not because people are in fact equal in their needs, capacities and potentialities, but precisely because each of us is unique. Section 15 is intended to protect and foster that individual uniqueness. Everyone who has a real or perceived handicap is in danger of having his or her individuality submerged in an imposed classification which is sealed by any one of several labels which make disability the primary description of the person. Section 15 holds the promise of finally breaking those seals and liberating individuals to experience and demonstrate their distinctiveness.

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97. Assistance in understanding the special needs of persons with disabilities can be found in such resources as R. Abella, *Access to Legal Services by the Disabled* (1983); G. Patti & G. Morrison, "Special Report: Enabling the Disabled" (1982), 60 Harv. Bus. Rev. 152; S. Herr, *The New Clients: Legal Services for Mentally Retarded Persons* (1979); H. Savage, *Justice for Some: A Discussion Book on Law for People with Mental Handicaps and Their Friends* (1983).