Re Ontario Human Rights Commission et al. and the Queen in Right of Ontario et al.; Charter Committee on Poverty Issues et al., Intervenors

[Indexed as: Ontario Human Rights Commission v. Ontario]

Court of Appeal for Ontario, Houlden, Finlayson and Weiler JJ.A.
August 16, 1994

Human rights — Discrimination — Age — Government program denied complainant financial assistance in purchasing visual aid because of his age — Complainant discriminated against on basis of age — Age restriction in program not protected by s. 14(1) of Human Rights Code — No rational basis for discrimination — Human Rights Code, R.S.O. 1990, c. H.19, ss. 1, 14(1).

R, a 71-year-old man who was legally blind, applied to the Ontario Ministry of Health's Assistive Devices Program ("ADP") for financial assistance in purchasing a closed-circuit television magnifier which would enable him to read and do other tasks involving fine visual acuity. He was denied ADP funding as there was an age limit (18 at that time) for funding visual aids. R complained to the Ontario Human Rights Commission that his right to equal treatment with respect to services provided to persons with his disability was infringed on the ground of age, contrary to ss. 1 and 8 of the *Human Rights Code*. A board of inquiry was appointed. The board concluded that the age restriction built into the ADP, which on its face appeared to violate s. 1 of the *Code*, was protected by s. 14(1), which protects special programs "designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I."

That decision was affirmed by the Divisional Court. R and the Human Rights Commission appealed.

Held, the appeal should be allowed.

Per Weiler J.A.: Section 14(1) has a dual purpose: the exemption of affirmative action programs from review and the promotion of substantive equality. The Divisional Court erred in law in construing s. 14(1) as having as its only purpose the exemption of special programs from the application of the *Code*. Where a person whom a special program is designed to assist is discriminated against on an enumerated ground prohibited by the *Code*, s. 14(1) is to be construed as an interpretive aid aimed at promoting substantive equality. Programs aimed at promoting substantive equality are reviewable depending on the context in which the challenge is brought. The exemptive purpose of s. 14(1) was not invoked in this appeal.

Although the commission's powers are excluded under s. 14(5) when a complaint is made respecting a special program provided by the Crown or a Crown agency, the commission may, upon receipt of a complaint under s. 36, request that a board of inquiry be appointed. In circumstances such as this case, the board of inquiry may review a special program. In this case, the board of inquiry and the Divisional Court erred in law in finding that the inquiry ends when "special program" status is proven. The inquiry should have considered: (1) whether a particular provision or limitation of a special program results in discrimination against a person or group with the disadvantage the program was designed to

benefit; and (2) whether the provision is reasonably related to the scheme of the special program.

R was discriminated against on the basis of age and such discrimination was not reasonably related to the vision aids category of the ADP. The order of the Divisional Court should be set aside and the age restriction in the vision aids category of the ADP should be struck out.

Silano v. British Columbia (1987), 33 C.R.R. 331, 42 D.L.R. (4th) 407, [1987] 5 W.W.R. 739, 16 B.C.L.R. (2d) 113 (S.C.), **consd**

Per Houlden J.A. (concurring): Where a complaint is filed concerning a special program implemented by the Crown for which s. 14(1) protection is claimed, the commission may only proceed by requesting that the Minister appoint a board of inquiry under s. 36 of the *Code* and refer the complaint to the board. The commission cannot proceed under s. 14(2). However, a special program implemented by the Crown is subject to the same scrutiny as any other special program. The scheme of s. 14 does not contemplate a lesser standard of review for, or a greater deference for, a special program of the Crown which seeks the protection of s. 14(1).

Where exclusion from an affirmative action program is based on one of the prohibited grounds in s. 1 of the *Code*, there must be a rational or logical connection between the prohibited ground and the provision of services under the program; if there is not, the program is not protected by s. 14(1). In this case, the age restriction in the ADP had no logical or rational connection with admission to the program and, hence, it was not protected by s. 14(1). It should be struck out.

Per Finlayson J.A. (dissenting): While the commission may refer a complaint respecting a Crown special program to a board of inquiry, the board cannot make modifications to the program in the same manner as the commission is entitled to do under s. 14(2). The ADP program is not reviewable in the sense employed by Weiler J.A. Weiler J.A.'s finding that "the discrimination is not reasonably related to the vision aid category of the assistive devices program", even if a permissible finding by an appellate court is part of a process of modification that is only permitted by the commission with respect to private sector programs under s. 14(2)(*c*).

The fact that a special program has some incidental discriminatory effect does not, in itself, disqualify it from meeting the requirements of s. 14(1). Section 14 must afford some relief against charges of discrimination, otherwise it is much reduced in effectiveness. The implementor of the program does not have to demonstrate that there is a rational connection between the hardship or disadvantage and the discriminatory feature in order to justify some discriminatory effect of the program. Section 14 is not wedded to a reverse discrimination concept. Programs that are in part discriminatory can be justified on another basis rationally connected to the purpose or implementation of the special program.

Once it is evident that a program has a discriminatory feature to it, the proponent of the program must justify the discrimination. That justification must demonstrate that: (1) the selection process is rational in the context of the purposes of the program; and (2) the elimination of the discriminatory aspect would be injurious to the implementation of the program.

The evidence before the board of inquiry in this case demonstrated that the selection process was rational in the context of the program and that the elimi-

nation of the discriminatory aspect would have been injurious to the implementation of the program.

Other cases referred to

Athabasca Tribal Council v. Amoco Canada Petroleum Co., [1981] 1 S.C.R. 699, 124 D.L.R. (3d) 1, 37 N.R. 336, [1981] 6 W.W.R. 342; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 38 C.R.R. 232, 57 D.L.R. (4th) 231, 92 N.R. 110, [1989] 3 W.W.R. 97, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105; *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609, 88 N.R. 321; *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193, 76 N.R. 161 *sub nom. Action Travail des Femmes v. Canadian National Railway Co.*; *Chambly (Commission scolaire régionale) v. Bergevin*, [1994] S.C.J. No. 57; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, 11 C.R.R. (2d) 1, 95 D.L.R. (4th) 439, 141 N.R. 1, [1992] 6 W.W.R. 385, 92 C.L.L.C. ¶17,033, 4 Alta. L.R. (3d) 193 *sub nom. University of Alberta v. Alberta*; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 45 C.R.R. 1, 64 D.L.R. (4th) 577, 102 N.R. 321, [1990] 1 W.W.R. 577, 41 C.P.C. (2d) 109, 71 Alta. L.R. (2d) 273; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 36 C.R.R. 1, 19 Q.A.C. 69, 54 D.L.R. (4th) 577, 90 N.R. 84 *sub nom. Chaussure Brown's Inc. v. Québec (Procureur Général)*; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, 52 D.L.R. (4th) 432, 87 N.R. 37; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 9 C.R.R. 355, 11 D.L.R. (4th) 641, 55 N.R. 241, [1984] 6 W.W.R. 577, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, 84 D.T.C. 6467, 33 Alta. L.R. (2d) 193 *sub nom. Southam Inc. v. Director of Investigation & Research, Combines Investigation Branch*; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 137 D.L.R. (3d) 219, 43 N.R. 168, [1983] 1 W.W.R. 137, [1982] I.L.R. 1-1555, 39 B.C.L.R. 145; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, 64 N.R. 161, 17 Admin. L.R. 89, 9 C.C.E.L. 185, 86 C.L.L.C. ¶17002, 12 O.A.C. 241, 52 O.R. (2d) 799*n*; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 13 C.R.R. 64, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 18 C.C.C. (3d) 385, 85 C.L.L.C. ¶14,023, 37 Alta. L.R. (2d) 97; *R. v. Hess*, [1990] 2 S.C.R. 906, 50 C.R.R. 71, 119 N.R. 353, [1990] 6 W.W.R. 289, 59 C.C.C. (3d) 161, 79 C.R. (3d) 332, 46 O.A.C. 13, 73 Man. R. (2d) 1 *sub nom. R. v. Nguyen*, *R. v. Boyle*; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, 157 N.R. 97, 349 A.P.R. 81, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179, 125 N.S.R. (2d) 81; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Saskatchewan Human Rights Commission v. Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93, [1985] 3 W.W.R. 717, 39 Sask. R. 81 (C.A.); *Weatherall v. Canada*, [1988] 1 F.C. 369, 11 F.T.R. 279, 32 C.R.R. 273, 59 C.R. (3d) 247 (T.D.) [revd [1991] 1 F.C. 85, 49 C.R.R. 347, 73 D.L.R. (4th) 57, 112 N.R. 379, 58 C.C.C. (3d) 424, 78 C.R. (3d) 257 *sub nom. R. v. Conway* (C.A.)]; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, 21 D.L.R. (4th) 1, 61 N.R. 241, [1985] 6 W.W.R. 166, 8 C.C.E.L. 105, 85 C.L.L.C. ¶17,020, 38 Man. R. (2d) 1

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Criminal Code, R.S.C. 1970, c. C-34, s. 146(1)
Human Rights Code, R.S.O. 1990, c. H.19, preamble, ss. 1, 2, 5, 8, 9, 10(1) "age", "equal", 14, 22, 24, 25(*a*), (*b*), 31, 33, 35(1), 36, 38(1), 39, 40, 41, 42, 47
Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 6(1)
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Ontario, Legislative Assembly Debates, vol. 5, pp. 5096-98 (December 9, 1980)

Ontario Human Rights Commission, "Life Together: A Report on Human Rights in Ontario" (1977) (Thomas H.B. Symons, Chair), p. 35

Ontario Law Reform Commission, *Litigating the Relationship Between Equity and Equality* (Study Paper) by Colleen Sheppard (Toronto, 1993) pp. 4, 14, 28, 73

Orton, H., "Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*" (1990), 19 *Man. L.J.* 288, p. 299

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Vizkelety, "Affirmative Action, Equality and the Courts: Comparing *Action Travail des Femmes v. CN* and *Apsit and the Manitoba Rice Farmers Association v. The Manitoba Human Rights Commission*" (1990), 4 *C.J.W.L.* 287, pp. 289, 291

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APPEAL from a judgment of the Divisional Court dismissing an appeal from a decision of a board of inquiry appointed under the *Human Rights Code*, R.S.O. 1990, c. H.19.

Joanne Rosen, for appellant, Ontario Human Rights Commission.

Anne Molloy and *Janet Budgell*, for appellant, E. Roberts.

Douglas K. Gray, for respondents.

Mary Cornish, for intervenors.

WEILER J.A.: — This appeal raises the following question: can a person who is in need of the assistance that a special government program provides, arbitrarily be refused assistance on account of age, a prohibited ground of discrimination under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the *Code*)? The answer to this question lies in the interpretation given to s. 14(1) of the *Code*.

I INTRODUCTION

Mr. Roberts is legally blind. He has lost the central vision required for reading or for any task involving fine visual acuity.

His peripheral vision remains unaffected. In May 1986, low vision specialists advised Roberts to obtain a closed circuit television magnifier which would enable him to read, write cheques and view pictures of his grandchildren. In August 1986, Roberts applied to the Ministry of Health's Assistive Devices Program ("ADP") for financial assistance in purchasing this device, which cost over $3,000. He was 71 years old at the time. It is conceded by the respondent that, but for his age, Roberts would have qualified for funding from this special program. When Roberts was denied ADP funding, he approached a service club for assistance. When no assistance was given he purchased the device himself.

In March 1987, Roberts filed a complaint under the *Code* which led to the appointment of a board of inquiry. The board dismissed Roberts' complaint in April 1989. The *Code* provides a broad right of appeal from the decision of a board of inquiry and the Divisional Court may affirm or reverse the decision of the board or make any decision that the board is authorized to make under the *Code*, including substituting its own opinion for that of the board. An appeal from the board's disposition to the Divisional Court was dismissed on December 18, 1990. Leave to appeal to this court on a question of law was obtained on September 23, 1991. By order of the Associate Chief Justice of Ontario dated December 15, 1993, the *Charter* Committee on Poverty Issues and the Canadian Disability Rights Council were granted intervenor status as a friend of the court.

II THE ADP PROGRAM

The ADP is a program operated by the Ministry of Health. It provides financial assistance to Ontario residents with long-term physical disabilities for the purchase of certain medically prescribed devices. The ADP assists persons who require communication aids, hearing aids, mobility aids such as wheelchairs, incontinence drainage supplies, orthotic, prosthetic, or respiratory devices and visual aids. The program covers devices which are useful in daily living, and not exclusively required for work, school or sports. Devices required solely for the education of children are funded by a different program operated by the Ministry of Education, while the Ministry of Community and Social Services provides assistive devices for post-secondary education. A program operated by Vocational Rehabilitation Services covers work-related devices.

The ADP was initially established in 1982 as a program for children. The intention was to commence the program with a manageable group and expand it as the appropriate level of serv-

ice could be provided. At that time, the program funded up to 75 per cent of the cost of certain specific assistive devices for persons 18 years of age and under. In 1983 and 1984, the types of assistive devices covered by the program were expanded. Since that time, the grant formula has been changed and the age limit for assistance with respect to some devices such as hearing aids, has been extended to include people of all ages. Despite an announcement by the Minister of Health in 1986 that the program would be expanded to eliminate all age restrictions, an age restriction has remained for the funding of some devices, including visual aids. In 1988, the age limit for funding visual aids was raised to 24 and it has been raised by one year each year since that time. The limit is now 30 years of age. The program is administered through policy directives. No specific legislative basis for the program was cited to the court.

In order to qualify for the subsidy for an assistive device, an applicant must: (a) attend upon a physician, who must complete a form containing prescribed information; (b) attend upon a health care professional, who must describe in detail the type of equipment required and its approximate cost, and who will ensure any necessary training in the use of the equipment; (c) in some cases, be assessed by a team of health care professionals at an approved clinic; and (d) obtain the equipment. If the equipment is obtained from a registered vendor, the ADP program is billed directly for 75 per cent of the approved costs. If the equipment is obtained from a non-registered vendor, the entire cost is paid by the applicant who then obtains reimbursement for up to 75 per cent of the price approved by the ADP. Although in some cases the funding will have the effect of relieving economic disadvantage, no needs test is administered before an applicant receives funding for a visual aid.

The parties agree that this particular visual aid, a closed circuit television magnifier, has recently been reclassified. It is now in a different category of assistive devices to which no age restriction applies. It is not suggested, however, that the removal of the closed circuit television magnifier from the vision aids category has the effect of rendering this appeal moot. The question of standing is determined at the time the application is made. At that time, the closed circuit television magnifier was in the vision aids category which was (and still is) subject to an age restriction which eliminated Roberts as a potential candidate for financial assistance. It is for this reason that despite the reclassification, the respondent maintains its refusal to reimburse Roberts for the closed-circuit television magnifier he purchased. Even if it can

be said that this appeal is moot, keeping in mind the principles set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 38 C.R.R. 232, we are satisfied that we should exercise our discretion to decide the case.

III THE ONTARIO HUMAN RIGHTS CODE

The *Code* is divided into five parts. Part I (ss. 1-9) sets out the areas in which equality rights are guaranteed. Part II (ss. 10-26) contains interpretive provisions as well as statutory defences under the *Code*. Part III (ss. 27-31) sets out the mandate and powers of the Commission. Part IV (ss. 32-45) deals with enforcement. Part V (ss. 46-48) contains general provisions.

The relevant portion of s. 1, Part I of the *Code*, provides:

> 1. Every person has a right to equal treatment with respect to services ... without discrimination because of ... age ...

The applicable definition of age is contained in s. 10(1):

> 10(1) In Part I and in this Part:
>
> "age" means an age that is eighteen years or more ...

Section 14(1) in Part II of the *Code* provides:

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

IV THE DIVISIONAL COURT DECISION

On behalf of a unanimous court, then Chief Justice Callaghan wrote:

> This appeal must be dismissed. We agree with the board of inquiry that the age restriction built into the Assistive Devices Program which on its face appears to violate s. 1 of the *Code* is protected by s. 13(1) [now 14(1)] of the *Code*.
>
> Programs such as that in issue in this case, will, by their very nature, create differences in treatment on many and varied grounds. The only issue in this case is whether or not the program is a "special program" designed to relieve hardship or economic disadvantage. It is agreed that this program was developed and implemented in order to assist its beneficiaries to achieve greater equality of opportunity. While the constitutionality of s. 13(1) was not challenged, the appellants submitted that the age criteria applied in the program removed the program from the protection of s. 13.
>
> In our view, the wording of s. 13(1) is plain, clear and can admit of no doubt. It is not possible to read into that section the qualification suggested by the appellants when the legislature has not itself seen fit to impose such a limitation. Generally speaking, courts should not lightly second guess clear legislative judgments, particularly when dealing with programs designed to proceed to greater equality of opportunity for disadvantaged persons. In our

view, the age limitation in the program is protected by s. 13 and the appeal must be dismissed.

V PRINCIPLES OF INTERPRETATION OF HUMAN RIGHTS LEGISLATION

Before analyzing s. 14(1), it is useful to articulate the principles which govern how human rights legislation ought to be interpreted.

1. *General Principles*

A human rights code is not like an ordinary law. It is a fundamental law which declares public policy: *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at p. 158, 137 D.L.R. (3d) 219, *per* Lamer J.; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 at p. 156, 21 D.L.R. (4th) 1, *per* McIntyre J. Because a human rights code is not an ordinary statute, rules of statutory interpretation which advocate a strict grammatical construction of the words are not the proper approach to take in interpreting its provisions; focusing on the limited words of the section itself would ignore the dominant purpose of human rights legislation: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at pp. 546-47, 23 D.L.R. (4th) 321, *per* McIntyre J.; *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at p. 1133, 40 D.L.R. (4th) 193 (hereafter "*Action Travail*"), *per* Dickson C.J.C. A human rights code is remedial legislation and is to be given such interpretation as will best ensure its *objects* are attained: *Action Travail*, *supra*, at p. 1134. An approach which emphasizes the role of individual provisions as expressions of the overall dominant purpose of the legislation as a whole must be taken.

In Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 105, the author sets out the following steps to be taken in reading statutes:

> 1. *The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved),* and the scheme of the Act (the relation between the individual provisions of the Act.)
>
> 2. *The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.*
>
> 3. If the words are apparently obscure or ambiguous, then a meaning that accords with the intention of Parliament, the object of the Act and the

scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.

4. *If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.*

5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected.

(Emphasis added)

Clearly, the first stage in any analysis of the meaning of a particular provision of the *Code* must be a determination of its objects or purpose. One of the general objects of human rights legislation "is to secure, as far as is reasonably possible, equality, that is to say, fairness": *Chambly (Commission scolaire régionale) v. Bergevin*, [1994] S.C.J. No. 57 at p. 16, *per* Cory J. The preamble to the *Code* is a guide to its specific nature and purpose: *Ontario Human Rights Commission v. Simpsons-Sears*, *supra*. It states, in part:

> ... it is public policy in Ontario ... to provide for *equal* rights and opportunities without *discrimination* that is contrary to law ...

(Emphasis mine)

The term "equal" is defined in s. 10, Part II, as follows:

> 10(1) In Part I and in this Part ...
>
> . . . . .
>
> "equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination ...

2. *The Influence of the Charter*

Although human rights legislation is subject to challenge under the *Canadian Charter of Rights and Freedoms*, the question of whether the vision aids category of the ADP program infringes the equality provisions of s. 15 of the *Charter* is not raised in this appeal. Even so, the jurisprudence pertaining to the interpretation of s. 15 of the *Charter* can be relied on in interpreting *Human Rights Code* guarantees: see *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, 11 C.R.R. (2d) 1. This is not incongruous or surprising as the interpretation of the *Charter* has been informed by the jurisprudence relating to human rights codes.

Two principles of *Charter* interpretation supplement the approach to interpretation of human rights legislation expressed

above. The first is that the meaning of a right is to be ascertained by an analysis of its purpose; it is to be understood in light of the interests it was meant to protect: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 9 C.R.R. 355, and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344, 13 C.R.R. 64, *per* Dickson C.J.C. The second principle is the importance of recognizing the context in which a legal right is being asserted. In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at pp. 1355-56, 45 C.R.R. 1, Wilson J. explained:

> One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. . . . The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake as well as the relevant aspects of any values in competition with it.

VI SECTION 14(1)

The Divisional Court, in upholding the decision of the board of inquiry, supported the notion that s. 14(1) functions solely in an exemptive fashion. Their analysis extended only as far as a determination of the status of the program. The only question answered was "whether or not the program is a 'special program' ". Having answered that question in the affirmative, s. 14 was viewed as precluding any further analysis. In my view, this narrow approach to the purpose and function of s. 14 constituted an error of law. An analysis of s. 14 within the broad framework of the *Code* as a whole, keeping in mind the contextual approach suggested above, leads me to the conclusion that s. 14 has two purposes.

1. *Protection of Affirmative Action Programs*

The board of inquiry that investigated Roberts' complaint found that s. 14(1) was included in the *Code* out of an abundance of caution in order to protect affirmative action programs from charges of discrimination, like those which had been laid against similar programs in the United States. The Divisional Court made no comment on this aspect of the board of inquiry's decision. Counsel for the respondent refused to concede that s. 14(1) was designed to protect affirmative action programs. Because the words "affirmative action" are not present in s. 14(1), he argued that the section could not be interpreted in this manner. Examination of a number of interpretive aids reveals that this position is untenable.

(a) *Legislative Debates and Commentary*

Legislative debates are relevant to a determination of the purpose of a piece of legislation: *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at pp. 483-85, 107 D.L.R. (4th) 537. The legislative debates relevant to Bill 209[1] make it clear that the history and intent of s. 14(1) is two-fold. They are the exemption of affirmative action programs from challenge by those not in the class the program is designed to benefit, and the promotion of equal opportunity through affirmative action. On the second reading, the Honourable Mr. Elgie stated:

> It [the bill] responds affirmatively to the majority of recommendations contained in Life Together, the 1977 report of the Human Rights Code review committee. . . .
>
> . . . . .
>
> Provision is made to exempt affirmative action plans or programs legitimately designed to benefit particular classes of persons. This is in response to the views expressed by many special interest groups that special programs to help their members achieve equal opportunity should be allowed to operate with the minimum amount of difficulty. Exception is also made for government programs of similar intent, including tax legislation.

(Ontario, Legislative Assembly Debates, vol. 5, pp. 5096-98 (December 9, 1980).)

During the debate on the amendments to the *Code*, the N.D.P. member for Riverdale, Mr. Renwick, commented:

> Section 13 [now 14] is a very important section from the point of view of the position of the New Democratic Party on the achievement of equality of condition and equality of opportunity for people. This is the affirmative action section in the bill.

(Ontario, Legislative Assembly Debates, vol. 4, p. 4114 (December 1, 1981).)

In "Life Together: A Report on Human Rights in Ontario," a 1977 report of the Human Rights Commission chaired by Thomas H.B. Symons, to which Mr. Elgie referred, one finds the following at p. 35:

> Equality of opportunity is the goal. But, because of patterns of unequal access to educational, social, and job opportunities in the past, groups today such as women, Native people, racial minorities, and the physically disabled, find that other people have been given a head start. Unless these groups are assisted by carefully designed affirmative action programs, which help to redress the balance of past discriminatory practices, they will often have great difficulty in improving their lot.

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[1]The purpose of Bill 209 was to revise and extend the protection of human rights in Ontario, but it died on the order paper when the Conservative government called an election, which it won. The government then reintroduced its proposals as Bill 7.

Judith Keene in *Human Rights in Ontario*, 2nd ed. (1992), at pp. 165-66, also makes the point:

> Section 14, while technically an exception to the *Code*, is in fact clearly intended to allow enhancement of the rights of the groups protected by the legislation.

(b) *The Canadian Human Rights Act, s. 16*

The respondent submits that in deciding how to interpret s. 14 of the *Code*, no reliance should be placed on jurisprudence relating to s. 16 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

Contrary to the submission put forward by the respondent, I do not find the wording of s. 14(1) to be significantly different from that of s. 16(1) of the *Canadian Human Rights Act*.

For ease of reference s. 14(1) is repeated below:

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

Section 16(1) of the *Canadian Human Rights Act* reads:

> 16(1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

In the *Canadian Human Rights Act*, as in the *Code*, the target group is disadvantaged persons. In s. 16 of the federal legislation, the kind of disadvantage is specifically enumerated, whereas in s. 14(1) of the Ontario legislation, it is implied by the reference to Part I. The object or design of a special program in s. 16 of the federal legislation is to: (1) prevent, (2) eliminate, or (3) reduce disadvantages, by improving the opportunities of disadvantaged persons respecting goods, services, facilities, accommodation or employment in relation to the disadvantaged person. Two of the objects of s. 14(1) of the Ontario legislation appear to be similar to those in s. 16, namely, to assist disadvantaged persons to achieve or attempt to achieve equal opportunity (reduce disadvantage) and to contribute to the elimination of the infringement of rights under Part I (eliminate disadvantage).

In addition, s. 14(1) of the *Code* and s. 16 of the *Canadian Human Rights Act* share a similarity of purpose because both "reinforce the important insight that substantive equality

requires positive action to ameliorate the conditions of soundly disadvantaged groups": see Ontario Law Reform Commission, *Litigating the Relationship Between Equity and Equality* (Study Paper), by Colleen Sheppard (Toronto, 1993), at pp. 28 and 73.

In *Action Travail*, *supra*, the Supreme Court recognized that substantive equality is one of the purposes of the *Canadian Human Rights Act* which is given expression in s. 16 of the Act. Based on s. 16, the court upheld the power of the Commission to impose an employment equity program on the C.N.R., even though the wording of the Act did not expressly give the Commission this power.

2. *Interpretive Guide*

The proper approach to interpreting human rights legislation requires that s. 14(1) be interpreted within the context of the purpose of the *Code* as a whole and with regard to the objects sought to be attained by the section.

As we have seen, the general purpose of the *Code* as a whole is the provision of equal rights and opportunities without discrimination.

An overview of the *Code* indicates that Part I addresses the need to ensure equal treatment and the prevention of discrimination on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap, in relation to goods, services, and facilities (s. 1), accommodation (s. 2), and employment (s. 5). The promotion of equal rights, by requiring equal treatment, is termed a recognition of "formal equality": see Vizkelety, "Affirmative Action, Equality and the Courts: Comparing *Action Travail des Femmes v. CN* and *Apsit and the Manitoba Rice Farmers Association v. The Manitoba Human Rights Commission*" (1990), 4 *C.J.W.L.* 287 at p. 289; see also Sheppard, *supra*, at p. 4. One of the purposes of s. 14(1) is to protect affirmative action programs from being challenged as violating the formal equality provisions contained in Part I of the *Code*.

The second purpose of the *Code*, equal opportunity, which finds expression in s. 14(1), is the promotion of "substantive" or "concrete" equality through affirmative action programs: see Vizkelety, *supra*, at p. 291, and Sheppard, *supra*, at pp. 4 and 28. Affirmative action programs are aimed at achieving substantive equality by enabling or assisting disadvantaged persons to acquire skills so that they can compete equally for jobs on a level playing field with those who do not have the disadvantage. In relation to daily living, affirmative action programs are aimed at

assisting those with a disadvantage to attain the same level of enjoyment of life as those who do not have the disadvantage. The purpose of s. 14(1) is not simply to exempt or protect affirmative action programs from challenge. It is also an interpretive aid that clarifies the full meaning of equal rights by promoting substantive equality.

Both formal equality and substantive equality conform to the overall aim of the *Code*.

VII DOES SECTION 14(1) EXEMPT SPECIAL PROGRAMS FROM REVIEW IN ALL CIRCUMSTANCES?

1. *A Contextual Approach*

The position of the respondent is that the ADP Program is a *bona fide* special program. The program is designed to assist persons or groups who suffer hardship or disadvantage to achieve equal opportunity in accordance with s. 14(1). Once the criteria of *bona fides* and design are met, the respondent says that the program qualifies as a special program and that a plain reading of s. 14(1) indicates that special programs do not infringe rights under Part I of the *Code*.

I agree that s. 14(1) creates an exemption from review with respect to the equality provisions contained in Part I of the *Code*. Affirmative action programs are best protected by statute from challenges based on the principles of formal equality. Otherwise, a person who was not disadvantaged in a manner the program was designed to address could challenge the legality of the program on the basis that it infringed the person's right to equal treatment. It is in this sense that s. 14(1) gives affirmative action programs a statutory exemption from scrutiny. As previously indicated, however, s. 14(1) also exists to promote substantive equality.

The dual purpose of s. 14(1), namely, protection of affirmative action programs and promotion of substantive equality, must be borne in mind when considering whether a special program is protected from review. Just as the ordinary meaning of the words in s. 14(1) cannot be ignored in interpreting the section, neither can the words be divorced from the context in which they are sought to be applied. The interpretation of *Charter* rights makes clear that a particular right may need to be addressed differently depending on the context in which it arises. The proper construction of statutes requires that individual provisions not be interpreted in a manner which produces disharmony respecting the overall purpose of the enactment.

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

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

The concession by the respondent that the vision aids category of the ADP program discriminates on the basis of age involves a recognition that: (1) there is a distinction exclusion or preference; (2) the exclusion, distinction or preference is based on one of the grounds listed in s. 1 of the *Code*; and (3) the distinction exclusion or preference has the effect of nullifying or impairing Roberts' right to full and equal recognition with respect to services delivered by the government: see *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90 at p. 98, 52 D.L.R. (4th) 432; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at pp. 783-84, 36 C.R.R. 1; and *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609.

Roberts is a member of a disadvantaged group in which other members of the group receive financial assistance for the purchase of visual aids. In some circumstances, an inference might be drawn that young disabled persons with a visual disadvantage have financial or other needs that older persons do not have, and that therefore no real discrimination on the basis of age has occurred. In this case that inference cannot be drawn. The particular needs of young persons in relation to education and employment appear to be addressed by other government programs. The ADP does not employ any needs test beyond requiring that the recipient have a visual disadvantage. Funding does not depend on the severity of the vision disadvantage, nor on the ability of the individual to pay for the visual aid or to access other sources of funds such as parents or charitable organizations. A millionaire within the age limit can receive assistance, while a poor person over the age limit cannot.

The withholding of the benefit is an institutionalized policy. It implies that because Roberts is over 30 he is somehow less deserving of the life he otherwise could have. In as much as the discriminatory nature of the age criteria employed by the ADP is not in issue, the question is whether s. 14(1) of the *Code*

exempts the vision aids category of the ADP from review in this context.

In *Bergevin*, *supra*, at p. 17, Cory J. stated:

> The whole aim and purpose of human rights legislation is to prevent discrimination. If there can be discrimination without any consequences, then the very purpose of the legislation is defeated.

In the context of this case, to say that s. 14(1) exempts the *age discrimination* in the vision aids category of the ADP program from review, is to interpret the section so as to permit substantive equality to be undermined, when substantive equality is one of the section's very purposes. It is to permit unfairness which is antithetical to the overall purposes of the *Code*. Fairness, and the recognition of substantive equality, require that discrimination, in the provision of a service to a person who is a member of a disadvantaged group for whom a special program is designed, not be tolerated and be subject to review. This interpretation does not second-guess the legislature. Rather, it fulfils one of the purposes of the legislature and is consistent with the overall purpose of the *Code*.

When s. 14(1) is viewed as an interpretive aid to promoting substantive equality, review of the vision aids category of the ADP for discrimination on a prohibited ground when a person in Roberts' position brings a complaint, is not excluded.

2. *Is Review Precluded Because the ADP is a Government Program?*

The respondent argues the provisions of s. 14 other than s. 14(1) indicate that special programs offered by the Crown are exempt from review by a board of inquiry.

> 14(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.
>
> (2) The Commission may,
>
> (*a*) upon its own initiative;
>
> (*b*) upon application by a person seeking to implement a special program under the protection of subsection (1); or
>
> (*c*) upon a complaint in respect of which the protection of subsection (1) is claimed,
>
> inquire into the special program and, in the discretion of the Commission, may by order declare,
>
> (*d*) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(*d*) or where an order is made under clause (2)(*e*) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown.

If a complaint is filed against someone other than the government, who claims that a program is a special program, the Commission may proceed in one of two ways. The Commission may follow its usual procedure of investigation and conciliation under s. 33 and, if this fails, may request that a board of inquiry be appointed pursuant to s. 36 of the *Code*. The board of inquiry has jurisdiction to determine whether or not the program is a special program which meets the requirements of s. 14(1) of the *Code*. If the *Code* has been contravened, the board of inquiry may make orders to ensure compliance with the *Code*.

The second way in which the Commission may proceed is pursuant to s. 14(2) of the *Code*. The Commission may inquire into a special program or proposed special program on its own initiative or at the instance of a person seeking to implement a special program. In this situation, the commission may by order declare that the program does not meet the requirements of s. 14(1) or that the special program, with such specific modifications as the commission considers advisable, satisfies the requirements of s. 14(1).

Section 14(5) exempts the Crown or an agency of the Crown from having its special program directly reviewed by the commission. Nothing in the Act, however, precludes the commission from requesting the appointment of a board of inquiry under s. 36 of the *Code* when a complaint is received in respect of a government program. The result is that where a complaint is filed against the Crown, or an agency of the Crown, and the Crown alleges that the program is a special program, the commission may only request that a board of inquiry be appointed under s. 36. The ADP being a government program, the commission chose its only option for review and had a board of inquiry appointed. While the commission itself would not have had authority to review the program and make orders, the board of inquiry did have such authority under ss. 39 and 41. In partic-

ular, s. 41(*a*) of the *Code* gives a board of inquiry broad power to order a party to "do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act".

VIII THE BASIS FOR REVIEW

The appellants argue that there must be a rational connection between the enumerated ground of discrimination and the purpose of a special program in order for the discrimination to be tolerated. They submit that the vision aids category of the ADP program has the effect of reducing hardship for those least affected. The respondent's position is that only the program need be rational; the ground of discrimination need not be. The respondent's position is really another way of saying that the only requirement should be a *bona fide* program which aims to alleviate hardship. I have already rejected this argument because it is not consistent with the promotion of substantive equality contained in s. 14 and results in disharmony having regard to the overall purpose of the *Code*. The respondent concedes that if a rational connection between the age restriction in the ADP and the disadvantage the program seeks to alleviate is required, the respondent cannot meet it.

When the ADP was first introduced, children presented a manageable group in terms of size. They were a group for whom special facilities existed within the community; as a group they would likely require assistive devices for the greatest number of years. Although this basis of selection was understandable, it was not rational. The expert evidence before the board of inquiry indicated that young people were less likely to be visually disadvantaged and that they compensated better than older persons who were similarly disadvantaged. Now there is no age restriction for funding for some categories of assistive devices while others have an age limit of 30. This current selection process remains devoid of rationale. In terms of funding, persons under 30 are more likely to be able to access other sources of government funding directed to assisting those in school or to obtain work. Thus, the arbitrary age limit of 30 for the vision aids category results in the funding of a group who have the least need, both in terms of the extent of their disability and access to other sources of funding. In as much as government resources are finite, assisting those least affected with a visual disadvantage has the effect of depriving those most affected by the same disadvantage from assistance. Although the government's *bona fide* intent is to alleviate hardship, the effect of the programs cannot be ignored: *Ontario Human Rights Commission v. Simpsons-Sears*, *supra*.

The decision in *Silano v. British Columbia* (1987), 42 D.L.R. (4th) 407, 33 C.R.R. 331 (B.C.S.C.), supports the view that government programs which provide a benefit to disadvantaged persons, but which result in the infringement of other rights not central to their purpose, are properly subject to judicial review. In that case, the court declared that a guaranteed income paid to individuals under the age of 26, which was less than the income paid to individuals over the age of 26, amounted to discrimination within the meaning of the equality provisions of s. 15(1) of the *Charter*. The purpose of the age differential was to conserve provincial revenues and to allocate scarce financial resources. The court held that allocation in accordance with need presupposed that different recipients were differently situated and so might be differently treated. The choice of age 26 as a dividing line for different levels of assistance was unreasonable and unfair and amounted to discrimination. The choice of age had no connection to any other age limit already accepted by society as a watershed for its citizens.

The court in *Silano* rejected the argument that, if the legislation was discriminatory, it was saved by s. 15(2) of the *Charter* which preserves the validity of any law or program which has as its object the amelioration of conditions of disadvantaged individuals or groups. It did so on the basis that those over age 26 were not shown to be more disadvantaged by reason of age when compared with those under 26. Similarly, the absence of any logical factor for choosing age 26 meant that the discrimination was not saved by s. 1 of the *Charter*.

Although not similar in wording, s. 15(2) of the *Charter* and s. 14(1) of the *Code* are similar in spirit: see Sheppard, *supra*, at p. 14; Black and Smith, "The Equality Rights" in Beaudoin and Ratushney, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (1989), at pp. 597-98. Both s. 15(2) of the *Charter* and s. 14(1) of the *Code* are aimed at protecting and promoting substantive equality. As previously stated, both *Charter* interpretation and the interpretation of human rights codes have relied on each other's jurisprudence for interpretation.

When two pieces of remedial legislation, such as s. 15(2) of the *Charter* and s. 14(1) of the *Code*, share the same purpose, it is desirable that in so far as possible they be interpreted in a congruent manner. This is one basis for considering the application of a requirement that there be a rational connection between the ground of discrimination and the program.

A second basis may be found in the overall aim of human rights legislation, which, as Cory J. stated in *Bergevin*, *supra*, at p. 16,

"is to secure as far as is *reasonably* possible, equality, that is to say, fairness" (emphasis added).

Webster's Encyclopedic Unabridged Dictionary of the English Language (1989), defines rational as follows:

> 1. agreeable to reason; reasonable; sensible.

There appears to be no difference between the word "rational" and the word "reasonable".

The *Code* itself, in several instances, requires persons seeking the benefit of exemptions thereunder to show that their actions or policies are not only *bona fide* but also reasonable. Section 24 of the *Code*, which deals with special employment, states *inter alia*:

> 24(1) The right under section 5 to equal treatment with respect to employment is not infringed where,
>
> . . . . .
>
> (*b*) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a *reasonable* and *bona fide* qualification because of the nature of the employment.

(Emphasis added)

This provision requires that the reason for unequal treatment must be "a reasonable and *bona fide* qualification" in relation to the nature of the employment. This provision binds the Crown and every agency of the Crown pursuant to s. 47 of the *Code*. It is a standard with which adjudicators are familiar. Other *Code* provisions of the same import are s. 22 (restrictions in insurance contracts), s. 24(1)(*a*) (employment by special interest organizations), and s. 25(*a*) and (*b*) (distinctions in employment disability and pension plans relating to handicap).

Special programs aimed at assisting a disadvantaged individual or group should be designed so that restrictions within that program are rationally connected to the program. Otherwise, the provider of the program will be promoting the very inequality and unfairness it seeks to alleviate. I do not say that there can never be a rational connection between a prohibited ground of discrimination and the cost consequences of a program. In a review of an already operational special program that discriminates against a group or individual whom the program was designed to assist, the mere assertion that removal of the discrimination will result in cost consequences is not, however, sufficient to satisfy the rational connection requirement. We know that other categories of the ADP program already operate without any discriminatory age restriction. Further, the respondent did not respond to the appellants' submission that a means test

could be used as a method of conserving scarce financial resources. Once it can be shown that an individual whom a special program is designed to assist is being discriminated against and that there is no rational connection between the prohibited ground of discrimination and the program, the provider of the program must remove the discrimination.

I would allow the appeal and set aside the order of the Divisional Court. In its place, there will be an order striking out the age restriction in the vision aids category of the ADP. If the appellant Roberts is requesting other relief, the matter will be referred back to the board of inquiry to fashion the appropriate remedy.

IX CONCLUSION

Section 14(1) has a dual purpose: the exemption of affirmative action programs from review and the promotion of substantive equality. The Divisional Court erred in law in construing s. 14(1) as having as its only purpose the exemption of special programs from the application of the *Code*. Where a person whom a special program is designed to assist is discriminated against on an enumerated ground prohibited by the *Code*, s. 14(1) is to be construed as an interpretive aid aimed at promoting substantive equality. Programs aimed at promoting substantive equality are reviewable depending on the context in which the challenge is brought. The exemptive purpose of s. 14(1) is not invoked in this appeal.

Although the commission's powers are excluded under s. 14(5) when a complaint is made respecting a special program provided by the Crown or a Crown agency, the commission may, upon receipt of a complaint under s. 36, request that a board of inquiry be appointed. In circumstances such as the present case, the board of inquiry may review a special program. In this case, the board of inquiry and the Divisional Court erred in law in finding that the inquiry ends when "special program" status is proven. The inquiry should have considered: (1) whether a particular provision or limitation of a special program results in discrimination against a person or group with the disadvantage the program was designed to benefit, and (2) whether the provision or limitation is reasonably related to the scheme of the special program.

Roberts has satisfied me that he was discriminated against and that such discrimination was not reasonably related to the vision aids category of the assistive devices program. Although the respondent submitted that the cost of removal of the age discrimination in the vision aids category of the ADP could lead to

the program being dismantled, the respondent introduced no evidence in support of this submission and it must fail.

I would therefore allow the appeal and set aside the order of the Divisional Court. In its place, there will be an order striking out the age restriction in the vision aids category of the ADP. If the appellant Roberts is requesting other relief, the matter will be referred back to the board of inquiry to fashion the appropriate remedy.

The appellant Roberts will be entitled to his costs here and in the Divisional Court forthwith after assessment thereof. There will be no other order as to costs.

FINLAYSON J.A. (dissenting): — The appellants are challenging a program run by the Ontario government to provide financial assistance to persons with long-term disabilities on the ground that it discriminates against persons on the basis of age contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*"). The challenge originated in a complaint to the Human Rights Commission (the "commission") by the appellant Edwin Roberts, a visually impaired person, that his right to equal treatment with respect to services provided to persons with his disability was infringed on the ground of age, contrary to ss. 1 and 8 of the *Code*.

Professor Constance B. Backhouse was appointed by the Minister of Citizenship on October 5, 1988 to serve as a board of inquiry pursuant to the *Code* to hear the complaint. After hearing seven days of evidence, the board concluded that the age restrictions that were built into the program, known as the Assistive Devices Program, which on their face appear to violate s. 1 of the *Code*, are protected by s. 14(1). She dismissed the complaint. An appeal to the Divisional Court was dismissed. The appeal to this court is with leave and is restricted to a question of law. I have had the benefit of reading the reasons of my colleague Weiler J.A. allowing the appeal and, with respect, I do not agree with them. I would dismiss the appeal. In order to explain my position, I feel obliged to set out my own approach to the appeal in some detail.

Issues

The issues in the appeal, as I formulate them, are the following.

(1) Whether a special program can satisfy the requirements of s. 14 of the *Code* where it is selective within the targeted

group of visually disadvantaged on the basis of age, a prohibited ground of discrimination under s. 1.

(2) Whether discrimination on the basis of age must be rationally connected to the visual disability that the program is designed to relieve against before this discriminatory practice can satisfy the requirements of s. 14 of the *Code*.

(3) Whether any justification is required of a program that has some ancillary discriminatory consequences provided that the program is *bona fide* and is designed to meet the criteria of a special program set out in s. 14(1) of the *Code*.

The Assistive Devices Program

Weiler J.A. has set out the position of the appellant Roberts in these proceedings and has described accurately the nature of the Assistive Devices Program ("ADP"). I would, however, add the following. When ADP was established in 1982, it was initially more limited in scope than at present in relation to both available equipment and eligible candidates. Initially, ADP was restricted to disabled persons 18 years of age and under and covered only hearing aids, incontinence supplies, prosthetic and orthotic devices, wheelchairs and ostomy supplies. Each year since 1982 the age limit has been increased by one year to allow current participants to continue in the program. For example, in 1986 the age ceiling was raised to 22 years old. In 1983, coverage was added for respiratory equipment and supplies. In 1984, certain visual and communication aids were added, including the closed circuit television magnifier which is the disputed device in this appeal. In 1986, the age limit was eliminated for prosthetic devices and respiratory supplies.

The Advisory Committee on Assistive Devices (the "committee"), which had been created in 1982, published an annual report on its activities in 1986. The committee recommended that all age restrictions in the program be eliminated by a phased expansion. This recommendation was publicly adopted by the Minister of Health in May of 1986. A memorandum dated August 18, 1987 predicted that ADP would include persons of all ages by March 1, 1989. ADP's expenditures increased from $2 million in 1982-1983 to $13.8 million in 1986-1987. In 1987, it was forecast that the program would expend $54.2 million in 1989-1990 and $67 million in 1991-1992 when it was expected that increased awareness of the availability of the program would lead to full utilization by eligible persons of all ages. In 1987, the age limit was eliminated for ostomy supplies and mobility devices

such as wheelchairs. At the end of 1988, coverage for hearing aids was expanded to include persons of all ages, although for those over 18 years, the program covered 75 per cent of the median cost of the devices, rather than the ADP-approved cost, and second hearing aids were not covered. Four of the five expansion phases outlined by the committee in 1987 have been completed and the fifth phase appears largely complete. The fifth phase is directed to expanding the class of persons eligible to receive assistance in purchasing hearing aids, visual and communication aids, and incontinence supplies. This court was advised by counsel on appeal that presently no age limits remain on visual devices, including the closed circuit television magnifier sought by the appellant Roberts. Professor Backhouse said of the program:

> Ministry of Health representatives testified that the Assistive Devices Program was developed and implemented in order to assist its beneficiaries to achieve greater equality of opportunity. I accept this evidence and have concluded that the respondent has proven that the design is a *bona fide* one, in the interests of assisting certain disadvantaged persons.

The Legislation

The relevant provisions of the *Code* are:

PART I
FREEDOM FROM DISCRIMINATION

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

. . . . .

9. No pesron shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

PART II
INTERPRETATION AND APPLICATION

. . . . .

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

(2) The Commission may,

(*a*) upon its own initiative;

(*b*) upon application by a person seeking to implement a special program under the protection of subsection (1); or

(*c*) upon a complaint in respect of which the protection of subsection (1) is claimed,

devices program", even if a permissible finding by an appellate court, is part of a process of modification that is only permitted by the commission with respect to private sector programs under s. 14(2)(*c*). As will be seen later, no attempt was made by the respondent to justify the program on a device-by-device analysis. Neither the board nor this court can appropriate the powers of the commission with respect to private sector programs and apply them to the Crown.

The age restriction in the ADP applies to a group of persons, not to a particular device, and our jurisdiction is limited to determining if this discrimination is justified as a matter of law with respect to the multiple assistive devices offered to those who qualify. If it is not, the ADP does not qualify as a special program and the complaint of the appellant Roberts must be sustained. Consequently, if this appeal is to be allowed, the only order that this court can make is that requested by the appellants. The appellants requested that, regardless of hardship, we should declare the respondent in breach of the *Code* in implementing the ADP with its discriminatory limitation. Further, the appellants asked the court to remove the age restriction in the ADP, and refer the matter back to the board to determine what compensation, if any, the appellant Roberts is entitled to receive. As I have indicated, I am not prepared to make such an order.

Position of the Appellants

As I understand the position of the appellants, s. 14 of the *Code* should be given such large and liberal interpretation as will best encourage the implementation of positive programs for the benefit of disadvantaged persons or groups. At the same time, the interpretation should not be so overly broad as to defeat the purpose of the *Code* and permit differential treatment that is unrelated to the achievement of equality or that furthers inequality. Intent or motive (even *bona fide* intent) is not definitive in determining if there is discrimination; it is the effect of the action complained of which is of paramount importance.

I accept the above as an overriding statement of principle as to the level of scrutiny to be applied to "special" or "affirmative action" programs. I have difficulty, however, in appreciating how the appellants have applied these principles to the present facts. The emphasis in the appellants' submissions is not on s. 14 but on s. 1. Applying the principle that s. 1 is deserving of a broad and liberal interpretation consistent with its purposes, the appellants have effectively reduced s. 14 to the status of an exception to the *Code* requiring a narrow interpretation. Using this con-

struction, the appellants submit that s. 14 of the *Code* must be read restrictively, so as not to detract from the protection afforded against discrimination by s. 1. This construction was rejected by Professor Backhouse, who stated:

> We ought not to set up two conflicting modes of interpretation — a broad construction for the legislation generally and a narrow construction for s. [14] in particular. This misconstrues the real nature of s. [14] programs. They seek to remove discrimination, just as the rest of the provisions of the *Code* do. Section [14] deserves the same broad, purposive interpretation as human rights provisions generally.

The approach of the appellants, refined for the purposes of the case on appeal, results in the following submissions:

(1) good intentions on the part of the implementor of the special program notwithstanding, the special program must be all-inclusive of the targeted group; or, if it is selective within the group, the selection must be on a basis that does not offend s. 1;

(2) alternatively, if the special program is "underinclusive" (meaning that it is not universal in its application to all persons within the targeted group, without discrimination on the grounds of any of the enumerated heads of s. 1), then the implementor of the special program must assume the onus of justifying any discrimination listed in s. 1 on the basis that the discrimination is rationally connected to the hardship, disadvantage or inequality sought to be addressed by the special program.

The appellants offer the following explanation for placing such a narrow interpretation upon s. 14. Their submission is that s. 14 was enacted out of an abundance of caution to protect affirmative action programs implemented to address inequalities among disadvantaged groups from attack on the basis that the programs themselves are discriminatory against those who are not disadvantaged and, for that reason, are excluded from the program. This argument finds its genesis in the case of *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699, 124 D.L.R. (3d) 1, where the Supreme Court of Canada considered the jurisdiction of the Energy Resources Conservation Board of Alberta to prescribe the implementation of an affirmative action program to assist Indians. The court unanimously held that the board did not have jurisdiction to prescribe the program. However, in writing a concurring judgment for himself and three other members of the court, Ritchie J. dealt with a subsidiary issue as to whether the affirmative action program constituted discrimination against non-Indians contrary to s. 6(1)

of the Alberta *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2. There was no provision in the Alberta legislation similar to s. 14 of the Act authorizing "special programs". Nevertheless, Ritchie J. held that the program did not constitute discrimination. He stated at p. 711:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the "affirmative action" programs for the betterment of the lot of the native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.

The appellants submit that s. 14 of the *Code* simply codifies the concept that affirmative action programs designed to further the betterment of one class subject to discrimination or disadvantage do not discriminate against persons who are not members of that class. That is to say, s. 14 is solely a shield against so-called "reverse discrimination" suits and was enacted out of excessive caution. Weiler J.A. accepts this approach and holds that since the challenge in this appeal is not by a member of an historically privileged group or by a disadvantaged person whose disability the program was not designed to benefit, the exemptive purpose of s. 14(1) is not invoked.

I have difficulty in accepting this view of s. 14 because, as Ritchie J. noted in *Athabasca*, *supra*, measures designed to assist a disadvantaged group in society do not constitute discrimination against members of society who are not equally disadvantaged. The appellants' interpretation, therefore, reduces s. 14 to mere surplusage. Furthermore, the appellants' submission that selection among the members of a disadvantaged group must be on a basis that does not offend s. 1 of the *Code*, such as a lottery system, similarly renders s. 14 meaningless because the protection afforded by s. 14 becomes unnecessary. My reasoning is that a special program restricted to certain members of a disadvantaged group on the basis of a criterion not mentioned in s. 1 does not violate s. 1 in the first place and, hence, has no need of protection from s. 1. It is only when a special program infringes s. 1 by selecting within the target group on the basis of an enumerated ground that s. 14 becomes relevant and applicable.

The appellants assert that s. 14 is similar in language and identical in intent to s. 15(2) of the *Canadian Charter of Rights*

and Freedoms (the "*Charter*") and to s. 16(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "C.H.R.A."). These sections are set out below.

Charter

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

C.H.R.A.

> 16(1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

In W.S. Tarnopolsky, "The Equality Rights in *The Canadian Charter of Rights and Freedoms*" (1983), 61 *Can. Bar Rev.* 242, in N. Finkelstein, *Laskin's Canadian Constitutional Law*, vol. 2, 5th ed. (Toronto: Carswell, 1986), the author comments upon s. 15(2) of the *Charter* at pp. 1268-69:

> It would appear that this provision was added to the *Charter* out of excessive caution. In line with the argument suggested earlier, that equal laws can result in inequality if applied to persons in unequal circumstances, it is suggested that "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups" cannot be a contravention of subsection (1) of section 15, even without subsection (2) saying so. It would appear that subsection (2) was included partly because of the fear that courts which gave such a limited definition to the "equality before the law" clause, under section 1(b) of the *Canadian Bill of Rights*, might also be inclined to find affirmative action to be discriminatory. The second reason appears to be a mistaken apprehension of the meaning of the *Bakke* case in the United States.

The *Bakke* case is *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), where the United States Supreme Court struck down as racially discriminatory a state medical school admissions quota which gave preference, in certain cases, to black applicants.

This "reaction to *Bakke*" interpretation of s. 15(2) of the *Charter* is recurrent in the commentaries to which the court was

referred on this appeal. In D. Lepofsky and J. Bickenbach, "Equality Rights and the Physically Handicapped" in A. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), the authors apply this thinking to affirmative action programs involving handicapped persons. They say at pp. 356-57:

> 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.

The effect of the application of this thinking to a special program under s. 14 of the *Code* is that such a program can discriminate against any person outside the group intended to be benefited but it cannot discriminate internally on any ground of discrimination enumerated in s. 1. In my view, whatever application this restrictive interpretation may have to s. 15(2) of the *Charter* and to s. 16(1) of the *Canadian Human Rights Act*, it is not appropriate to s. 14 of the *Code*. The exception to s. 1 that is provided by s. 14 appears to me to be more affirmative than a mere defence to reverse discrimination litigation.

We must look to the plain meaning of the section. The permissible programs in s. 14 of the *Code* are not directed exclusively to the alleviation of discrimination under the enumerated heads in s. 1. Indeed, the essence of the programs described in s. 14 appears to be unrelated to discrimination *per se*. A special program, within the meaning of s. 14, is one that is:

(a) designed

  (i) to relieve hardship or economic disadvantage; or

  (ii) to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity

  or

(b) that is likely to contribute to the elimination of the infringement of rights under Part I.

It is thus apparent that the beneficiaries of a special program in s. 14(1) are not necessarily members of a group that is intended to be protected under s. 1. This is in stark contrast to s. 16(1) of the C.H.R.A. which is restricted to special programs

designed to prevent, eliminate or reduce disadvantages where those disadvantages are based on or related to any of the prohibited grounds of discrimination listed in s. 16(1).

The board of inquiry found that the target group of the special program under appeal, *i.e.*, disabled persons, suffers "hardship", experiences "economic disadvantage" and can be classified as "disadvantaged" generally under s. 14 of the *Code*. This is not a program falling under that which I have designated as part (b) of s. 14(1). No element of s. 1 discrimination is intended to be addressed in this special program which, to the extent that it requires s. 14(1) protection, is sheltered under part (a). Consequently, unlike Weiler J.A., I do not read the reasons of Professor Backhouse as restricting s. 14(1) to being merely protective of an affirmative action program.

Apart from what I consider to be the plain meaning of the section, if the provision for special programs is as restrictive as the appellants contend, not only is s. 14(1) surplusage but the distinction between private sector and Crown-implemented programs is meaningless as well. There is no role for the commission to play in either type of program. What advantage is it to a member of the private sector who wishes to implement a special program to seek approval under s. 14(2) if the commission is restricted to ruling only that the program is protected from a reverse discrimination suit? This ruling is unnecessary on the authority of the *Athabasca* case. The role of the commission becomes, at most, advisory when surely the legislature contemplated a larger role. I am of the view that s-ss. (2) to (4) of s. 14 were intended to provide protection to affirmative action programs over and above what was already available to them at law. In my opinion, s. 14 offers protection from complaints of s. 1 discrimination brought by the intended beneficiaries of the program but who do not meet the criteria of the special program. In this case, the persons intended to benefit are those with a particular visual handicap. The appellant Roberts complains that he shares the handicap but that he is excluded from sharing in the benefits of the special program because of his age.

Analysis

The court was referred to a number of judicial authorities and articles by commentators but I did not find them of much assistance in interpreting s. 14 of the *Code*. I think we should approach the matter as one of first impression.

In my opinion, it is axiomatic that legislation which gives its *imprimatur* to affirmative action programs designed to relieve

against hardship or disadvantage or which attempt to achieve equal opportunity should receive the most liberal interpretation consistent with the overall purposes of the principles of human rights enshrined in the same legislation. The same supportive approach should be taken to the programs that are created in response to this legislative initiative, particularly where they are created under the aegis of a democratically elected body. This does not mean that we should countenance programs which advance one disadvantaged group at the expense of others or which use the program as an excuse for discrimination at large. On the other hand, we should not be overly critical of these programs provided that there is a rational justification for any limitations on their scope and intent.

To deal with the issues in appeal as I have identified them, as to the first issue I should say that the fact that a special program has some incidental discriminatory effect does not, in itself, disqualify it from meeting the requirements of s. 14(1) of the *Code*. As I think I have made clear from my comments above, s. 14 must afford some measure of relief against charges of discrimination, otherwise it is much reduced in effectiveness. I do not think I have to expand further upon this point.

As to the second issue, I do not think that the implementor of the program must demonstrate that there is a rational connection between the hardship or disadvantage and the discriminatory feature in order to justify some discriminatory effect of the program. If such a connection can be shown then this should be a complete answer to those who claim discrimination. For instance, if the particular visual handicap in this case was related to a disease affecting children only, then the selection of a young target group would not only make sense but any other approach would make very little sense. In accordance with my analysis above, however, I do not believe that s. 14 is wedded to a reverse discrimination concept. Programs that are in part discriminatory can be justified on another basis rationally connected to the purpose or implementation of the special program.

The position of the appellants underscores the absurdity of restricting the rationality of the discrimination to the handicap. They assert that it would be satisfactory if the participants in this program were chosen by lottery, by geographical area, by the position of their last name in the alphabet or by selecting them on a "first come, first serve" basis. All these methods are irrational and manifestly unfair but they do have the virtue of not being listed as discriminatory practices in s. 1. In fairness to the appellants, they favour selection of candidates on the basis of a

financial means test. This approach, however, involves policy decisions of a major order in the supply of health care services. Universal coverage is the centre-piece of the present system. In any event, as we shall see from an examination of the program in issue, a means test would not address the restrictions in personnel and facilities which forced the program to be underinclusive in its inception.

As to the third issue, I accept that once it is evident that a program has a discriminatory feature to it, the proponent of the program must justify the discrimination. Section 14 is not designed to perpetuate discrimination through programs which favour, without reason, some members of a disadvantaged group over other members of the disadvantaged group or, for that matter, discriminate needlessly within the general populace. I do not propose to lay down any general rules as to what kind of justification would meet a threshold test because each program has to be judged on its individual merits. If some policy guidelines are required, they must come from the legislature. Suffice it to say that I agree with the Divisional Court that it is not the court's function to supply guidelines when the legislature was not prepared to do so. I will only say that where there is discrimination on prohibited grounds, a justification must be advanced and that justification must demonstrate that: (1) the selection process is rational in the context of the purposes of the program, and (2) the elimination of the discriminatory aspect would be injurious to the implementation of the program.

The Evidence of Justification

Evidence was given before the board of inquiry as to why ADP was initiated with an age restriction in place. Dr. Graham Strong, a member of the ADP subcommittee on visual aids, testified that it was his understanding that the age restriction was intended to create a relatively manageable sample population for the early days of ADP with a view to expanding the program when an appropriate level of service could be assured for a greater number of persons. In response to a question from counsel for the respondent regarding access to ADP services, he stated:

> Well, the problem, I suppose, is that there just aren't enough people that are able to provide the level of service the way it's been established, the way it's been envisaged by the subcommittee. There are very few people that can provide a high-quality service, and so I think one of the problems would be that you would, in fact, end up compromising the integrity of the service delivery the way it has been established, just in order to make it accessible and have the Ministry of Health be good guys.

> I might just mention as well the — one of the things that people have to realize about ADP is basically what it is, is it's a funding mechanism to help people buy aids that have been authorized or prescribed and authorized under the programme, but there isn't anything in place that provides all the services of assessment and authorization for all of the other services of support and rehabilitation that are also required in a high-level service. And so there would just be pandemonium in the service delivery system, if all of a sudden there was ten times as many potential or eligible people for the programme, and there really is no service receptacle for those people.

Dr. Strong's evidence was supported by Donna Segal, Director of ADP, who described the impact of each phased expansion to ADP. She testified that extensive consultation with health professionals was necessary before each expansion because ADP took a multi-disciplinary, teamwork approach to rehabilitation. This approach was adopted because many of ADP's clients had multiple disabilities and required an integrated system of assistance. She alluded to the difficulties of quality control for services provided by professionals who were, at the time, largely unregulated. She testified that when the age restriction was eliminated on hearing aids, a program which had been servicing 1,800 children was suddenly expected to serve 35,000 children and adults, although less than 500 health care professionals were available to provide the required services. In fact, the 1986 report in which the committee recommended phased expansion indicates that agencies servicing the needs of disabled persons had informed the committee that demand for services was already exceeding available resources at that time. Ms. Segal also spoke of the increased administrative burden that the expansion brought and the substantial backlog created until more staff were hired and trained.

The evidence before the board of inquiry indicates that, prior to each expansion of ADP, considerable thought was given to the adequate preparation of health care professionals and agencies to support the expanded program in the community. The existence of this network is important because some equipment requires, in the words of Ms. Segal, "sophisticated therapy intervention" at the time of purchase and afterwards. Additionally, ongoing maintenance of the equipment and training for the client and his or her family members may be necessary for optimum use. Periodic reassessment of the equipment in terms of evaluating its benefits to the client's lifestyle may also be required. While ADP's involvement is limited to funding the equipment, the success of the program depends upon a network of health professionals who can evaluate a patient's condition and lifestyle, recommend a suitable device and then assist in the successful

integration of that device into the client's daily living routine. This network of health care professionals already existed in 1982 in the form of 18 multi-disciplinary rehabilitation treatment centres in Ontario for persons under the age of 21 years. There is no comparable system for adults who, instead, must go to a number of health care professionals in a number of health care settings.

The position of the respondent in this court was that ADP is premised on a multi-disciplinary, functional approach designed to best serve the needs and interests of its clients. The respondent made no attempt to argue that disabled children are a more disadvantaged group than disabled adults at any stage of these proceedings. It would not appear that this was ever the perception of those charged with designing or administering ADP. The reason for the restrictions in relation to both equipment and age of eligible clients seems to have always been the concern that ADP should endeavour to deal with a manageable client base in order to assure the quality of the services it offers while taking steps to expand the program in a reasonable and manageable fashion. For that reason, at its inception, it took advantage of existing facilities already restricted to persons under the age of 21. In my opinion, the appellants' attempt to characterize ADP's decision to initially limit its client population to children as mere administrative convenience misinterprets the purpose of the program. It is also inaccurate to state, as Weiler J.A. does, that cost consequences were determinative.

I turn now to the application of the two-part test for justification which I outlined above. I am of the view that the evidence before the board of inquiry demonstrates that the selection process was rational in the context of the program and that the elimination of the discriminatory aspect in place during the early days of ADP would have been injurious to the implementation of the program. The initial decision to restrict ADP to persons under the age of 18 was both reasonable and rational as the selection of this group provided the creators of ADP with a manageable client base and adequate resources, unavailable to the adult population, to develop this unique multi-disciplinary program. It is evident that the organizers of ADP have been committed to expanding ADP's client base from its inception by steadily increasing both the age cut-off and the list of eligible aids. In fact, an irony of this appeal is that, without such expansion, the appellant would have had no cause of action because visual aids were not initially covered by ADP and were only added to the list of eligible devices two years into the program's

development. Furthermore, the imposition of these selection criteria was necessary to the implementation and phased expansion of ADP because the community resources on which ADP depends were not initially equipped to deal with the large numbers of clients who would be eligible under a scheme of universal application.

I am further of the opinion that the elimination of the discriminatory aspect of the ADP would have been injurious to the implementation of the program. It is clear from the evidence of the respondent's witnesses, which the board of inquiry expressly accepted, that this program, in this form, would never have been implemented when it was, had those responsible for it not decided to limit the initial recipients to an age group which had significant resources available to it already. The issue is not whether there would have been injury to the program or even undue hardship, but whether there would have been a program at all. As Professor Backhouse stated in her reasons:

> In this context, one might speculate that the Ministry of Health would have refused to introduce the Assistive Devices Program at all if it had been forced to expand the beneficiary groups to include the disabled of all ages, the mentally disabled, the short term disabled, etc. from the outset. At the very least, the program would likely have been introduced much later than it was.

In my opinion, the decision to initially limit participation in ADP to a manageable sample of disabled persons with special access to resources which are both necessary to the successful implementation of the program and unavailable to other members of the disabled community was entirely justifiable.

Conclusion

I am impressed by this ADP program. It is imaginative and carefully constructed to achieve substantial benefits for severely disadvantaged persons. It is not restricted to the limited class of visual aid which is the subject of this appeal, but is directed to a broad spectrum of assistance through the careful use of limited financial, technical and administrative resources. The best evidence of the rationality of the limitations initially imposed upon this program is the fact that this appeal is now moot because time has overtaken the complaint and the program was evolved to the point where it is no longer underinclusive. The court, however, is left with a matter of principle which goes beyond the supply of a single visual aid. This is a matter which affects the integrity of the entire ADP program. To allow a challenge such as this one to succeed would mean that no program to assist

disabled persons could ever be created unless all disabilities were covered from the very beginning. Such a consequence is clearly undesirable. As Professor Backhouse stated:

> . . . if complaints of this nature against affirmative action programs are upheld, especially since these are voluntary programs, affirmative action as a concept will fail. In the end, all disadvantaged groups will lose as compared to the advantaged.

I agree with the Divisional Court that the court should not lightly second-guess programs such as these which are designed to achieve greater equality of opportunity for disadvantaged persons. I agree that the age limitation inserted in the program at its outset is protected by s. 14(1) of the *Code*. I can see no reversible error in law in the decision of the board of inquiry or the judgment of the Divisional Court. Accordingly, I would dismiss the appeal. If costs are requested by the respondent, I would entertain written submissions on the subject.

HOULDEN J.A.: — This appeal involves the interpretation and application of s. 14(1) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. The issue is, does s. 14(1) permit the respondent to discriminate on the basis of age in determining eligibility for the ADP?

I have had the benefit of reading the reasons of Finlayson and Weiler JJ.A. Since there is a division in the court on the interpretation of s. 14(1), I propose to state my own reasons for agreeing with the interpretation given to the subsection by Weiler J.A.

Access to the ADP is restricted on two grounds, namely, handicap and age. These two grounds for discrimination are prohibited by s. 1 of the *Code* as a ground for refusing a right to equal treatment with respect to services. The board of inquiry found that restricting the ADP to handicapped persons was protected by s. 14(1) of the *Code*. Extending financial aid to handicapped persons so that they may achieve equality is, in my opinion, rationally connected to the provision of services under the ADP, and I agree with the board that it is protected by s. 14(1). It is the discriminatory ground of "age" that causes the difficulties in this case.

Counsel for the respondents conceded that, if it were not for s. 14(1), the ADP, because of its age restriction, would violate s. 1 of the *Code*. The board of inquiry held that, although the appellant Roberts had been discriminated against by reason of age, the discrimination, like the restriction because of handicap, was protected by s. 14(1). The Divisional Court upheld the decision of the board. It was of the view that the ADP was a special pro-

gram designed to relieve hardship or economic disadvantage, and since the program came within one of the objects in s. 14(1), it was protected by the subsection.

The ADP is a special program implemented by the Crown. Where a complaint, other than a complaint against the special program of the Crown, is filed with respect to a special program for which s. 14(1) protection is claimed, the commission may proceed in one of two ways. First, it can follow its usual procedure of investigation and conciliation and, if it fails to effect a settlement, it can request the Minister, pursuant to s. 36 of the *Code*, to appoint a board of inquiry and to refer the complaint to the board. When this procedure is followed, the board of inquiry has the jurisdiction to determine whether the special program meets the requirements of s. 14(1). If the board concludes that the special program does not meet the requirements of s. 14(1), it can direct the party to do anything that, in the opinion of the board, ought to be done to achieve compliance with the *Code*, and it can direct the party to make restitution, including monetary compensation, for loss arising out of the infringement of the *Code*: see s. 41. The order of the board may be appealed to the Divisional Court: ss. 41 and 42. The Divisional Court may substitute its opinion for that of the board and may make any order or decision that the board had authority to make.

Secondly, the commission may, by s. 14(2), inquire into the special program and make one of the following orders:

(i) that the program does not meet the requirements of s. 14(1);

(ii) that the program meets the requirements of s. 14(1) providing that modifications, specified by the commission, are made in it; or

(iii) that the program meets the requirements of s. 14(1): see s. 14(2)(*d*) and (*e*).

Where the commission makes an order that a program does not meet the requirements of s. 14(1) or that it meets the requirements with modifications and the modifications have not been implemented, a respondent to a complaint cannot raise s. 14(1) as a defence to a *prima facie* case of discrimination: s. 14(4).

Where a complaint is filed with respect to a special program implemented by the Crown, the commission may only proceed in the first way outlined above (*i.e.*, by requesting that the Minister appoint a board of inquiry under s. 36). The commission cannot proceed under s. 14(2): see s. 14(5). However, a special program implemented by the Crown is subject to the same scrutiny as any other special program to see if it complies with s. 14(1). If this

were not the intention of the legislature, Crown programs would have been completely exempted from review. The scheme of s. 14 does not contemplate a lesser standard of review for, or a greater deference for, a special program of the Crown which seeks the protection of s. 14(1). The requirements of s. 14(1) are the same, regardless of whether the program is implemented by a private or government body.

Section 14(1) contemplates four kinds of special programs, namely, a special program:

(1) designed to relieve hardship;

(2) designed to relieve economic disadvantage;

(3) designed to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity; or

(4) that is likely to contribute to the elimination of the infringement of rights under Part I.

The subsection is intended to ensure that special programs designed to assist persons or groups that come within one of the above objects are not invalidated on the ground of "reverse discrimination": *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at p. 1133, 40 D.L.R. (4th) 193. Members of advantaged groups cannot, therefore, use the *Code* to strike down special programs from which they are excluded.

No evidence was adduced by the respondents to demonstrate that the persons who are admitted to the ADP were more disadvantaged than those excluded by reason of age. On the contrary, all the evidence pointed to the opposite conclusion. Counsel for the respondents conceded that there was no rational connection between age and the provision of services under the ADP. The age restriction in the program was adopted in order to create a manageable system in terms of cost and service delivery. If the funds available for the financing of the program were limited, then other non-discriminatory mechanisms for admission to the plan could have been adopted, such as a means test or a test based on needs. In his reasons, Finlayson J.A. refers to the selection of participants in the program by lottery, by geographical area, by the position of their name in the alphabet or by selecting them on a "first come, first served" basis. These suggestions were only advanced by counsel for the appellants to illustrate that the mechanism for admission to the program should be non-discriminatory; they were not meant to be taken seriously as a basis for admission.

I do not quarrel with the conclusion of the board of inquiry (at p. 74) "that virtually all affirmative action programs will fail to be fully inclusive of all disadvantaged groups". However, where exclusion from an affirmative action program is based on one of the prohibited grounds in s. 1, there must, in my opinion, be a rational or logical connection between the prohibited ground and the provision of services under the program; otherwise, the special program instead of relieving discrimination results in discrimination.

In arriving at the conclusion that discrimination on the basis of age was protected by s. 14(1), the chair of the board said (at p. 75):

> In this context, one might speculate that the Ministry of Health would have refused to introduce the Assistive Devices Program at all if it had been forced to expand the beneficiary groups to include the disabled of all ages, the mentally disabled, the short-term disabled, etc. from the outset. At the very least, the program would likely have been introduced much later than it was.

There was no evidence to support these statements; they are pure speculation. One could equally well speculate that if the legislature had considered some non-discriminatory ground for admission to the ADP, such as a means test, the program would have been implemented with that ground as the basis for admission.

In the two-fold test that Finlayson J.A. would adopt for justification of a special program that infringes one of the rights in s. 1, the second part of the test is that the elimination of the discriminatory aspect would be injurious to the implementation of the program. There was no such evidence in this case. Rather, the evidence was that it was more convenient for the government to introduce the program with an age limitation, not that it would have been injurious to the implementation of the program to have adopted some non-discriminatory ground for admission to it.

Human rights legislation is to be given an interpretation that furthers its broad purpose of the elimination of discrimination and the advancement of equality: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at pp. 546-47, 23 D.L.R. (4th) 321; *Canadian National Railway Co. v. Canada (Human Rights Commission)*, *supra*, at p. 1134. Section 14(1) must be interpreted in that manner. The *Code* is not to be interpreted by applying strict grammatical construction to its words: *Canadian National Railway Co.*, at p. 1133. A non-restrictive interpretation is to be avoided: *Saskatchewan Human Rights*

Commission v. Canadian Odeon Theatres Ltd., [1985] 3 W.W.R. 717 at p. 735, 18 D.L.R. (4th) 93 (Sask. C.A.).

Under s. 1 of the *Code*, discrimination with respect to services on the basis of race, ancestry, *etc.*, is forbidden. Section 14(1) permits discrimination in the provision of services on those prohibited grounds, if a special program has one or more of the objects set out in the subsection. There can be no doubt that the ADP possesses one or more of those objects. However, if it were only necessary for a special program to possess one of the objects in s. 14(1) to receive the protection of the subsection, the subsection, instead of removing discrimination, would be authorizing it.

In "Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*" (1990), 19 *Man. L.J.* 288 at p. 299, Helena Orton in discussing the relationship between s. 15(1) and (2) of the *Canadian Charter of Rights and Freedoms* sums up what I believe is the correct approach to s. 14(2):

> This approach to equality recognizes that disadvantaged groups must be the beneficiaries of positive action on the part of government and others. It gives no reason to suggest that such equality-promoting steps are themselves immune from review, the implication of many government defences to challenges to equality promoting programs. An employer's disability plan must not be sex discriminatory. Welfare benefits for sole support mothers must not impose criteria based on sexual stereotype. Section 15(2) provides that section 15(1) does not preclude ameliorative programs and as such can be understood as an interpretive guide to section 15(1); it *does not preclude review of ameliorative programs where some aspect is discriminatory.*

(Emphasis added)

In *R. v. Hess*, [1990] 2 S.C.R. 906, 50 C.R.R. 71, the Supreme Court was concerned with the validity of s. 146(1) of the *Criminal Code*, R.S.C. 1970, c. C-34, which made it an offence for a male person to have sexual intercourse with a female who is not his wife and who is under the age of 14. McLachlin J., dissenting, dealt with a similar point to that which arises in this case in connection with s. 15(2) of the *Charter*. At pp. 945-46, the learned judge said:

> Nor can I accept the argument of the Attorney General for Ontario that s. 146(1) is saved by s. 15(2) of the *Charter*. Subsection 15(2) is potentially far-reaching in its application. Interpreted expansively, as the Attorney General suggests, it threatens to circumvent the purpose of s. 1. Under s. 15(2) it must only be shown that the "object" of the legislation was amelioration of conditions of a disadvantaged individual or group, and there is no need to demonstrate that the legislation used proportionate means. I prefer the approach to s. 15(2) adopted by Huddard L.J.S.C. in *Re MacVicar and Superintendent of Family and Child Services*, (1986), 34 D.L.R. (4th) 488 (B.C.S.C.), at pp. 502-03:

> To ensure that the s. 15(1) guarantee of equal protection and benefit has real effect, s. 15(2) must be construed as limited to its purpose. It was included in the Charter to silence the debate that rages elsewhere over the legitimacy of affirmative action. . . . It was not intended to save from scrutiny all legislation intended to have positive effect. . . .
>
> If this provision could be saved, little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its stated object the betterment or amelioration of the conditions in our community of a disadvantaged individual or group.

To the same effect see: *Weatherall v. Canada*, [1988] 1 F.C. 369 at p. 410, 32 C.R.R. 273 (T.D.); *Canadian National Railway Co. v. Canada (Human Rights Commission)*, *supra*, at p. 1145; and *Silano v. British Columbia* (1987), 42 D.L.R. (4th) 407 at pp. 413-15, 33 C.R.R. 331 (B.C.S.C.). Similarly, here, if the Divisional Court is right, and because legislation is passed for one of the objects set out in s. 14(1), it can discriminate on one of the prohibited grounds in s. 1, then most legislation having a positive effect will receive the protection of the subsection.

In *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609, s. 20 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, was the relevant legislation. Like s. 14(1), s. 20 created a statutory exception to the protection from discrimination afforded by s. 10 of the Quebec *Charter*. The relevant portion of s. 20 read as follows:

> 20. A distinction, exclusion or preference . . . justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

In *Brossard*, a town had adopted a hiring policy which disqualified members of immediate families of full-time employees from being employed by the town. It was contended that the exclusionary hiring policy was justified by the political nature of the town as a non-profit institution and was therefore deemed non-discriminatory by s. 20. It was conceded that the town in adopting the hiring policy had been acting honestly and in good faith. The members of the court were unanimous that the hiring policy could not be justified under s. 20. Beetz J., who delivered the majority judgment, said at pp. 335-36:

> While there need not be a direct or exclusive relationship between these factors, I am of the view that there must always be a connection between the brand of discrimination practised and the nature of the institution. As I have said, s. 20 protects the right to associate freely in groups for the purpose of expressing particular views or for engaging in particular pursuits. Section 20 has, however, a limited legislative purpose: it is intended as an answer for "distinctions, exclusions or preferences" which would otherwise

> be discriminatory under s. 10. It is logical that s. 20 protection only be extended to groups for which the mere fact of associating results in discrimination founded on a s. 10 ground. The institution must have, as a primary purpose, the promotion of the interests and welfare of an identifiable group of persons characterized by a common ground under s. 10: race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, or handicap, to cite the enumerated grounds of the amended provision. *The institution itself may fall into one or another of the s. 20 types but there must always be a congruence between a primary group purpose and the s. 10 ground of discrimination practised.*

(Emphasis added)

In order to interpret s. 14(1) in a manner that removes discrimination and achieves equality for disadvantaged persons and groups, a special program must be passed for one of the objects set out in the subsection, and in addition, there must, in my judgment, be a rational or logical basis for the discrimination. If there is not, the program is not protected by s. 14(1). Thus, in this case, if it could be shown that those excluded by age from the special program were more advantaged than those who were eligible for the program, there would be a rational basis for the discrimination, and the discrimination on the basis of age would be protected by s. 14(1). However, as I have pointed out and as counsel for the respondent conceded, the age restriction in the ADP has no logical or rational connection with admission to the program and, hence, in my judgment, it is not protected by s. 14(1).

In her report, the chair of the board said (at p. 72):

> This is not to suggest that there is no room for challenge to respondents who seek to shelter a program under s. 13 (now s. 14). The beneficiaries must be individuals who suffer hardship, economic disadvantage, or disadvantage generally. The respondents must show that their *bona fide* intent in designing the program is to relieve such hardship or disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity.

There is no doubt that, in the present case, the respondent had a *bona fide* intent in formulating the ADP. But, if a *bona fide* intent is sufficient to confer the protection of s. 14(1) on a special program, then the special program can discriminate on one of the prohibited grounds in s. 1 with impunity. A *bona fide* intent is not sufficient, in my opinion, to remove discrimination and to permit disadvantaged persons or groups to achieve equality: see *Ontario Human Rights Commission v. Simpsons-Sears*, *supra*, at p. 551.

Section 16(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, is the equivalent section of s. 14(1). It provides:

> 16(1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Clearly, in s. 16(1), the disadvantage must be based on or related to the listed grounds of discrimination and if it is not, it is not protected by the subsection. By interpreting s. 14(1) in the manner in which I have, the special program provisions of the two Acts receive a consistent application.

To sum up, the discriminatory ground of age in the ADP is not protected by s. 14(1) of the *Code*. The age restriction operates to exclude visually impaired persons, such as the appellant Roberts, from receiving funding which would enable them to purchase the assistive devices which would assist them in coping with their handicap. There is no rational connection between the eligibility requirement of age and the provision of services under the ADP; the age restriction is completely unrelated to the purpose of the program. I am therefore of the opinion that the age restriction is not protected by s. 14(1), and consequently, it must be struck out.

I would dispose of the appeal in the manner proposed by Weiler J.A.

Appeal allowed.

Daniels v. Crosfield (Canada) Inc.

Ontario Court (General Division), Borins J. *July 21, 1994*

Civil procedure — Offer to settle — Costs — Rule 29.10(1) applicable (all other conditions being met) where plaintiff obtains judgment on motion for summary judgment — Judgment obtained by plaintiff not as favourable as or more favourable than his offer to settle where offer had stipulated for costs on solicitor-and-client scale and where plaintiff only entitled (applying usual principles) to party-and-party costs — Rule 49.10(1) not applicable — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 49.10.

The plaintiff served an offer to settle on the defendant which provided for payment by the defendant of $43,000 together with interest and the plaintiff's solicitor-and-client costs to the date of acceptance, to be assessed or agreed. The offer was not accepted by the defendant, and had not been withdrawn by the plaintiff when the plaintiff moved successfully for summary judgment. Counsel agreed