THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

THE SHIELD BECOMES THE SWORD:

THE EXPANSION OF THE AMELIORATIVE PROGRAM DEFENCE TO PROGRAMS THAT SUPPORT PERSONS WITH DISABILITIES

FINAL RESEARCH PAPER
(prepared for the Law Commission of Ontario)

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LAW COMMISSION OF ONTARIO
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I. PREFACE

We are delighted to have had the opportunity to prepare this Case Study Paper that considers the questions raised by Section 5 ("Equality") of the LCO's *Call for Papers: The Law as it Affects Persons with Disabilities.* Here, we offer a critical analysis of the application of the ameliorative defence to programs that support persons with disabilities. The research advances our understanding of the principles identified by the Law Commission's *Background Paper*. It adds further context to an understanding of the barriers to equality and non-discrimination experienced by persons with disabilities. It builds on the *Background Paper's* review of conceptual approaches to disability.

A. About ARCH Disability Law Centre

ARCH Disability Law Centre (ARCH) is a community legal clinic dedicated to advancing the equality rights of persons with disabilities. ARCH provides free and confidential legal advice and information to persons with disabilities in Ontario. ARCH provides services to Ontarians with disabilities in many ways, through law reform and policy initiatives, community development, legal advice and referrals, public legal education, and litigation.

B. Language

This work uses the terms “special program” and “ameliorative program” interchangeably. The term “special program” is more often used in the context of statutory human rights instruments. The term “ameliorative program” is more often used in the context of *Charter* jurisprudence. Section 13 of the *Yukon Human Rights Act* distinguishes between “special programs” and “affirmative action” programs in the following way:

> 13(2). Special programs are programs designed to **prevent** disadvantages that are **likely to be** suffered by any group identified by reference to a prohibited ground of discrimination.
>
> 13(3). Affirmative action programs are programs designed to **reduce** disadvantages **resulting from** discrimination suffered by a group identified by reference to a prohibited ground of discrimination.[1]

In her 1984 report, *The Report of the Royal Commission on Equality in Employment*, Justice Abella considered and rejected the use of the term “affirmative action”.[2] She made the following comment about “intellectual resistance” to the use of particular language:

> The Commission was told again and again that the phrase "affirmative action" was ambiguous and confusing. Not surprisingly, those who favoured government intervention to create more equitably distributed employment opportunities had less objection to the term, even if they were unclear as to its precise meaning. On the other hand, those who rejected intervention opposed the term, no matter how it was defined. **People generally have a sense that "affirmative action" refers to interventionist government policies, and that is enough to prompt a negative reaction from many**…..In other words, there may be a willingness to discuss eliminating discriminatory

> employment barriers but not to debate "affirmative action" as it is currently misunderstood.[3]

The term “equity program” is applied to formal employment and pay equity systems, and do not appear to have a broader or less formal application.

“Reverse discrimination” is sometimes used to describe the kind of complaints from historically privileged communities, typical of the American jurisprudence. Some advocates from equity seeking groups challenge this language, arguing that “reverse discrimination” is not discrimination at all.

There are also regional differences in the use of the terms. “Affirmative action” is a term more often used in the United States. Until recently, the United Kingdom often used the term “positive discrimination” or “positive action”. Others use the term “benign discrimination”.[4]

C. Methodology

In the first phase of the project, we conducted a review of the legal literature on the application of the “ameliorative program” defence. We undertook a survey of the cases where government respondents have raised Section 15(2) of the Canadian *Charter of Rights and Freedoms* or Section 14 of Ontario’s *Human Rights Code*. Where available, we reviewed *facta* and oral submissions on the application of that defence. The review focused on its application to programs that support persons with disabilities. Applying a

comparative analysis, we reviewed relevant legislation in other Canadian jurisdictions and internationally.

In the second phase of the research, we conducted in-depth interviews and discussed the review findings with equality seeking groups including advocates for persons with disabilities. The targeted consultations were carried out in May of 2010. The structure of consultations was flexible. A focus group of experts in the field was held in May of 2010. Where they could not be conducted in person, consultations were conducted by telephone. Given that the interviews were not intended to represent a random sample, interviewees were selected to represent a broad range of views.

We are very grateful for the opportunity to have consulted with the following experts:

- Kate Stephenson, Human Rights Legal Support Centre
- Larissa Ruderman, Clinic Resource Office, Legal Aid Ontario
- Lesli Bisgould, Clinic Resource Office, Legal Aid Ontario
- David Baker, Baker Law
- Cathy Pike, Ontario Human Rights Commission
- Dianne Pothier, Schulich School of Law, Dalhousie University.
- Yvonne Peters, Legal Advisor to the Council of Canadians with Disabilities

II. INTRODUCTION

Despite constitutional and statutory affirmations of the right to equality, our communities continue to be characterized by patterns of economic, political and social exclusion. The recognition of the persistent, systemic and institutional nature of inequality may require the development of proactive and broad-scale measures, including the development of ameliorative programs.

The Supreme Court's decision of *R v. Kapp* (2008) offers a deferential reading of the governments' authority to target particular groups, and establish those ameliorative programs. *Kapp* stands for the proposition that a government respondent's declaration that a disability support or service is an "ameliorative" program may shield it from further *Charter* scrutiny.

Following *Kapp*, government respondents have increasingly relied on "ameliorative program" defences to claims of persons with disabilities. Government respondents may argue that an "ameliorative" program is immune from a finding of discrimination. For instance, providers of specialized transportation have argued that specialized transit is an "ameliorative program". Government defendants have argued that the Ontario Disability Support Plan, the Special Diet Allowance, funding for children with autism and

autism spectrum disorder and special education supports/services are ameliorative programs.

Here, we offer a critical analysis of the application of the ameliorative defence to programs that support persons with disabilities. We do so in eight parts:

1. First, we review the legislative context of the "ameliorative program" defence, as well as the application of the defence outside of Ontario and internationally.
2. Second, we review equality jurisprudence, which stands for the proposition that a government respondent's declaration that a disability support or service is "ameliorative" may shield it from further scrutiny.
3. We review recent caselaw from Ontario, demonstrating that government respondents increasingly rely on "ameliorative program" defences to claims of persons with disabilities.
4. In the fourth Section, we detail how the actual *raising of* the defence poses particular procedural barriers for claimants with disabilities - even if the defence is not made out.
5. In the fifth Section, we address the theoretical/conceptual implications of the (broadened) application of the defence. In particular, we examine how an over-expansive "ameliorative program" defence undermines the promise of substantive equality that underpins the *Charter* and the *Code*.
6. In the sixth Section, we highlight questions that have been unanswered or under-answered by the Courts.
7. In the final Section, we offer a principled and rigorous alternative to the analysis of ameliorative program defenses. We also provide practical guidance and arguments available to groups seeking to protect themselves from governments' "ameliorative program" defences.

A. Ameliorative Programs and Persons with Disabilities

Ameliorative programs are forward-looking, proactive challenges to group-based patterns of exclusion. They are designed to redress institutionalized, systemic or historic discrimination. Their goals might include to: eliminate present inequalities, remedy past inequalities, equalize opportunities between groups and to embrace and promote diversity.[5] In the case of disability, Marcia Rioux and Tim Daly put it this way:

> Ameliorating disability is not simply a matter of intervening medically. It is about addressing the physical, social, civic, economic, and cultural rights violations experienced by people with disabilities.[6]

There are a variety of types of ameliorative programs, in a variety of contexts (including workplace programs, educational institutions). Ameliorative programs may be used in both the public and private sector. For the purposes of this paper, types of ameliorative programs include, but are not limited to:

i. Hiring preferences for members of disadvantaged groups;
ii. Setting quotas, ensuring that at least a set number of positions (including paid jobs, board members, volunteers) are occupied by members of disadvantaged groups;
iii. Outreach to certain kind of applicants (job, board member, volunteer); and
iv. Special admission standards to educational institutions for members of disadvantaged groups.

Our focus is on the application of the ameliorative program defence to claims by persons with disabilities. While the expanded defence is a barrier for all equity seeking groups, people with disabilities more often rely on, or are the subject of, government programs than persons without disabilities, including: medical or health services, specialized transportation services, social assistance, education. In particular, women with disabilities are subject to increased scrutiny by a variety of institutions, including *Children's Aid Societies*. As a result of socio-economic-political marginalization, persons with disabilities from racialized communities are subject to increased scrutiny by - for example - psychiatric settings, social services and justice institutions.

Because they often rely on government programs, an over-expansive defence particularly threatens the equality claims of persons with disabilities. People with

disabilities are at an increased risk of poverty, and rely on government programs for minimal and basic entitlements. People with disabilities are less likely to be employed and, when they are employed, earn less than people without disabilities.[7] People with disabilities are more much more likely than people without disabilities to be living in poverty.[8] Persons with disabilities often face poor and unsafe living conditions.[9] Discrimination, inaccessible environments and lack of access to health services and supports threatens participation in work, social and community lives (including schooling). [10] It ultimately results in a systemic pattern of life-long exclusion.

B. Ameliorative Programs as an Expression of Substantive Equality

Adherence to formal equality has been referred to as applying the “similarly situated” test. That is, the similarly situated should be similarly treated.[11] On the other hand, substantive equality is concerned with the actual distribution of resources, opportunities and choices within a society. Indeed, Anne Bayefsky contended that the wording of Section 15 deliberately provides for "equality of results".[12]

In *Andrews v. Law Society of British Columbia,*[13] the first equality rights case after Section 15 came into effect, the Supreme Court of Canada confirmed that the equality guarantee was concerned with “equality of results” and not formal equality.[14] Speaking for the majority of the Supreme Court, Justice McIntyre expressly recognized that “the accommodation of differences....is the essence of true equality”.[15] He emphasized the

crucial importance of considering differing needs when looking at achieving substantive equality.

It is well established that ameliorative programs are intended to promote and be an expression of the *Charter's* promise of substantive equality. The ameliorative program defence, then, is a necessary part of the government fulfilling its Section 15(1) obligations. Peter Hogg put it this way:

> Under a substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it.[16]

Indeed, the principle of substantive equality may require the <u>proactive</u> provision of additional support and accommodation. In that way, the ameliorative program defence is related to calls for a "positive obligation" approach. For more on this point, see Section VII.B "Ameliorative Programs as Positive Obligations".

C. Ameliorative Programs as Targeted Resource Allocation

Ameliorative programs focus on segments of the population in order to ensure that those with the greatest needs are supported.[17] Ameliorative programs preserve resources in the most effective[18] and efficient manner. [19] Deferring to the government's resource-allocation role, Courts have held that there should be minimal restrictions on the authority of governments to set up special programs. In *Lovelace*, Justice Iaccobucci wrote for the Court:

> Given its important purpose, ameliorative programs should be permitted to operate with a minimum amount of difficulty.[20]

In *R v. Willocks,* Justice Watt of the Ontario Divisional Court considered whether alternative justice programs designed for persons from Aboriginal communities were "special programs". Justice Watt spoke to the value of encouraging governments to set up special programs:

> The *Charter* does *not* ask, in my respectful view, that an affirmative action program within its s. 15(2), address at once all individuals or groups who suffer similar disadvantage. **There must be some room left to establish and give effect to priorities amongst disadvantaged groups, provided there is no gross unfairness.**[21]

Constance Backhouse heard the seminal decision of *Roberts* (see Section IV.B for more on *Roberts*) at the Ontario Board of Inquiry, and commented on the value of targeting, reflective the principle of substantive equality:

> …[I]t is consistent with the object of substantive equality to develop <u>targeted</u> ameliorative programs, and to exclude those without the same needs as those for whom the program is developed.[22]

It is well established that governments are permitted to identify priorities and 'target' particular disadvantaged groups. That 'targeting' necessarily excludes other groups. Persons who are excluded from an ameliorative program may challenge that "targeting" as discriminatory. There are two types of challenges:

- A challenge of that targeting by a member of an <u>advantaged</u> group is sometimes referred to "reverse discrimination".
- A challenge of that targeting by a member of a <u>disadvantaged</u> group is sometimes referred to "under-inclusion".

D. Criticisms of Ameliorative Programs, Generally

Ameliorative programs, of course, are not uncontroversial. For instance, Mark Drumbl and John Craig argue that affirmative action programs make unfair generalizations about a person's needs, based on group membership.

> Constitutionally problematic affirmative action then is any state law or program which generalizes about an individual's social and economic status on the basis of group membership and allocates social benefits accordingly. **Treating individuals differently on the basis of generalizations about the groups to which they belong, while ignoring their actual needs and ability, is the hallmark of discrimination**.[23]

Critics claim that affirmative action programs only benefit the most-advantaged of members from historically disadvantaged groups.[24] Others express concern that some affirmative action programs offer "cookie cutter" approaches to ameliorating disadvantage. Indeed, a "one size fits all" approach is less effective than developing individualized and contextualized responses to the particular needs of a member of a disadvantaged group.

Other critics question the actual benefit or value of affirmative action programs.[25] M.B. Abrams claims that such "social engineering" confers benefits without actually addressing the underlying cause of disadvantage.[26] Abrams continues on to say narrowly constructed affirmative action programs reinforce the status quo rather than challenging it. In the same way, Frank de Zwart explains that the unintended effect of affirmative action in India was to reinforce the caste system.[27] Rather than ameliorate

disadvantage with an eye towards long-lasting change, individuals from disadvantaged groups rely on membership to establish entitlements in the short-term.

III. LEGISLATIVE FRAMEWORK GOVERNING THE OPERATION OF "AMELIORATIVE PROGRAMS"

This Section reviews legislation governing the application of the special program defence in Canada. It touches briefly on the protection of analogous (or nearly analogous) programs internationally. This Section does not offer particular comment on legislative measures, including Ontario's *Pay Equity Act*[28] or the federal *Employment Equity Act*.[29]

A. Canadian *Charter of Rights and Freedoms*

Section 15(2) was added through "excessive caution", following American litigation challenging affirmative action programs.[30] Section 15(2) of the *Charter* provides:

> Subsection [15(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.[31]

Section 15(2) offers protection to "any law, program or activity". The Supreme Court in *McKinney v. University of Guelph*, found that the wording of Section 15(2) supported the view that Section 15(1) was not meant to be restricted to "law".[32]

B. Ontario's *Human Rights Code*

Section 14 of Ontario's *Human Rights Code* provides:

> 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. [33]

The *Code* also includes a number of procedural provisions with respect to the designation of "special program"[34], the duration of the effect of that designation[35] and how that designation may be used as evidence before the Human Rights Tribunal of Ontario.[36] An application may be made to the Ontario Human Rights Commission (OHRC) for a program to be designated as special program.[37] Generally, the OHRC has declined to undertake the function of designating special programs.

The OHRC cannot inquire into special programs that are implemented by the Crown. Section 14(9) of the Code provides that those procedural provisions do not apply to a program implemented by the Crown or an agency of the Crown.[38] Section 18 of the *Code* provides that restrictions to membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization are protected from findings of discrimination.

C. Other Canadian Jurisdictions

The protections offered to special programs are codified in legislation across Canadian jurisdictions. Appendix I offers a review of relevant sections of the governing human rights statutes in the federal, provincial and territorial jurisdictions, including:

- *Canadian Human Rights Act*

- *Charte des droits et libertés de la personne du Québec*
- *British Columbia Human Rights Code*
- *Alberta Human Rights, Citizenship and Multiculturalism Act*
- *Saskatchewan Human Rights Code*
- *Manitoba Human Rights Code*
- *New Brunswick Human Rights Act/ Loi sur les droits de la personne du Nouveau-Brunswick*
- *Nova Scotia Human Rights Act*
- *Prince Edward Island Human Rights Act*
- *Newfoundland Human Rights Code*
- *Yukon Human Rights Act*
- *Northwest Territories Human Rights Act*

Some of Canadian jurisdictions, including British Columbia[39], appear to only offer the special program defence in the context of employment. Other jurisdictions, like Saskatchewan, offer protection to fraternal, religious, racial or social organizations who give preference in employment to persons identified by the same ground that the organization is engaging in the serving the interests of.[40] Nova Scotia's *Human Rights Act* directly cites Section 15(2) of the Charter.[41]

Through its "Equity Works" program, the Saskatchewan Human Rights Commission approves and supports equity plans of specific organizations. Saskatchewan Human Rights Commission has taken an active role in designating equity programs, keeping approval requirements to a minimum.[42]

Alberta's newly enacted *Human Rights Act* is silent on the issues of "ameliorative" or "special programs".[43] Instead it offers that a contravention is deemed not to have occurred where the contravention is "reasonable and justifiable in the circumstances". [44]

Quebec's *Charte des droits et libertés de la personne du Québéc* [Quebec Charter] is the most extensive, and deserves further examination outside this Paper. For instance, the Quebec *Charter* requires that the Commission des droits de la personne et des droits de la jeunesse lend assistance to develop affirmative action programs.[45] The *Charter* also provides that the Commission shall supervise the administration of affirmative action programs. Section 86 deems an affirmative action program non-discriminatory if it is established in conformity with Quebec's *Charter*.[46]

D. Examples of International Approaches to Special Programs

This Section reviews how jurisdictions outside of Canada have addressed the persistent barriers to equality. Rather than a comprehensive review, this Section offers a few jurisdictions as illustration. On the other hand, Global Rights' report, *Affirmative Action: A Global Perspective* comprehensively surveys affirmative action programs across the world, including in Brazil, Malaysia and South Africa.[47]

1. United States

In the United States, there is no constitutional protection for "affirmative action" programs. Instead, the Fifth Amendment and the Fourteenth Amendment of the *United States Constitution* simply provide for "the equal protection of the laws".[48] The status of affirmative action programs continues to be hotly contested. Jason Morgan-Foster

describes the American approach to affirmative action as the "most restrictive".[49] Roozbeh Baker also offers:

> The American definition of equality rights has become highly formalistic and requires that the government not discriminate against select citizens, by – save for the most narrow circumstance – attempting to treat all equally under the law. In taking the equal treatment for all citizens as its point of departure, **US equality rights jurisprudence has resulted in a piecemeal approach to affirmative action programs**.[50]

Much of the affirmative action jurisprudence in the U.S. has developed in the context of racial discrimination, which requires a "strict scrutiny" analysis. American courts review legislation that classifies people on the basis of gender under the less onerous "intermediate scrutiny" test.[51] There has been little attention paid to the constitutionality of sex-based affirmative action programs in the United States.

The American colour blind approach is reminiscent of a formal understanding of equality. Justice Harlan, dissenting in *Plessy v. Ferguson,* argued that the *Constitution* "is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[52] In *Adarand Constructors Inc. v. Pena*, Justice Thomas found that "it is relevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help…"[53]

The bulk of American jurisprudence involves complaints from members of historically privileged groups – that is, claims of "reverse discrimination". For example:

- In *Regents of the University of California v. Bakke*, the American Supreme Court struck down as discriminatory the admissions policy of a medical school that offered priority to black applicants on a quota system.[54]
- In *Adarand Constructors Inc. v. Pena*, the Supreme Court considered a challenge to a federal program offering financial incentives to hire subcontractors who were "socially and economically disadvantaged". The Court confirmed that all race-based affirmative actions programs must be reviewed on a standard of "strict scrutiny". The Court split on whether a government affirmative action program could ever pass the "strict" standard.
- In 2003, the Supreme Court determined that the University of Michigan's use of race in its "Undergraduate Admissions Policy" violated the Equal Protection Clause.[55] The "point system" used by the Michigan Admissions Office made race too decisive a factor, and failed to consider applicants as "individuals."
- In a companion case, the Supreme Court found that the **"**Law School Admissions Policy**"** was narrowly tailored, and served the compelling state interest of diversity.[56] The Law School Admissions Policy survived the strict scrutiny test.

2. India

India's approach to affirmative action is "liberal, expanded" [57] and "firmly embrace[s] the notion of substantive equality". [58] The *Indian Constitution* explicitly allows for affirmative action programs, known as "reservations".[59] The State mandates that a percentage of public sector jobs be reserved for minority candidates. Public and private educational institutions, except in the religious/ linguistic minority educational institutions, also use reservations.[60] Entry criteria are lowered for certain identifiable groups that are under-represented in the schools. Gender and caste are the most often used criteria to identify under-represented groups. Disability is not a ground on which reservations may be made.

Approximately 65% of the population has reservations available to them.[61] There has been much concern about who falls within a protected class, and whether the

reservation system only benefits the wealthiest and educated members of a protected class. In April 2008, the Supreme Court of India upheld Other Backward Classes ("OBC") quotas in Government funded institutions. The wealthier and better educated members of the OBC's (referred to as the "creamy layer") are excluded from the ambit of reservation policy.[62]

3. United Kingdom

The United Kingdom's newly promulgated *Equality Act* (2010) extends the range of voluntary "positive actions" as wide as is permitted under EU legislation, without discarding the merit principle. [63] In particular, the *Equality Act* extends until 2030 the exemption from sex discrimination law allowing political parties to select all women or all men candidate short-lists.[64] Unlike its predecessor, the new *Equality Act* does not engage the principle of "positive discrimination", given that it "would have been unlawful under both current domestic and European legislation because it would discard the merit principle".[65]

4, European Union

Most jurisdictions in the European Union appear to be generally uncritical or at least supportive of affirmative action programs. For example, Article 23 ("Equality between Men and Women") of the European Union's *Charter of Fundamental Rights* (2000) provides:

> Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.[66]

That support for affirmative action, however, is not unwavering. In its 1995 decision in *Kalanke*, the European Court of the Justice found the affirmative action programs, such as preferential treatment and quotas in favour of women, were not bringing about the end of discrimination.[67] At issue in *Kalanke* was a "tie break" rule that preferred a female job applicant over an equally qualified male competitor. The European Court of Justice found that affirmative actions programs of that kind were not compatible with the equal treatment of women and men. *Kalanke* has been mitigated to some degree by *Marshall.*[68] The European Court upheld a narrowly tailored affirmative action program[69] that required that priority be given to equally qualified female candidates in particular job sectors.[70]

E. International Law

Ameliorative programs are "strongly endorsed by international law".[71] This Section reviews the international law materials, as they apply to "affirmative action" programs. The Section reviews international materials in chronological order.

The United Nations opened the *Convention on the Elimination of All Forms of Racial Discrimination* for signature on March 7, 1966. Canada signed the Convention on August 24, 1966 and ratified it on October 14, 1970. Article 1(4) provides:

> Article 1(4). Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2) of the *Convention on the Elimination of All Forms of Racial Discrimination* provides:

> Article 2(2). States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved. [72]

Canada is a signatory to the *International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and ratified it on December 10, 1981. Article 4 provides the following comment on “temporary special measures”.

> Article 4(1). Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; **these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved**.
>
> 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity **shall not be considered discriminatory**.[73]

At paragraph 10 of the *General Comment* 18 to the *International Covenant on Civil and Political Rights (ICCPR)*, the Office of the Commissioner of Human Rights provides the following comment on affirmative action programs:

> 10. The Committee also wishes to point out that the **principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.** For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. **However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant**.[74]

Article 27 of the newly ratified *Convention on the Rights of Persons with Disabilities* provides for the recognition of the rights of persons with disabilities to work on an equal basis with others. State parties are required to take appropriate steps to realize that goal, including the development of affirmative action programs:

> 27.1(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.[75]

In short, international law and material clearly contemplates a role for "affirmative action" programs, including those that ameliorate the disadvantage experienced by persons with disabilities.

IV. THE EVOLUTION OF THE BROADENED APPLICATION OF THE "AMELIORATIVE PROGRAM" DEFENCE

This Section reviews the evolution of the "ameliorative program" defence, from the inception of the *Charter's* equality provisions (in force in 1985) to the Supreme Court's most recent pronouncements. This Section does not focus on Ontario, but offers attention to its evolution across Canada.

There have been three distinct periods of the use of the ameliorative program defence.

- The first wave is characterized by a mixed or inconsistent application of ameliorative program defences.
- In the second wave, the Court appeared to attempt to develop a principled approach to the defence and even rebuked the government where it sought to expand the defences' application (*Roberts*, *Eaton*, *Schafer* and *Lovelace*).
- The emergent third wave of jurisprudence offers increasing deference to the government to target particular disadvantaged groups (*Kapp*).

This Section of the Paper does not distinguish between its pedigree in *Charter* and statutory human rights contexts. These areas share a history, although their boundaries are contested. It is beyond the scope of this paper to elaborate on the link between the *Charter* and the *Code*.[76] The Court of Appeal will have the opportunity to comment on the relationship between the *Charter* and the *Code* in *Tranchemontage,* heard in March 2010.

There are considerable differences between the operation of the defence in the *Charter* and the *Code* context. Indeed, Russel Jurianz found that statutory human rights defences are narrower than Section 15(2) of the *Charter* – that is, it is more difficult to make out a Code special program defence, than it is to make out a *Charter* defence.[77] Examples of the differences include:

- Human rights statutes do not have the equivalent of Section 1 of the *Charter*.
- Human rights instruments offer protection from discrimination by non-governmental and governmental actors. Section 15(2) only applies to ameliorative programs established by government actors. [78] This Paper is primarily concerned with the application of the *Code's* "special program" defence by government respondents.
- Section 15(2) requires that groups are disadvantaged "because of" an enumerated or analogous ground. Legislative exceptions require that the disadvantage be "based on" the enumerated ground. [79]

Despite the difference in the two contexts, the Ontario Human Rights Commission held that cases decided under the *Charter* can advance understanding of how Section 14 of Code is properly interpreted.[80] Human rights tribunals have appeared to be more willing to consider the special program defense in a way that supports a substantive vision of equality, as in the case of *Roberts* and *Ball* (below).

A. First Wave: Mixed Application of the Ameliorative Program defence (1985-1994)

This Section reviews early judicial commentary to the ameliorative program defense from the introduction of Section 15(2) until the Ontario Court of Appeal's seminal human

rights decision in *Roberts* in 1994. This first wave is characterized by an inconsistent application of the ameliorative program defence.

In *Action Travail des Femmes v. Canadian National Railway,* the Court considered the constitutionality of a human rights tribunal's order that CN hire one woman for every four new hires. The evidence demonstrated that women had been improperly excluded for many years by systemic discriminatory employment practices.[81] The Supreme Court upheld the employment equity program in that it was "rationally connected" to the purpose of increasing the number of women in CN's workforce. [82]

In *Apsit Manitoba Rice Farmers Association v. Human Rights Commission* (1987), the Manitoba Court of Queen's Bench considered the decision of the Manitoba Human Rights Commission to approve a plan that gave preference in the granting of licences to harvest wild rice to aboriginal persons.[83] Justice Simonsen found that the affirmative action plan did not serve to actually redress the disadvantage, since the cause of the disadvantage was not the difficulty in getting licences. Aboriginal farmers did not have the resources or equipment that they needed.

> In order to justify a program under section 15(2), I believe there must be a **real nexus between the object of the program as declared by the government and its form and implementation.** It is not sufficient to declare that the object of a program is to help a disadvantaged group if in fact the ameliorative remedy is not directed **toward the cause of the disadvantage**. There must be a unity or interrelationship amongst the elements in the program which will prompt that court to conclude that the remedy in its form and implementation is rationally related to the cause of the disadvantage.[84]

Silano v. *British Columbia* (1987) involved a Section 15(1) challenge to the provisions of a provincial assistance program, wherein recipients under 26 years of age received $25 less per month than recipients over 26 years of age. Justice Spenser of the British Columbia Supreme Court rejected the argument that the discriminatory provisions could be saved by Section 15(2), since young people are not disadvantaged because of age. The age distinction did not have a rational connection to the program's purpose, and therefore, the program was not saved by Section 15(2).[85]

In *Andrews*, Justice McIntyre used Section 15(2) as an interpretive aid to understand Section 15(1). In particular, he found that:

> It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(*a*) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. **Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups**...."[86]

Justice Wilson, in her dissenting reasons in *Harrison v. University of British Columbia (1990),* concluded that mandatory retirement policies could not be construed as affirmative action measures, since older workers under the age of 65 have not experienced discrimination. She argued that Section 15(2) strengthens the notion adopted by the Court in *Andrews*.

> It seems to me clear [...] that at the very least the purpose of this section is to enshrine the notion of the viability, indeed the necessity, of measures designed to redress the drastic effects of discrimination. … It follows, in my respectful view, that for any measure to be characterized as an "affirmative action" measure within the meaning of s. 15(2), it must first be established that the measure is directed towards assuaging the effects of discrimination against a disadvantaged group.[87]

This first wave is characterized by an inconsistent application of the ameliorative program defence. The legal landscape changed with the Ontario Court of Appeal's decision in *Roberts*.

B. Second Wave: Towards a Principled Approach (1994 – 2000)

This second wave is characterized by an attempt by the Courts to develop a principled approach to the ameliorative program defence. Courts appeared, at times, to rebuke a government respondent where it sought to unreasonably expand the defence's application.

In *Ontario (Human Rights Commission) v. Ontario* ("Roberts"), the complainant applied for funding from Ontario's Assistive Devices Program (ADP) to purchase a closed circuit television magnifier. He was 71 years old at the time of the application. He was determined to be ineligible for ADP funding, since at that time there was a cut-off age of 18 years for assistance to purchase that type of assistive device.

The Court of Appeal found that Section 14 of the Ontario *Human Rights Code* only insulates a program from review where the challenge is from a member from a

historically privileged group or a disadvantaged person whose disability the program was not designed to benefit.

> **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.
>
> … 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**.
>
> 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*. 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. [88]

The Ontario Court of Appeal in *Eaton* v*. Brant (County) Board of Education* judicially reviewed a decision of the Special Education Appeal Board, upholding the decision of the Identification, Placement and Review Committee which identified Emily Eaton as “exceptional” and placed her in a segregated classroom. Emily Eaton’s parents asserted that Emily’s exclusion from an integrated classroom violated her right to equal

treatment, as guaranteed by s. 15 of the *Charter* and her right to be free from discrimination, as guaranteed by the *Code*. The respondent School Board asserted that the special education programs were protected by the "saving provisions" of the 15(2) of the *Charter* and Section 14(2) of the *Code*. The Board advanced the argument that special education programs were exempted from *Charter* compliance.

The Court of Appeal characterized special education program as necessary accommodations rather than protected "special programs". With regard to the relationship between Sections 15(1) and (2), Justice Arbour held:

> It is unnecessary to determine whether the special education programs offered pursuant to the provisions of the *Education Act* and regulations would need the protection of s.15(2) of the Charter in the event of an allegation that they discriminate against mainstream students. Even though these programs were enacted in part to ameliorate the conditions of disabled students, they arguably do nothing more than to provide these students with the real equality that they are entitled to under s.15(1). **In such a case, they may not be viewed as "affirmative action" programs as understood under s.15(2).**[89]

The appeal to the Supreme Court of Canada did not specifically involve consideration of Section 15(2).[90] The Supreme Court made its finding on entirely Section 15(1). Emily Eaton's placement in a segregated classroom did not constitute a burden or disadvantage in breach of Section 15(1).

In *Schafer v. Canada,* two Ontario couples challenged the parental benefit provisions of *Unemployment Insurance Act* that offered fewer benefits to adoptive parents. The government respondent claimed that the provision of maternity benefits was an ameliorative program. Justice Cameron of the Ontario Court (General Division) held that

status as an adoptive parent was an analogous ground, that the provisions denied equal benefit of the law to adoptive parents, and that the provisions were not saved either by Section 15(2) or by Section 1 of the *Charter*.[91] He found that the "history, net result and effects of the present statutory provisions" established that purpose was to "to facilitate the process of family formation, whether by pregnancy or adoption".[92] Given that purpose, the government failed to justify the differentiation.[93] At the Court of Appeal, the provision of shorter leaves to adoptive parents was found to not infringe Section 15. There was no determination with respect to the application of Section 15(2).

In the early 1990s, the province of Ontario and the leadership on Ontario's First Nations entered in negotiations with a goal of setting up Ontario's first reserve-based commercial casino. The appellants were not eligible to receive proceeds from that casino, since they were not registered as a "band" for the purposes of the *Indian Act.* The Court of Appeal found that the casino project was authorized by Section 15(2) and could not constitute discrimination. In making that decision, the Court warned against the *Charter's* use as an instrument of advantaged persons to roll back legislation designed to assist less advantaged persons.[94]

> ...If government affirmative action programs can be too readily challenged because, for example, they do not go far enough in remedying disadvantage, governments will be discouraged from initiating such programs. Governments should be able to establish special programs under s.15(2) that distinguish between or even within groups protected under s.15(1).[95]

The Court found that Section 15(2) should be seen as an interpretive aid to Section 15(1), not an exception or an exemption from it. Justice Iaccobucci wrote for the Court:

> We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[96]

For there to be an ameliorative purpose, there should be a correlation between the program and the disadvantage suffered by the target group.[97]

After reaching that conclusion, Justice Iacobucci performed a contextual analysis of the discrimination under Section 15(1) by examining the four factors the trial judge referred to in his analysis, namely,

> (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability, (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others, (iii) **the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society**, and (iv) the nature and scope of the interest affected by the impugned government activity. [98]

Justice Iacobucci did not foreclose the possibility that Section 15(2) may have independent application in some future case.[99]

C. Third Wave: The Danger of Deference (2008 and forward)

After *Lovelace* was decided by the Supreme Court of Canada in 2000, there were few challenges that raised ameliorative program defences. *Lovelace* stood as the authority on the application of the ameliorative program defence for almost a decade.

In *R v. Kapp*, a group of commercial fishers, mainly non-Aboriginal persons, challenged the issuance of a communal fishing license to members of three Aboriginal bands. They argued the violation of their rights to equality protected by Section 15(1). The Supreme Court broadened the application of the "ameliorative program" defence. The Chief Justice and Justice Abella authored the joint decision of the majority of the Court. Only if the government fails to demonstrate that the program fails under Section 15(2), will the program receive full scrutiny under Section 15(1). There is no determination of whether the program is "discriminatory", if a special program defence is made out**.** This evolution makes the special program defence especially attractive to government respondents.

The judgment of the majority of the Court was delivered by the Chief Justice and Justice Abella. Justice Bastarache wrote separate reasons, concurring in the result but on a different ground. The Chief Justice and Justice Abella offered a third approach to Section 15(2), which avoided the "symbolic problem" of finding a program discriminatory before saving it as ameliorative. At paragraphs 35*ff*, the Chief Justice and Justice Abella held:

> Iacobucci J. in *Lovelace* perceived two possible approaches to the interpretation of s. 15(2). He believed that the Supreme Court could either read s. 15(2) as an **interpretive aid** to s. 15(1) (the approach adopted in *Lovelace*) or read it as an **exception or exemption** from the operation of s. 15(1)…
>
> In our view, there is a **third option**: if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all. As discussed at the outset of this analysis, s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or

> imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other. ...
>
> Section 15(2) is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combating disadvantage to be discriminatory and in breach of s. 15.[100]

Relying on a language of Section 15(2), the Court required that the program only have an ameliorative *purpose*, but not ameliorative *effect*. The Court also found that the ameliorative purpose need not be the program's *sole* purpose. *R. v. Kapp* also explicitly warns that further refinement of the Section 15(2) test may be necessary:

> In proposing this test, we are mindful that **future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances**. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point – one that is adequate for determining the issues before us on this appeal, but **leaves open the possibility for future refinement**.[101]

The Supreme Court also made clear that the defence does not apply to broad social programs.[102]

In *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, the Court of Appeal of Alberta considered the constitutionality of the Métis Settlements Act (MSA), which requires the termination of Métis settlement status upon registration under the Indian Act. The appellants applied for status to access health care benefits. At the Court of Appeal, the government respondents argued that so long that they are able to point to an ameliorative purpose relating to disadvantaged persons, the impugned

legislation will be saved by Section 15(2), regardless of whether the appellants could make out a case of discrimination.[103]

The Court of Appeal disagreed and found that the legislation did not rationally advance the purported purposes, and that Section 15(2) is not a bar to the consideration of Section 15(1).[104] The Supreme Court granted leave in March, and the hearing is tentatively scheduled for December.

In *Jean, v. Minister of Indian and Northern Affairs Canada*, the student members of a landless nation were denied access to an educational program.[105] The program offers funding for educational services on reserves. Because the applicants did not have a reserve, they were ineligible for the program's assistance. The Federal Court of Appeal upheld the Federal Court's decision that there was no breach of Section 15(1) on an enumerated or analogous ground (place of residence, or lack of land base). The Federal Court of Appeal remarked only in passing to the issues raised by Section 15(2). In particular, Justice Trudel offered the following comment on *Kapp*:

> [8] . Kapp taught us that subsection 15(2) may be more than an interpretive aid or an exemption to the applicability of section 15 [citations]. According to *Kapp*, a third possibility is that it has an independent role in that it tells us, "in simple clear language, that subsection 15(1) cannot be read in a way that finds an ameliorative program aimed at combating disadvantage to be discriminatory and in breach of subsection 15" (Kapp, at paragraph 38). **Therefore, if the government can demonstrate that (1) the Program has an ameliorative purpose and (2) the Program targets a disadvantaged group identified by the enumerated or analogous grounds, it may be unnecessary to conduct a subsection 15(1) analysis at all**….
>
> [9] There was considerable debate before this Court as to whether the guidance of *Kapp*, a case of reverse discrimination,

> could be applied in a case of discrimination owing to the overly restrictive scope of a program. In that regard, two observations must be made: (1) **if Kapp had been intended to be read in a limited manner, the Supreme Court of Canada would have stated so**; and (2) Kapp is part of the line of cases of Andrews v. Law Society of British Columbia, 1989 CanLII 2 (S.C.C.), [1989] 1 S.C.R. 143 [Andrews] and Law v. Canada (Minister of Employment and Immigration),1999 CanLII 675 (S.C.C.), [1999] 1 S.C.R. 497 [Law], neither of which dealt with a case of reverse discrimination. Therefore, I do not believe that the teachings of Kapp should be rejected outright for the purposes of this appeal. However, I note that in that case, the third possibility was stated after the Court concluded that "the appellants [had] established that they [had been] treated differently based on an enumerated ground, race" (Kapp, above, at paragraph 29). Since I do not intend to draw a conclusion related to an analogous ground, my analysis will proceed along the path laid out by the trial judge.[106]

In *Jean*, the Women's Legal Education and Action Fund (LEAF) intervened at the Federal Court of Appeal on the proper interpretation of Section 15(2).[107] LEAF distinguished the *Jean* case from *Kapp* (a classic case of reverse discrimination). In particular, LEAF argued that *Kapp* did not consider Section 15(2) in the case of a disadvantaged group alleging that a remedial program is underinclusive. As LEAF set out in its factum to the Federal Court of Appeal in *Jean*:

> The consequence of an approach that protects all ameliorative programs from Section 15(1) *Charter* scrutiny would be a two-tiered hierarchy of equality rights that would accord second class status to members of disadvantaged group who are excluded from these programs. The particularly vulnerable and marginalized members of disadvantaged group - those who experience multiple and intersecting groups of discrimination, including on the basis of sex, race, Aboriginality, disability, poverty, marital status and sexual orientation - would be most likely to suffer from such exclusion and diminished constitutional recognition.[108]

Leave to the Supreme Court was refused in June 2010.

Recently in *Cooper*, the Ontario Superior Court heard the Section 15 complaints of students who did not receive special education benefits in private faith based schools, available to children in public and separate schools. The Superior Court found that the Province was not obliged to extend funding to special education services to faith based schools. The Court also found that the Province extended health services - but not special education services - to private schools. The extension of health services had an "obvious ameliorative and remedial purpose". Citing *Kapp*, the Court found that the students' claims failed because the provision of "health services" was ameliorative.[109]

The next Section highlights the implications of the third wave's expansion of the ameliorative program defence for persons with disabilities in Ontario. It reviews current caselaw demonstrating that government respondents are increasingly often raising ameliorative program defenses to the *Charter* and *Code* claims of persons with disabilities.

V. THE CURRENT CONTEXT IN ONTARIO: EXPANDING THE APPLICATION OF THE DEFENCE

This Section explores why attention to the constitutional protection of ameliorative programs is particular pressing. Government respondents increasingly rely on "ameliorative program" defences as a shield from claims of discrimination. **In that way, the defence is reconfigured from a shield to a sword. Persons with disabilities are required to defend themselves from the defence raised by sophisticated government defendants.** This Section reviews *Charter* and *Code* analyses of ameliorative programs, including occasions where it has been used as a defence against claims of discrimination. This Section focuses on Ontario examples of government actors seeking the protection or the insulation of the “ameliorative program” defence.

A. Specialized Transit Cases before the Ontario Human Rights Commission (2002-2006)

Transit providers have frequently taken the position that specialized transit services are “special programs” within the meaning of Section 14 of the *Code.*[110] In these series of cases, the complainants were users of the specialized transit systems who challenged the way that the services were provided. The providers sought to defend themselves by arguing that the specialized transit services were “special programs”.

In *Odell et al. v. Toronto Transit Commission* (2002), the Commission settled a series of complaints against the Toronto Transit Commission's specialized transit services ("Wheel Trans"). The Board of Inquiry considered a preliminary motion brought by the TTC that Wheel Trans was a special program, and to have the complaint dismissed at the outset of the hearing. The Board of Inquiry quashed the preliminary motion. Given that the TTC did not concede a *prima facie* violation of the Code, the defence could not be raised as a preliminary matter.[111]

In 2004, the Commission settled a series of complaints against the City of Hamilton's specialized transportation services. The City of Hamilton claimed that its "Accessible Transportation Services Program", including the Disabled and Aged Regional Transit System (DARTS) service, constituted a "special program" within the meaning of Section 14 of the *Code*.[112]

Neither of these settlements addressed the important issue of whether the specialized transit services were "special programs" for the purpose of Section 14 of the *Code*. In 2006, the Ontario Human Rights Commission authored a position paper on the question of whether specialized transportation was a "special program".[113] That paper determined that specialized transportation programs are <u>not</u> special programs within the meaning of Section 14 of the *Code*.

B. *Wynberg v. Ontario* (2006)

In *Wynberg v. Ontario,* the applicants challenged the age limitations to the funding for services/supports for children with autism. Services to children with autism were only available to children under the age of six. Relying on Section 15(2) of the *Charter of Rights and Freedoms*, the government defendants argued that the funding for children with autism and autism spectrum disorder had an ameliorative purpose.

Justice Kiteley of Superior Court of Justice found that she must address Section 15(1) before considering the government's Section 15(2) arguments.[114] She found that the age cut-off violated the *Charter's* equality guarantees. Justice Kiteley accepted that the special education regime is an ameliorative program.[115] Nevertheless, she found that the funding for children is a rare example of a targeted ameliorative program that is unconstitutional.

Justice Kiteley's decision was overturned by the Court of Appeal. There is a brief discussion of Section 15(2) in the Court of Appeal's decision:

> … The Court [in *Lovelace*] also makes clear that a claim that such a program is discriminatory is properly assessed under s. 15(1), but that exclusion from a targeted ameliorative program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society than might be the case with exclusion from a more comprehensive ameliorative program.[116]

The Court of Appeal's decision in *Wynberg* did not rely on Section 15(2). Indeed, there is only fleeting attention paid to Section 15(2).

C. *Ball v. Ontario* (2010)

The Human Rights Tribunal of Ontario recently considered whether the provincial Special Diet Allowance (SDA) program violated the *Code* in the way it provides benefits to Ontario Disability Support Program (ODSP) recipients. The SDA provides additional funds to ODSP recipients to relieve the disadvantage faced by people who have extra dietary costs related to therapeutic diets prescribed by their health care professionals. In 2005, there were significant changes made to the SDA program, reducing the benefits to people with particular types of disabilities.

During the hearing, Ministry of Community and Social Services (MCSS) relied on Section 14 of the *Code* to argue that the Special Diet program was a "special program", and therefore immune from a finding that it violates the applicants' *Code* rights.[117] The MCSS argued that the *Roberts* decision ought to be re-visited given the Supreme Court's decision in *R v. Kapp* (2008).

The HRTO distinguished *Kapp* from the claims before it, and concluded that the *Roberts* analysis still applies under the *Code*.[118]

> The analysis in *Kapp* does not detract from or contradict the reasoning in *Roberts* about why, when a member of the targeted group is excluded on a prohibited ground, substantive equality is undermined…..

> Therefore, I conclude that the *Roberts* analysis still applies under the *Code*. Considering the *Roberts* test in the circumstances of this case, I conclude that the analysis above regarding the purpose of the program disposes of the s. 14 issue. Under s. 1 of the *Code*, the analysis, following the approach in *Gibbs* and other cases, is to determine whether the claims fall within the purpose or underlying rationale of the program in order to determine whether there is substantive discrimination. ***Roberts* provides that s. 14 of the *Code* does not shield a program from scrutiny where the claimant has a disadvantage the program was designed to benefit.** The analysis under s. 14 is the same as that under s. 1.[119]

The HRTO left open whether *Kapp* is inapplicable in the context of the *Code*, or whether *Kapp* is inapplicable in the case of under inclusive claims. If *Ball* is read to be limited to the *Code* context, only *Code* applicants will be protected from the formalistic operation of the "ameliorative program" defence. People with disabilities who raise *Charter* arguments will still have to defend their *Charter* claim against the operation of the ameliorative program defence. In that way, *Charter* litigation becomes increasingly less accessible for persons with disabilities and the *Code* becomes a more attractive forum. Section VI ("Barriers to Defending against Ameliorative Program Defence") offers further comment on the barriers experienced by *Charter* applicants.

D. *Larromana v. Ontario (Director of the Ontario Disability Support Program*) (2010)

In *Larromana v. Ontario (Director of the Ontario Disability Support Program),* the Divisional Court found that the Ontario Disability Support Program (ODSP) was a special program. The appellant challenged the *Ontario Disability Support Program Act's* definition of disability, which is different from the *Code's* definition. The decision applies

to ODSP in its entirely, and not just to the special diet allowance, as in the *Ball* decision at the HRTO, which was rendered a week before the *Larromana* decision.[120] The appellant did not seek leave to appeal that decision.

The Court relied on *Roberts* to find that a special program can not discriminate on grounds relevant to the purpose of the program. But it's not clear that the Divisional Court applied a fulsome discrimination analysis, under Section 1 of the *Code*.

> [4] As a matter of law, the Tribunal correctly determined that disability benefits provided under the *ODSPA* **constitute a program designed to ameliorate the conditions of a disadvantaged group and is not discriminatory** merely because the group provided with that advantage is not as broad as the group meeting the definition of disabled persons for the purposes of the *Code*.
>
> [5] The primacy of the *Code* over other legislation is engaged only when other legislation conflicts with the Code. However, the mere fact that one statute defines "disability" differently from the definition in the Code is not necessarily discriminatory, and is not necessarily a conflict that engages the primacy provision. In this case, the two statutes have fundamentally different purposes, and the different definitions reflect those different purposes.
>
> [6] The broad definition of disability in the *Code* is designed to protect a broad range of individuals from discriminatory treatment based on any degree of actual or perceived disability. The much narrower definition of disability in the ODSPA is designed to provide a financial benefit to a smaller disadvantaged group, those with more serious degrees of impairment. **That benefit meets the requirements of s. 14(1) of the Code** which provides, inter alia, that rights to be free from discrimination guaranteed under the *Code* are not infringed by a special program designed to relieve hardship or disadvantage. **Even a program that falls within s. 14(1) is not permitted to discriminate on grounds not relevant to furthering the purpose of that program**: *Ontario Human Rights Commission and Roberts v. Ontario* 1994 CanLII 1590 (ON C.A.), (1994), 19 O.R. (3d) 387 (C.A.). **However, where the government elects to provide a benefit to a group identified by a prohibited ground of discrimination (such as disability), it is not required to extend that benefit to every conceivable member of that broad class**. Here, the group excluded from

> benefits under the ODSPA is less disadvantaged than those who are included**. It is not discrimination on the basis of disability to provide benefits to the most disadvantaged in order to ameliorate that disadvantage, without providing such benefits to all persons with any degree of impairment**: Lovelace v. Ontario 1997 CanLII 2265 (ON C.A.), (1997), 33 O.R. (3d) 735 (C.A.); **R. v. Kapp**. [2008] S.C.R. 483; Granovsky v. Canada, 2000 SCC 28 (CanLII), [2000] 1 S.C.R. 703. Indeed, such programs are consistent with the *Code's* general purpose of enhancing the equal rights and opportunities of the most disadvantaged, rather than the contrary.[121]

The Court cites *Kapp* as valuable to the determination of constitutionality the allegedly under-inclusive legislation. *Kapp* is included in the list of citations at the end of the sixth paragraph. Our interpretation of *Kapp* differs on this point. Section IX of this paper ("A Proposed Test for the Ameliorative Program Defence, and a Practical Guide") offers further comment on this point. *Kapp* is only instructive in the case of a claim of "reverse discrimination". We argue that *Kapp* is not instructive in the case of a complaint of "underinclusion".

E. *Tranchemontagne v. Ontario (Director, Disability Support Program) (2010)*

Tranchemontagne v. Ontario (Director, Disability Support Program) considered the exclusion of persons whose sole disability is addiction from ODSP supports. The case went to the Supreme Court on the question of whether administration tribunals, who were legislatively barred from considering the *Charter*, had the authority to determine *Code* issues. The case was returned to the Social Benefits Tribunal. *Tranchemontagne*

was recently heard at the Court of Appeal again, on the question of the influence of the *Charter* on the test for discrimination under the *Code*.

In its factum to the Court of Appeal, the government respondents alleged that ODSP is a special program pursuant to the *Code*, and therefore immune from a finding of discrimination. The government respondents were ultimately barred from raising the "ameliorative program" argument at the Court of Appeal, since that argument had not been brought to the Social Benefits Tribunal.

In her oral remarks to the Ontario Court of Appeal, counsel for the Ministry of the Attorney General (Constitutional Law Branch) gave notice that the Ministry intends to rely on the "ameliorative program" defence increasingly often in the future.[122]

VI. BARRIERS TO DEFENDING AGAINST AMELIORATIVE PROGRAM DEFENCES

Even where government defendants do not make out "ameliorative program" defences, the raising of the defence itself is a barrier. Persons with disabilities are required to shield themselves from the operation of the defence, raised by sophisticated government respondents. In order to protect her complaint from the operation of defence, a litigant will have to take on additional legal expenses. The operation of the defence will also delay the resolution of the complaint.

"Ameliorative program" arguments reveal an evolving and unsettled area of law. Given that there is a great deal of confusion amongst experienced lawyers on these issues, an unrepresented person with a disability is not likely to fare well defending herself against an ameliorative program defence. Persons with disabilities are not likely to afford legal representation. For instance, the appellant in *Larromana v. Ontario (Director of ODSP)* (Section III.D above) was self-represented. The ODSP director was represented by two lawyers from the Constitutional Law Branch.[123] In the same way, more than one half of applicants before the Human Rights Tribunal of Ontario are unrepresented.[124]

Section 15, like the rest of the *Charter*, is mainly enforced by the courts. Such litigation can be very costly. To overcome this barrier, the Court Challenges Program was expanded in 1985 to fund Section 15 test cases. In 2006, the newly elected Federal government cut all funding to the Court Challenges Program. Persons with disabilities

do not have access to the Court Challenges Program to support their Section 15(1) applications.

In the last two years, Legal Aid Ontario (LAO) has undertaken to change the way that it delivers services to people who can not afford a lawyer. Much of LAO's legal services will be delivered by phone. Advocates fear that these changes may interfere with the chance that a person with a disability - who challenges the operation of an alleged "ameliorative program" - may find a lawyer through Legal Aid Ontario.[125] There has been reduction in the number of civil certificates issued. The Clinic Resource Office has limited resources to support community clinics who taken on complex cases that raise the ameliorative program defence.

The Supreme Court in 2007 pulled back on the availability of advance costs in the case of *Little Sisters*. The bookstore sought interim costs from the government to cover their legal expenses, because they could no longer afford to continue the litigation. The majority of the Court set a high bar for the test to award interim costs. The award of interim costs was, in the majority's words, "rare and exceptional".[126]

Some charge that Section 15 has become impracticable for claimants from equity seeking groups.[127] Instead, they suggest Section 7 of the *Charter* as an alternative.[128] Some claim that the human rights system is a less-cumbersome alternative to *Charter* claims.[129] Indeed, an ameliorative program may be constitutional, but nevertheless breach the *Code*.[130] In any case, the expansion of the Section 15(2) defence –

illustrated in the following Sections – further restricts the utility of Section 15 for equity seeking claimants, including persons with disabilities.

VII. CONCEPTUAL APPROACHES TO DISABILITY

The broadened application of the "ameliorative program" defence raises considerations about how tribunals and Courts conceptualize disability. Ameliorative programs are illustrative of the tension between individual and group-based understandings of equality. This Section also examines the possibility of a "universalist approach" to the understanding of ameliorative programs.

A. Individual-Regarding Equality and Group-Regarding Equality

Ameliorative programs focus on the disadvantage experienced by groups or individuals. For instance, Section 15(2) offers protection to a law, program or activity "that has as its object the amelioration of conditions of disadvantaged individuals or groups".[131] Section 14 of the *Code* protects programs "designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups".[132]

There is considerable debate as to whether constitutional and statutory protections should aim to remedy group patterns of historical and social disadvantage or whether they should redress any harmful individual treatment based on group attributes, regardless of the group's historical social status.[133] Speaking to the evolution of equality rights jurisprudence ahead of the Court's decision in *Law*, Sophia Moreau pointed out

that there had been no agreement on what "substantive equality" involved. She elaborated:

> And was the right to substantive equality really, at bottom, an individual right, concerning the way in which individuals ought to be treated relative to each other; or was it ultimately aimed at equalizing opportunities between different social groups?[134]

Some are critical of the value of the attention to equality at the group level, and in particular the allocation of social benefits based on group membership. They point to concerns that social engineers will "submerge" personality, effort, and character under the "blanket" of race, sex and ethnicity.[135] Drumbl and Craig describe as particularly dangerous those assumptions about group membership upon which ameliorative programs are based.[136] They described as "constitutionally problematic" the situation where allocations are prescribed based on a group membership that is "irrelevant to the issue of whether the individuals want or need the social benefit."[137]

> Treating individuals differently on the basis of generalization about the groups to which they belong, while ignoring their actual needs and abilities, is the hallmark of discrimination.[138]

On the other hand, recognition of the institutionalized and historical patterns of exclusion of people with disabilities - from work, social and community lives - requires attention to group-based barriers. Narrowly constructed ameliorative programs that focus on individual rather than institutional change reinforce the status quo rather than challenge it.[139] Effective interventions require attention beyond the individual level. Justice Abella, in her 1984 Royal Commission Report on employment equity, described an individual approach to the enforcement of human rights (rather than a group

approach) as unable to deal with the "pervasiveness and subtlety of discrimination."[140]

She continued:

> In recognition of the journey many have yet to complete before they achieve equality. … Section 15(2) covers the canvas with a broad brush, **permitting a group remedy for discrimination**. This section encourages a comprehensive or systemic rather than a particularized approach to the elimination of discriminatory barriers. [141]

Ameliorative programs are directed at redressing systemic patterns of group inequality, a value "most consistent with substantive equality…."[142] Sheppard found that concentration on discrimination experienced by individuals does not address the core power imbalances between groups.[143] She elaborated:

> Affirmative action … is a group-based concept based on social thought, for it recognizes that while groups remain excluded from social and economic benefits, their exclusion fuels further inequality.[144]

Nevertheless, Sheppard described programs that address **institutional** transformation and those that address **individual** accommodation as <u>complementary</u>. Together they are part of a "multi-dimensional approach" to remedying disadvantage as a result of discrimination.

> Transforming institutional policies, practices, standards and customs to make them welcoming and responsive to formerly excluded or marginalized groups is the essence of affirmative action. Nevertheless, in some instances, special accommodation of particular groups and individuals needs will be required to facilitate multiple ways of doing things within an institution. Thus**, equity programs must embrace both institutional change and special accommodations as two important strategies for promoting equality**.[145]

Shelagh Day and Gwen Brodsky suggested that accommodation cannot be dealt with only as an 'individual matter' as it entrenches the mainstream. Particularly in the case of

disability, accommodation requires group-based measures to address accessibility of public spaces.[146]

B. Ameliorative Programs as Positive Obligations

Ameliorative programs are proactive responses to the patterns of exclusion and disadvantage. Section 15 guarantees of equal protection and equal benefit create a positive obligation on the state to actively protect persons with disabilities from economic and social disadvantage.[147] Colleen Sheppard put it as follows:

> Affirmative action is premised on the recognition of the need to take **positive steps** to redress institutionalized discrimination and persistent societal inequalities.[148]

In human rights discourse, there are primarily two types of rights considered: negative and positive. *Negative rights,* such as civil and political rights, are guarantees of "freedom from" state interference. For example, negative rights include freedom from false arrest, freedom from illegal searches and from unreasonable state interference. On the other hand, *positive rights* grant individuals access to goods or services and may require state action. Examples of positive rights include economic and social rights, such as a right to health care.

Libertarian theorists generally accept only negative rights as legitimate.[149] They argue that states are not under an obligation to provide goods and services.[150] They purport that voluntary charity, rather than government-enforced charity, must answer the moral claims of the disadvantaged.[151] Martin pointed out that equality jurisprudence typically

protects classically liberal, individualized interests such as autonomy and physical integrity of the person.[152]

On the other hand, the human rights field widely accepts that states must be bound to take positive steps to assist persons who are disadvantaged, to ensure their meaningful participation in an inclusive community. Positive steps must be taken to ensure that disadvantaged groups benefit equally from services offered to the public.[153] This positive approach to disability, according to the *Ontario Human Rights Commission,* entails government responsibility for inclusive design and integration. This positive approach is preferable to the modification of rules or "barrier removal", since the latter assumes the status quo of able-bodied standards.[154] This positive approach is also more effective because it is accessible and inclusive from the start.

The protection of the development of <u>targeted</u> ameliorative program may be distinct from advocacy towards the development of a positive right to comprehensive health or education programs, for example. Distinguishing between <u>targeted</u> and <u>comprehensive</u> ameliorative programs, Sheppard pointed out that Section 15(2) should "not be reduced to a requirement that all problems be solved or addressed at the same time and allocated the same amount of resources".[155] She continued in the footnotes,

> I do not mean to foreclose the possibility of positive claims for government action in specific areas. I simply think that such initiatives should be made independently of any critique or challenge to an existing program in another domain. [156]

It is unlikely that Section 15(2) will be interpreted to require that all disadvantaged communities benefit from tailored ameliorative programs.[157] Judicial interpretation will likely preserve governments' authority to target particular disadvantaged communities voluntarily.[158] Justice Abella in the 1984 report on employment equity found that Section 15(2) does not create a statutory obligation to establish ameliorative programs. Instead, it sanctions them with "statutory acquiescence".[159] The Court in *Kapp* clarified that Section 15 only applies to targeted programs and not to broad societal legislation.[160] That said, there are remaining questions about how far a positive rights approach will take Section 15(2) jurisprudence.

C. Is it Really Just an Accommodation?

The provision of accommodation might be claimed to be a "special program", as opposed to an obligation on a service provider or employer. Persons with disabilities rely on a myriad of government supports and services, and they might require accommodation in order to access those supports and services.

There is judicial work to be done to distinguish, in a principled way, between an "ameliorative program" and the duty to accommodate. The provision of accommodation might be claimed to be a "special program", as opposed to an obligation on a service provider or employer.

Persons with disabilities rely on a myriad of government supports and services, but they might require accommodation in order to access those supports and services. For instance, the applicants in *Ball* argued that the Ministry of Community and Social Services (MCSS) had failed to accommodate their disabilities with respect to the administration of the Special Diet program. The MCCS argued that the case was not about accommodation, and that the language and case-law relating to the duty to accommodate were inapplicable. The HRTO did not accept the MCCS' arguments.

Ena Chadha pointed out that the Ontario Human Rights Commission's position in the Special Transit cases was that specialized transit is a form of accommodation.[161] Since they are accommodations, she argued that specialized transit providers may not rely on Section 14 of the *Code*.[162]

At the Court of Appeal, Justice Arbour in *Eaton* found that even though special education programs were enacted in part to ameliorate the conditions of students with disabilities, they do nothing more than to provide these students with the real equality that they are entitled to under Section15(1).[163] Justice Arbour held:

> It is unnecessary to determine whether the special education programs offered pursuant to the provisions of the Education Act and regulations would need the protection of s.15(2) of the Charter in the event of an allegation that they discriminate against mainstream students. Even though these programs were enacted in part to ameliorate the conditions of disabled students, they arguably do nothing more than to provide these students with the real equality that they are entitled to under s.15(1). In such a case, they may not be viewed as "affirmative action" programs as understood under s.15(2).[164]

Universal design offers an alternative approach to the targeting of particular disadvantaged groups. Like ameliorative programs, universal design takes a proactive approach. Universal design principles, however, work towards ensuring that services, products and environments are accessible and usable by the broadest possible community without the need for specialized or targeted programs. Universal design includes the need to ensure that the design is useful and flexible to accommodate a wide range of diverse abilities and preferences.[165] Universal design focuses on ensuring that disability supports and services are inclusive and accessible at the outset, without the need for after-the-fact modification, accommodation or targeting.

Universal design can play a practical role the provision of disability services and supports, including transportation, education and employment. Universal design can be applied to social planning in order to proactively redress barriers, prevent future barriers and create more inclusive social environments. Unlike ameliorative programs, the universal design approach is not bound by the status quo; rather new possibilities for inclusive disability services and supports can be imagined. Employing a universal design approach can assist in developing a framework for the delivery of services that facilitates and promotes inclusive communities.

Universal design principles are forward-thinking; they do not address the pressing power imbalances that currently threaten our communities. Beatrice Vizkelety points out that in a “utopian” society, universal requirements would be sufficiently flexible to

accommodate a variety of Code-related needs. She argues that "until that day arrives, the right to differentiate is very much a necessary means of achieving equality."[166] Similarly, the American Supreme Court in *Grutter* held that while narrowly tailored affirmative action programs may survive constitutional scrutiny, the use of racial preferences will no longer be necessary in 25 years.[167]

D. The Universalist Approach to Ameliorative Programs

The protection of ameliorative programs demonstrates the conflict between human rights approaches and universalist approaches. A principled rights-model more easily applies to the understanding of ameliorative programs. The concept of "universalism" is not easily compatible with the nature and purpose of the "ameliorative programs" defence. The nature and purpose of the "ameliorative program" defence reinforces the view of persons with disabilities as a "special interest minority group". "Targeting" a disadvantaged community undermines an understanding of disability as universal. There is more judicial and scholarly work to be done to determine how government can target "specialized populations", while still engaging the principles of universal design.

If an ameliorative program is not genuinely inclusive, a participant in an "ameliorative program" may be perceived as a recipient of favouritism or special treatment. She may be subject to feelings of resentment and jealously. The impression that an ameliorative program is a "treat" offered by generous employers is an attitudinal barrier. Such an attitude fuels the predominant stereotype that persons with disabilities are dependent and in need of charity.

The “universalist” approach to disability understands disability as a fluid concept that will affect every human being at some point in their lives.[168] People who do not have a disability may be referred to as the “not yet disabled”.[169] Martha Fineman theorized a concept of vulnerability that embraces a more substantive vision of equality, that we are all “vulnerable”.[170]

An approach to ameliorative programs must avoid reinforcing the pervasive social attitude that people with disabilities require special treatment and are deserving of “charity”. Day and Brodsky argued that the principles of “accommodation” do not challenge the imbalances of power, thereby undermining the promise of substantive equality.[171] They maintained that accommodation cannot address the underlying social structures at the root of equality claims as long as the formal standard remains intact.[172] Accommodation remains entrenched in the formal model of equality; while “likes” are treated alike, those who are “different” are treated differently. Day and Brodsky added:

> Accommodation seems to mean that we do not change procedures or services. We simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.... Its goal is to try to make "different" people fit into existing systems.[173]

Despite the dangers of its mainstreaming effects, the notion of accommodation is still useful, and well-developed accommodation efforts may indeed transform attitudes.[174] The Council of Canadians with Disabilities agreed:

> Regardless of how the duty is manifested, it is clear that the courts have begun to interpret accommodation as a process for transforming norms that are based on majoritarian values into norms that are more inclusive of all abilities and characteristics. Over the last couple of decades accommodation has evolved from a concept that promoted minor tinkering to a concept that has the potential to redefine the meaning of status quo.[175]

Based on our consultations, advocates are concerned that an over-expansive "ameliorative program" defence will lead to more segregated programs. Governments will be more likely to develop "segregated" programs with limited or carefully defined program purposes to clearly exclude those who might try to claim membership. By narrowly constructing the programs' purposes, those programs would be more likely to meet the requirements of the ameliorative program defence. This is attractive to governments in order to avoid future scrutiny.

VIII. THE FUTURE OF THE AMELIORATIVE PROGRAM DEFENCE: REMAINING QUESTIONS

This Section reviews some of the questions that remain unanswered (or under-answered). Those questions are included here in italics and in bullet point at the start of each sub-heading.

Despite the express protection of ameliorative programs by the *Charter* and the *Code*, significant questions remain about those protections' appropriate scope and nature. Courts have appeared reluctant to settle those debates decisively. Even following *Kapp*, there is no coherent theory for the application of "ameliorative programs". In the two leading cases on the inter-relationship between Section 15(1) and Section 15(2), the Supreme Court deliberately remarked on the possibility of future refinement.[176] And so, it appears that there is little settled ground on these issues.

A. Typology of Complaints where the Special Program Defence May be Raised

- *Is there a different test for challenges to ameliorative programs by individuals from historically privileged groups than for individuals belonging to socially disadvantaged groups?*
- *Is there a different test for complaints from individuals from disadvantaged groups who the program was <u>not</u> designed to address than for individual from disadvantaged groups who the program <u>was</u> designed to address?*

This Section offers a classification of the types of complaints, where a government respondent may raise an "ameliorative program" or "special program" defence.

1. **Complaints from Individuals who are NOT members of a disadvantaged group:** This is the classic "reverse discrimination' claim, characteristic of the American context.
2. **Complaints from individuals who are members of disadvantaged groups who the program was NOT designed to benefit:** For the purposes of this paper, this kind of claim is termed "exclusion". These cases generally turn on the determination of the purpose of the program. .
3. **Complaints from individuals who belong to disadvantaged groups who the program was designed to benefit:** These types of complaints might be termed "under-inclusive" or "partial programs".

		Is the Program Designed to Benefit the Claimant?	
		Yes	No
Is the Claimant a Member of a Disadvantaged Group?	Yes	**TYPE 3:** "Under inclusive" or "partial programs"	**TYPE 2:** Exclusion, Non-inclusion (typically a "competing claim")
	No	**Not applicable**, ameliorative programs are not designed to benefit members of privileged groups	**TYPE 1:** Classic Reverse Discrimination complaints

Kapp is the authority in "reverse discrimination" claims (Type 1). However, *Kapp* has been criticized for not offering direction where the claim comes from a member of the very group that it was intended to benefit.[177] **It is our contention that *Kapp* has no application to Type 2 (exclusion) or Type 3 (under-inclusion) complaints.** Ankur Bhatt put it this way:

> Engaging the test of whether discrimination is justified (at s. 15(2)) **prior to even fully finishing off with the test of making it out** (at s. 15(1)) would seem to put the cart before the proverbial horse.[178]

R v. Willocks is an example of a Type 2 (exclusion) case. Mr. Willocks claimed that the fact that he, as a black man, did not have access to alternative justice programs designed for Aboriginal persons, amounted to discrimination in contravention of Section 15(1) of the Charter.[179] Justice Watt of the Ontario Divisional Court determined that alternative justice programs designed for persons from Aboriginal communities were "ameliorative programs". In making that decision, Justice Watt spoke to the value of encouraging governments to set up special programs:

> In any program which is designed to ameliorate the conditions of a disadvantaged group, others will be "disadvantaged" as a result of their non-eligibility for participation. Section 15(2) acknowledges as much. What must be avoided is gross unfairness to others. [180]

Roberts and *Ball*, above, are typical "under-inclusive" complaints (Type 3). These cases generally turn on whether the exclusion had a "rational connection" or "nexus" to the program's purpose.

There has not been judicial comment on whether there should be a different test for a complaint of exclusion than for a complaint of under-inclusion. The jurisprudence does not address whether there should there be an examination of whether the exclusion from the program's purpose may be discriminatory, itself. In a similar way, Justice Iaccobucci in *Lovelace* distinguished between <u>targeted</u> and <u>comprehensive</u> ameliorative programs. He does not comment on whether there would be a different test for a <u>comprehensive</u> program, rather than the <u>targeted</u> program at issue in *Roberts*.

> Here, the focus of analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program in question was targeted at ameliorating the conditions of

> a specific disadvantaged group **rather than at disadvantage potentially experienced by any member of society**. In other words, we are dealing here with a **targeted** ameliorative program, which is alleged to be under inclusive, rather than a more **comprehensive** ameliorative program alleged to be under inclusive.[181]

Some claim that the characterization of a claim as "under-inclusive" inappropriately triggers government deference. Professor Sheppard argues that its use was transported from the United States. She prefers the term "partial program".

> The term "under-inclusiveness" is itself problematic because it inadvertently seems to draw us back into a "similarly situated" analysis of inequality, an approach reject in the *Andrews* case.[182]

Section IX further comments on the appropriate test for Type 1, 2 and 3 complaints.

B. The Relationship between Section 15(1) and Section 15(2)

- *What is the nature and scope of the relationship between Section 15(1) and Section 15(2)?*
- *Is the "interpretative aid", "exemption" or Kapp's third "independent force" approach more appropriate?*
- *Should Section 15(2) have an effect <u>independent</u> of Section 15(1)? Does the answer depend on the type of complaint?*

Scholars have remarked on the value of Section 15(1) <u>clarifying</u> the meaning of Section 15(2) rather than <u>contradicting</u> it. For instance, Day and Brodsky put it this way:

> Section 15 is more cogent…when read as a whole with the parts that complement rather than contradict each other. An interpretation of section 15(1) and 15(2) that assumes they are contradictory also assumes that treating everyone the same is the norm of equality although special treatment may be justified in certain circumstances. On the other hand, reading sections 15(1) and 15(2) as a whole assumes that equality is not merely or even primarily a matter of same treatment, but rather a matter of

> addressing and overcoming the disadvantage of historically oppressed and excluded groups. [183]

In her 1984 report for The Royal Commission, Justice Abella also contemplated the relationship between Section 15(1) and Section 15(2). She set out the principles underlying the relationship between Sections 15(1) and 15(2):

> While section 15(1) guarantees to individuals the right to be treated as equals free from discrimination, section 15(2), **though itself creating no enforceable remedy,** assures that **it is neither discriminatory nor a violation of the equality guaranteed by section 15(1) to attempt to improve the condition of disadvantaged individuals or groups, even if this means treating them differently**.[184]

There has been much debate about the nature of the relationship between Section 15(1) and Section 15(2). That relationship between Section 15(1) and Section 15(2) has important implications for the breadth of the protection offered by Section 15(2). Questions include whether Section 15(2) has independent effect from Section 15(1), or whether it is merely an "interpretative aid". In describing this, Edward M. Iacobucci stated,

> The debate is whether section 15(2) *informs* the interpretation of section 15(1), which, if true, indicates that while section 15(2) is not absolutely necessary to establishing equality rights, it is important in determining the scope of the equality rights set out in section 15(1). Under this view, section 15(2) admittedly does not set out any new rights, but it is not redundant.[185]

Kapp offered a third approach to understanding the relationship between Sections 15(1) and Section 15(2). The majority held that the Section 15(2) is an interpretative guide to the Section 15(1) analysis, but that it pre-empts Section 15(1). That is, a program that

meets Section 15(2) standards cannot be said to be “justified discrimination”, since it is not “discrimination” at all.

The question that arises from *Kapp*, then, is whether this third approach to “justified discrimination” in the operation of targeted ameliorative programs applies only to “reverse discrimination” cases, typical of the American context.

C. Demonstrating Disadvantage

- *How can “disadvantage” be demonstrated? What kind of evidence is required?*
- *Is the test for disadvantage a subjective or objective one?*

The determination of “disadvantage” is central to the analysis of the ameliorative program defence. Problematic, though, is the precise or practical meaning of “disadvantage”. The Court in *Kapp* did not offer comment on the precise meaning of “disadvantage” and what evidence would demonstrate that disadvantage.

There are different types of “disadvantage”: social, economic, political, and historical. Sometimes the term “privileged” is used. The Supreme Court in *R. v. Turpin* found that the discrimination analysis required attention to the “larger social, political and legal context”.[186] The Court in *Kapp* found that disadvantage also connotes “vulnerability, prejudice and negative social characterization.” [187] As set out by LEAF in its factum to the Federal Court of Appeal in *Jean*, the Supreme Court has used a variety of indicia to demonstrate disadvantage: devaluation, stigmatization, political and social prejudice,

stereotyping, lacking political power, exclusion, marginalization, social political and legal disadvantage, vulnerability, oppression and powerlessness. [188]

Courts have commented on the "disadvantage" experienced by particular groups. The Court in *Lovelace* held that all Aboriginal groups experience pre-existing disadvantage.[189] The Court also upheld that a lack of access to culturally-based programs is a unique disadvantage.[190] The Supreme Court in *Eldridge* made the following comment about the disadvantage experienced by persons with disabilities.

> It is an unfortunate truth that **the history of disabled persons in Canada is largely one of exclusion and marginalization**. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions… This **historical disadvantage** has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw.[191]

The principle of disadvantage is also central to the Section 15(1) discrimination analysis. With respect to the third part of the *Law* test, pre-existing disadvantage weighs in favour of a discrimination finding where claimants are able to establish that they suffer a "unique pre-existing disadvantage".[192] Justice Iaccobucci in *Law* put it this way:

> The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are **vulnerable, disadvantaged, or members of "discrete and insular minorities"** should always be a central consideration. Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.[193]

The fact that not all individuals within the group are disadvantaged to the same degree is not a sufficient basis for invalidating an ameliorative program. *Kapp* makes clear that not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.[194] Justice Gonthier in *Martin* found:

> This Court has long recognized that differential treatment can occur on the basis of an enumerated ground **despite the fact that not all persons belonging to the relevant group are equally mistreated**. [195]

The determination of disadvantage is particularly important to determine the claims of competing groups, especially in the context of Type 2 (exclusion) and Type 3 (under inclusion) complaints. Sheppard commented on the difficulties inherent in deciding who is in, and who is out. Deciding who is entitled to be part of a social group, may exacerbate intra-group conflict.[196] From an American perspective, MB Abrams put it this way:

> .. a major problem with addressing discrimination through race-conscious laws is the **balancing of historical experiences.** How and by whom shall the varying grievances of different groups be weighed and judged in order to decide what varying levels of compensation society should pay.[197]

It is clear, though, the determination of "disadvantage" cannot be understood as how "sick", "deficient", "abnormal" or "flawed" a claimant with a disability is. Sheppard emphasized that "disadvantage" is rooted in societal mistreatment. Over-reliance on "disadvantage" may emphasize the individual's or group's lack of conformity with the dominant norm.[198] Fiona Sampson also spoke to the particular disadvantage experienced by persons with disabilities. Historically, society has understood disability

as due to individual "deficiency", and understood those differences bio-medically. She found that the traditional social construction of the experience of disability has been identified by many authors and academics as the greatest source of disability discrimination.[199]

D. Determining the Program's Purpose

- *How is the program's purpose determined?*
- *Are there evidentiary problems with determining the program's purpose?*
- *Can the claimant challenge the government's determination of program's purpose?*
- *Could the government construct the program's purpose too narrowly, in order to avoid, limit or pre-empt scrutiny?*

It was well established that programs designed to alleviate disadvantage can discriminate by leaving out those identified by a prohibited ground. The Supreme Court addressed this point in *Battlefords and District Co-operative Ltd. v. Gibbs* [200], *Vriend v. Alberta*[201] and *Nova Scotia (Workers' Compensation Board) v. Martin*[202]. The joint decision of the Chief Justice and Justice Abella in *Kapp* also makes the following point:

> By their very nature, **programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups.** This does not necessarily make them either unconstitutional or "reverse discrimination". *Andrews* requires that discriminatory conduct entails more than *different* treatment. As McIntyre J. declared at p. 167, a law will not "necessarily be bad because it makes distinctions". [203]

The determination of the program's purpose is decisive to the outcome of the determination of the "ameliorative defence". The Supreme Court in *Kapp* found that there must be "correlation between the program and the disadvantage suffered by the

target group"[204] Restrictions must be related to the ameliorative program's purpose.[205] The Ontario Human Rights Commission, in its *Special Program Guidelines*, described

> Restrictions in the program cannot be arbitrary, and indeed must be demonstrably related to the **goal of the program**. In other words, special programs must not include eligibility restrictions that unreasonably restrict who can benefit from them.[206]

The government respondents may characterize the impugned program's purpose in a self-preserving way in order to avoid scrutiny. A broadened defence permits a tribunal or a Court to rely on a government's assertion that a program has an ameliorative purpose "as a shield to protect an activity or program which is unnecessarily discriminatory."[207] The majority of the Supreme Court in *Kapp* held that government respondents are not permitted to rely on the ameliorative program defence where the impugned programs are based on "colourable pretexts".[208]

> There is nothing to suggest that a test focussed on the goal of legislation must **slavishly accept** the government's characterization of its purpose.[209]

The Court in *Kapp,* however, does not offer specific advice about how to avoid the injury of an overly-deferential approach to determining the program's purpose. Justice Bastarache in his concurring opinion in *Kapp* offered a different understanding of the program's purpose.[210] With respect to the determination of the program's purpose, the Court in *Kapp* noted:

> In examining purpose, courts may ... find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combating disadvantage.[211]

The approach to determination of purpose must "be consonant with the goals of human rights legislation".[212] Legislative debates are relevant to a determination of the purpose of a piece of legislation.[213] As stated by Justice McLachlin (as she then was) in *Miron,* a Section 15(1) case.

> Examination of the goal of the legislation is vital in discrimination cases as elsewhere. Sometimes the legislative goal is apparent on the face of the legislation. Other times it may not be. Legislation aimed at effecting a less than worthy goal may be cloaked in the rhetoric of justice and reason. The task of the court in every case is to identify the **functional values** underlying the law.[214]

Chairperson Wright at the Human Rights Tribunal of Ontario in the *Ball* decision considered the purpose or underlying rationale of the Special Diet program.

> This is a **legal analysis**, in that the Tribunal is not making a factual determination about what was in the minds of those who developed and implemented the current version of the special diet program. Rather, I must determine, **based upon the legislation and regulations and appropriate extrinsic evidence, the objective or goal of the program.**[215]

In the context of Section 15(1), Shelaigh Martin made the following comment about *Law v. Canada***:**

> The Court's ability to select the government's purpose allows for a great deal of **analytical leeway** under both Section 15 and Section 1. In *Law*, the Court accepted that the government's purpose was to provide for the long-term needs of surviving spouses. Had it accepted the plaintiff's characterization that the Act was meant to provide also for the immediate needs of those who are widowed, the result may have been different.[216]

Not only is the determination of the program's purpose determinative to the defence, it is also very difficult. Complainants challenging an "under inclusive" ameliorative program will have to gather evidence about the program's purpose, in order to argue that they should be included in the program's purpose. Complainants may have difficulty accessing records or evidence about the programs "true purpose". Government respondents may claim that the records are "privileged". The determination of the purpose may be hidden behind claims of privilege. Complainants may be required to make freedom of information requests, adding to the delay in the resolution of the complaint.

The program's purpose is often not static – they are instead fluid. [217] The program might have started off with one purpose in mind, but the continuance of the program may have served another objective. [218]

Special consideration must be paid to the situation where the alleged "ameliorative program" is premised on stereotypes that do not correspond to the claimants' actual circumstances. Although not a Section 15(2) case, Justice MacIntyre in *Andrews* found that where distinctions are drawn, they must not rely on stereotypes that could bring about or reinforce the disadvantage of those groups and individuals.[219] *Andrews* considered the claim by non-citizens who were denied the ability to practice law. The Court found that the denial breached Section 15(2), since the distinction was founded on stereotypes that non-citizens were not capable to practice law in another country.

The purpose of an ameliorative program must be remedial, rather than coercive or restrictive. The Court in *Kapp* stressed that the defence should not encompass "laws designed to restrict or punish behaviour".[220] However, in *Gosselin v. Quebec (Attorney General),* the Chief Justice McLachlin's considered the constitutionality of Quebec's welfare rules, offering lower benefits to recipients under 30 years. She characterized the purpose of the welfare rule as identifying the important role that young people play in the workplace.[221] Those welfare rules acted as a negative incentive or even as a punishment. While the Chief Justice did not clearly consider whether the purpose of the welfare rule was "ameliorative", she did address the value of the objective encouraging young people to participate in or return to the workplace.

E. Objects and Effects of Ameliorative Programs

- *Must an ameliorative program have an ameliorative effect or ameliorative purpose/object?*
- *What kind of evidence may demonstrate ameliorative effect/object?*

Relying on a language of Section 15(2), the majority of the Court in *Kapp* required that the program only have an ameliorative *purpose*, and not ameliorative *effect*.[222] This finding suggests that as long as the government purpose is defensible, its failure to achieve ameliorative effect is irrelevant. Russel Jurianz commented on the distinction between an ameliorative programs' goal and effects, as follows:

> This distinction is sometimes characterized by "subjective" (goal-based) and "objective" (effects-based language). There are critical analyses that span these two positions. Some criticize the subjective (goal-based) as "too wide" and too easily permit a government to avoid a discrimination challenge by claiming the impugned law, program or activity as "ameliorative". [223]

With respect to claims from persons with disabilities, David Lepofsky and Jerome Bickenbach contend that a defendant must establish that the impugned program has some serious likelihood of achieving its ameliorative goal.[224] By only requiring ameliorative purpose, governments may too easily circumvent *Charter* scrutiny by pre-emptively declaring a program as "ameliorative":

> If ameliorative legislative purpose were the sole test under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that 'this *Act* has as its object the amelioration of the conditions of … a disadvantaged group.' [225]

Many human rights statutory regimes require the establishment of the effectiveness of the alleged "special program". For instance, Section 11 of the *Manitoba Human Rights Code* requires that the program will "achieve or is reasonably likely to achieve that object". Section 42(1)(b) of the *British Columbia Human Rights Code* requires that the special program "achieves or is reasonably likely to achieve that objective".

Even if a program's ameliorative effects are considered, there must be attention paid to the effect of the program on individuals of other disadvantaged groups. Indeed, the program may "deepen the disadvantage" experienced by other groups. The Council of Canadians with Disabilities in its factum to the Supreme Court in *Lovelace* offered comment on this situation, which they characterized as a "zero sum issue":

> In the rarest of situations a program which has affirmative effects may also have other consequences which are discriminatory. Thus the affirmative action program is simultaneously furthering and undermining the purposes underlying Section 15(1).[226]

Where there is overlap between the victims of an ameliorative program and its intended beneficiaries, this zero sum issue is not appropriately resolved under Section 15(2). To do so would suggest that the benefits of an ameliorative program for one group "trumps" the discrimination experienced by another disadvantaged group.

F. Third Contextual Factor of the *Law* Test

- *What is the relationship between the third contextual factor of the third stage of the Law test ("ameliorative purpose or effect") and Section 15(2) ("ameliorative purpose")?*
- *Given Kapp's unclear pronouncement on the revision of the Law test, does there continue to be a role for the programs "ameliorative purpose or effect" in the contextual analysis?*

It is remarkable that the third contextual factor of the third part of the Law test requires that the Court attend to the impugned law, program or activity's ameliorative purpose or effects. Section 15(2) only requires attention to the law, program or activity's purpose. The Court in *Kapp* made on the following comment on its application to the Section 15(2) test:

> The ameliorative purpose or effect of law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of section 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under Section 15(1) as to whether the effect of the law or program is to perpetuate disadvantage). [227]

In *Cunningham*, the Alberta Court of Appeal found that the analysis of "ameliorative purpose" of Section 15(2) parallels the analysis performed in determining discrimination under Section 15(1). [228] The Alberta Court of Appeal went to find that:

> Ameliorative purpose and effect may also be relevant to the question of whether a law perpetuates disadvantage, but is most **appropriately dealt with under the Section 15(2) analysis**. [229]

In early equality jurisprudence, including *Andrews*, the Court was clear that the question of whether or not there has been discrimination should be determined solely from the perspective of the claimant, and that the justification of discrimination should be restricted to Section 1. However, Justice Iaccobucci in *Law* set out that one of the contextual factors of the third branch of the Law test is whether the impugned activity, program or legislation has an "ameliorative purpose or effect" for a historically disadvantaged group.

> An ameliorative purpose or effect which accords with the purpose of Section 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely **corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.** I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. **Under-inclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination**.[230]

Martin expanded, and argued that for the purposes of Section 15(1), pre-existing disability only weighs in favour of a discrimination finding where claimants are able to establish that they suffer a unique pre-existing disadvantage. [231]

G. Towards Section 1

- *What is the relationship between Section 1 and Section 15(2)?*

- *Should the analysis of the programs' "ameliorative purpose" be dealt with under Section 1 as a "pressing and substantial objective"? Does the answer depend on the type of complaint?*

Section 1 of the *Charter* guarantees the rights and freedoms set out in the *Charter* – including Section 15 - subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[232] The Supreme Court's decision in *R. v. Oakes* is the leading case about the analysis of Section 1.[233] Chief Justice Dickson set out a two-part test, to be applied once the claimant has proven that one of the provisions of the *Charter* has been violated. The onus is on the Crown.

> 1. There must be a pressing and substantial objective.
> 2. The means must be *proportional.*
>
> a. The means must be rationally connected to the objective.
> b. There must be *minimal impairment* of rights.
> c. There must be proportionality between the infringement and objective.

In the context of Section 15(1), the Supreme Court in *Law* rejected the proposition that any distinction should be treated as a violation of Section 15(1), and any justificatory work should be done within the frame of Section 1 of the *Charter*. Sophia Moreau commented on this rejection of this approach:

> We think of discrimination not just as any sort of differential treatment but as a particular kind of differential treatment; to be discriminated against is not just to be denied something that others have but to be denied it in a way that is objectionable or unfair. … **Allowing for some justificatory considerations to weigh into our determination of whether or not Section 15 has been violated, then, gives us an understanding of discrimination that accords with our ordinary moral thought about discrimination**.[234]

However, the “ameliorative purpose or effect” - a contextual factor in determining whether discrimination exists - may “open the door” for balancing competing claims under Section 15 rather than Section 1. [235] The contextual factor (“ameliorative purpose or effect”) of the *Law* test permits balancing at the Section 15(1) stage, rather than at the Section 1 stage. Martin expands on moving the “balancing” to Section 15(1) from Section 1 of the *Charter* where is claimant is a member of a privileged group.

> This may happen when the person or group that is excluded is **more advantaged with respect to the circumstances addressed by the legislation** – the Court’s very conclusion in *Law*.[236]

In *Law,* the Court found that Nancy Law had not experienced discrimination at all, and consequently there was no need for the Section 1 analysis. To make that decision, Justice Iaccobucci found that Parliament can premise remedial legislation on informed generalizations and that “legislation need not always correspond perfectly with social reality to comply with Section 15(1) of the Charter.”[237] However, he continued on to find that a more precise correspondence will be required where the excluded group is already disadvantaged or vulnerable. [238]

Also, in *Granovsky*, the differential treatment of persons with temporary disabilities was determined not to breach Section 15(1), because that legislation was designed to ameliorate the disadvantage experienced by persons with permanent and severe disabilities.[239] There was no Section 1 analysis in *Granovsky*.

This Section has reviewed some of the questions that remain unanswered (or under-answered) by the Courts. There must be guidance from the Courts on these points in order to develop a coherent framework to analyze the constitutionality of ameliorative programs. In the meantime, the next Section is designed to be of more practical significance for persons with disabilities who must defend themselves against the defence.

IX. A PROPOSED TEST FOR THE AMELIORATIVE PROGRAM DEFENCE, AND A PRACTICAL GUIDE

Given that government respondents will increasingly rely on "ameliorative program" defences, there is an urgent need to empower persons with disabilities to defend their claims against "ameliorative program" defences. This Section is intended to be of practical use for equity-seeking groups, including advocates for the rights of persons with disabilities. It proposes resources and arguments available to groups seeking to protect themselves from governments' "ameliorative program" defences.

This Section also proposes a vision of a rigorous, principled ameliorative program defence. This Section relies heavily on the input of expert consultants. It is also an evolving area – law reform strategies must be revisited and refined as the law changes and Courts address the questions set out in the preceding Section VIII.

A. The Dangers of Deference: Taking the Ameliorative Program Defence Too Far

Developing the "ideal" test for an ameliorative program defence is challenging. On one hand, persons with disabilities may benefit from well-developed ameliorative programs. In that way, it should be easy enough for governments to set up ameliorative programs. The Court of Appeal in *Lovelace* found that if ameliorative programs can be too readily challenged, governments will be discouraged from initiating such programs.[240] Sheppard made the following comment on striking that balance:

> It is significant that Section 15(2) does not require **a prior finding of discrimination** against a particular group before remedial affirmative action can be taken. To impose such a **prerequisite would undermine voluntary equity initiatives** since employers, educational institutions. Governments may be reluctant to admit to past discrimination to the extent that such an admission would leave them open to legal claims for redress.[241]

In addition, the defence should be able to efficiently dispose of Type 1 ("reverse discrimination") complaints, typical of the American jurisprudence.

On the other hand, there is a danger of too deferential (to the government's policy making/resource allocation role) an approach. In the extreme situation, if the defence is too deferential, the government respondents may be tempted to characterize all government "law, programs and activities" as ameliorative. LEAF offered the following comment on the dangers of too deferential an approach:

> A deferential approach in cases involving a challenge by a disadvantaged claimant to an under inclusive remedial program is **not consistent with Section 15's purpose of furthering substantial equality**.[242]

David Lepofsky and Jerome Bickenbach also addressed the dangers of an over-expansive test for Section 15(2):

> …If ameliorative legislative purpose were the **sole test** under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that 'this *Act* has as its object the amelioration of the conditions of … a disadvantaged group.' [243]

In its factum to the Supreme Court in *Lovelace*, the Council of Canadians with Disabilities also warned that – if taken too far – most of the government's work could be held to be "ameliorative", and therefore insulated from review.

> Much of what government does could be described as having as its object the amelioration of disadvantage. It was never intended that such programs as health care, education (including special education), disability and employment insurance, social insurance and pensions plans should be exempted from s. 15(1) review altogether. Such programs are extremely important to persons with disabilities.[244]

The goal then is to strike a balance between making it easy for governments to set up ameliorative programs, but not so easy that the defence is used to avoid, pre-empt or limit *Code* or *Charter* scrutiny. In our consultations with expert advocates for persons with disabilities, we developed the following Proposal. While this Proposal focuses on the *Charter*, its principles apply to the special program defence under the *Code*.

B. Kapp is only Available to Reverse Discrimination Claims

For claims from privileged complainants, the *Kapp* analysis is satisfactory. Indeed, the *Kapp* analysis was only designed for reverse discrimination claims. For a claim of reverse discrimination, the test from *Kapp* is two fold:

> 1) the program has an ameliorative or remedial purpose.
> 2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[245]

The burden of adducing evidence of the purpose of Section 15(2) is entirely on the government.[246] This is different from the Section 15(1) analysis of the program's ameliorative purpose or effect pursuant to the *Law* third stage.

If a Section 15(2) defence is made out the provision is saved, then the analysis stops and there is no Section 1 analysis. If a Section 15(2) defence is not made out, the analysis turns to Section 15 (1). If a Section 15(1) breach is found, the analysis turns to Section 1 to determine if the Section 15(1) breach can be justified.

C. Mandatory Section 15(1) Analysis for Type 2 and Type 3 Complaints

As set out in Section V ("The Current Context: Expanding the Application of the Defence"), government defendants have relied on the ameliorative program defence in the context of claims of reverse discrimination (as in *Kapp*) as well as claims of under-inclusion. Any claim by a member of a disadvantaged group should not be funnelled through Section 15(2) of the *Charter* or Section 14 of the *Code*. **For Type 2 (exclusion) or Type 3 (under-inclusion) complaints, there is no consideration of Section 15(2) principles.** Everything else does violence to Section 15(1) jurisprudence.

For complaints from individuals who are members of disadvantaged groups, there should always be a fulsome Section 15(1) analysis. The analysis starts with the two-stage Section 15(1) analysis. The reformulated *Kapp/Andrews* test is:

> (1) Does the law create a distinction based on an enumerated or analogous ground?

> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

The onus continues to be on the claimant at the Section 15(1) stage. If there is no Section 15(1) breach, the analysis ends. If there is a Section 15(1) breach the analysis turns to Section 1. The analysis of the programs' ameliorative purposes - including the "rational connection" between the exclusion and the objective of the program - will be appropriately addressed at the Section 1 stage.

D. Complaints of Underinclusion, Section 15(1) and Section 15(2)

It is well established that when a government decides to provide benefits, it must do so in a non-discriminatory way, without arbitrary exclusions.[247] Under-inclusion, in most circumstances, has been determined to constitute discrimination.[248] Where determined to be discriminatory, that under-inclusiveness may be justified. It is at this point that special program provisions (that is, Section 15(2) of the *Charter* or equivalent human rights code provisions) have been relied upon to justify partial programs.

In *Bliss* v. *Attorney General of Canada*, the Supreme Court found that the denial of unemployment insurance to pregnant women did not offend the equality protections of the (now defunct) *Canadian Bill of Rights*.[249] The Court in Brooks went to some lengths to repair the damage of *Bliss* in *Brooks* v. *Canada Safeway Ltd*., with regards to the exclusion of pregnant women from an employee benefit program.[250] Chief Justice Dickson held:

> **Under-inclusion may be simply a backhanded way of permitting discrimination**…. Once an employer decides to provide an employee benefit package, exclusions from such scheme may not be made in a discriminatory fashion.[251]

Section 15(1)'s explicit reference to the protection of the "equal benefit" of the law reinforces that "under inclusiveness" is a violation of Section 15.[252] In *Eldridge*, the Supreme Court held (as has often been cited) that once the state does provide a benefit, it is obligated to do so in a non-discriminatory manner.[253]

The Ontario Human Rights Commission's *Position Paper* offers a fulsome analysis of the definitions of "special programs" and of the *Roberts* analysis.[254] The Commission, in its *Guidelines of Special Programs*, provided:

> Even where a program appears to qualify as a special program under section 14(1) [of the *Code*], the program provider can not arbitrarily discriminate based on other prohibited grounds under the *Code*.[255]

While not in the context of Section 15(2) and instead in the context of Section15(1), Justice Iaccobucci in *Law* found, relying on *Vriend*, that under inclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will "rarely escape the charge of discrimination".[256]

E. The Importance of the Review of Programs that Support Persons with Disabilities

If *Kapp* were to apply to Type 2 or Type 3 complaints, the operation of ameliorative programs would essentially be immune from review. The Court of Appeal in *Roberts*

held 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 must be subject to review.[257] Sheppard also emphasized the importance of review of programs by a person who is a member of a disadvantaged group for whom the special program is designed to benefit:

> With respect to an individual **who is supposed to be a beneficiary of the program,** it does not make sense to interpret Section 15(2) in such a way as to foreclose legal challenges to both the ameliorative intent and the actual effects of the program. **If the program is experienced by its intended beneficiaries as problematic, such concerns should be open to legal challenge**.[258]

By requiring that they meet *Charter* standards, ameliorative programs are subject to review and are more effective. In that way, the Council of Canadians with Disabilities proposed:

> Rather than encouraging governments to advance the purposes underlying s. 15(1) in their programs, immunizing them from review would diminish their incentive to update them and to ensure they further the cause of equality.[259]

The operation of a program must be open to challenge by beneficiaries of the program.

F. Statutory and Constitutional Interpretation

Courts have repeatedly emphasized that human rights should be offered a broad and purposeful interpretation, while exceptions and defences should be narrowly construed.[260]

The Court in *Lovelace* found that in stating that Section 15(2) acts as an interpretive aid to Section 15(1) that "such an interpretation ensures the internal coherence of the *Charter* as a working statute."[261] Section 15(2) only offers interpretative force to Section 15(1). Section 15(2) can not have an independent effect, since if it did Section 1 of the *Charter* would not be of any use.[262]

Unless the ameliorative program defence places a burden on the respondent that is as heavy as the burden under other *Code* defences, an overly broad definition of the special program will undermine the rights set out in the *Code*. Relying on principles of statutory interpretation, Chadha advanced the argument that specialized transit complaints must be subjected to scrutiny under Section 1 of the Code (non-discrimination in services) and Section 17 (duty to accommodation), prior to any special program assessment.[263] Section 17 of the Code is under the same heading as Section 14. A respondent can not rely on Section 17 unless and until the respondent has demonstrated that the complainant was first accommodated to the point of undue hardship. Chadha elaborated:

> … [B]ased on the arrangement of the statute, as well as the fact that section 14(1) comes under the "Interpretation and Application" heading, it is apparent that the purpose of Section 14(1) is foremost to serve as an interpretive guide to the rights under Part I, and secondly, only at the later stage of the discrimination analysis, to serve as an exception to those rights.[264]

As set out in *Rizzo & Rizzo Shoes Ltd.*, the Supreme Court of Canada reiterated that it is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.[265] It would be clearly absurd if the

ameliorative defence is used to undermine the rights of the disadvantaged groups that the defence was intended to support.

G. Legislative Intent: Kapp Only Applies to Reverse Discrimination Claims

The inclusion of Section 15(2) in the *Charter* arose from a concern that affirmative action programs be protected from challenge by privileged groups. Section 15(2) was added through "excessive caution"[266], in order to avoid the "reverse discrimination" litigation characteristic of the American context. Justice Iaccobucci in *Lovelace* held:

> Section 15(2) was undoubtedly included in the Charter to silence this debate [in the US about affirmative action] and to avoid litigation similar to *Bakke*.[267]

Lepofsky and Bickenbach also contend that Section 15(2) was intended to only apply to American-style claims of "reverse discrimination".

> The *Charter's* framers felt that section 15(2) was rendered necessary by the US Supreme Court's controversial decision in *Regents of the University of California v. Bakke…* concern was expressed in Canada over the possibility that equality rights might be asserted to prevent the amelioration of conditions of minorities.[268]

The Ontario Human Rights Commission also sets out that Section 15(2) was intended to apply to "reverse discrimination" claims:

> In the United States, people were using the Constitution successfully to challenge special programs on the basis that they were "reverse discrimination." Section 15(2) of the *Charter* was intended to prevent such challenges from successfully **eroding or undermining** special programs in Canada.[269]

The protections of the Ontario *Human Rights Code* developed out of the same types of concerns. In *Roberts*, the Ontario Court of Appeal remarked on the legislative context of the protections in the Code offered to "special programs".

> 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. [270]

On the second reading of amendment to the Ontario *Human Rights Code*, the Hon. Mr. Elgie stated:

> 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.**[271]

During the debate on the 1981 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.[272]

Section 15(2) was only ever meant to apply to classic "reverse discrimination" claims. The government's intention should reflect how that Section is analyzed. Section 15(2)

was not intended to apply - *even in an interpretative way* - to complaints from members of disadvantaged, underprivileged, stigmatized, stereotyped or marginalized groups.

H. Drawing Lines

There must be more thought given to determine how to distinguish between claims of "reverse discrimination" from other claims (Types 2 and 3). The distinguishing principle is the privilege, vulnerability or disadvantage of the claimant (*or the other members of the group to which the claimant belongs*). There are various indicia to determine if the claimant is a member of a privileged group and whether – as a result - the *Kapp* analysis applies. (See Section VIII.C)

A claim from a person with a disability is not likely to constitute a claim of reverse discrimination. The Courts have been clear that persons with disabilities have been subject to historic patterns of oppression, exclusion and marginalization.[273]

There is more work that needs to be done to distinguish the appropriate tests to determine the ameliorative program defence raised by government respondents in Type 3 ("under-inclusive") and Type 2 ("exclusion") complaints. It is not clear that there should be two different tests. The Courts should provide additional guidance on this point.

Both Type 2 and 3 complaints may involve competing interests between different disadvantaged or oppressed groups. Careful attention should be paid to how the

comparative analysis is constructed in the Section 15(1) analysis, in order to avoid a "race to the bottom". Justice Binnie in *Granovsky* remarked the dangers of restrictive comparator group analysis, pitting groups of disadvantaged people against each other to determine who is *more* disadvantaged."[274] In addition, Justice Iacobucci in *Lovelace* found:

> This enquiry does not direct the appellants and respondents to a 'race to the bottom', i.e., the claimants are not required to establish that they are more disadvantaged than the comparator group.[275]

As set out by Justice Gonthier in *Martin*, the appropriate comparator group in the context of an under inclusive benefit is the group who is able to access the benefits.[276] That decision was somewhat undermined by the Supreme Court's decision in *Hodge* in 2004.[277]

This Section was designed to offer an alternative reading of the "ameliorative program" defence. It was also intended to support persons with disabilities – raising concerns about disability supports and services – who finding themselves having to <u>defend</u> themselves against the operation of the "ameliorative program" <u>defence</u>.

X. CONCLUSION

This paper has aimed to, first, identify the evolution of the expanded ameliorative program defence. The Supreme Court's decision in *Kapp* offers a deferential reading of the governments' authority to target particular groups by developing ameliorative programs. *Kapp* stands for the proposition that a government respondent's declaration that a disability support or service is an "ameliorative" program may shield it from further *Charter* scrutiny. Following *Kapp*, government respondents have increasingly relied on "ameliorative program" defences as a shield from claims of discrimination. **In that way, the defence is reconfigured from a shield to a sword.**

This paper also aimed to demonstrate how the expanded defence poses particular barriers for the claims from persons with disabilities. Because they often rely on government programs, an over-expansive defence particularly threatens the equality claims of persons with disabilities. In particular, an over-expansive "ameliorative program" defence may lead to more segregated programs. Governments will be more likely to develop programs with limited or carefully defined program purposes to clearly exclude those who might claim membership.

Even where government defendants do not make out the "ameliorative program" defences, persons with disabilities will have to shield themselves from the operation of the defence, raised by sophisticated government respondents. Given the dissolution of the Court Challenges Program, changes at Legal Aid Ontario, and the relative

unavailability of advance costs, persons with disabilities are not likely to access or afford legal support to defend their claims against special program defences.

The paper offers an alternate vision of the ameliorative program defence, and practical guidance to persons with disabilities to “defend against the defence”. Here, we have made a case for the proposition that Section 15(2) is only designed to apply to claims of “reverse discrimination” from members of historically privileged groups. Any claim by a member of a disadvantaged group should not be funnelled through Section 15(2) of the Charter. For complaints from individuals who are members of disadvantaged groups, there should always be a fulsome Section 15(1) analysis. In that way, the operation of a program will be open to challenge by beneficiaries of the program. If the program is experienced by its intended beneficiaries as problematic, such concerns should be open to legal challenge.

APPENDIX I – LEGISLATIVE PROVISIONS (CANADIAN)

Charter of Rights and Freedoms

15(2): Subsection [15(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.

Ontario Human Rights Code

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. A person may apply to the Commission for a designation of a program as a special program for the purposes of subsection (1).

3. Upon receipt of an application, the Commission may,
a. designate the program as a special program if, in its opinion, the program meets the requirements of subsection (1); or
b. designate the program as a special program on the condition that the program make such modifications as are specified in the designation in order to meet the requirements of subsection (1).

4. The Commission may, on its own initiative, inquire into one or more programs to determine whether the programs are special programs for the purposes of subsection (1).

5. At the conclusion of an inquiry under subsection (4), the Commission may designate as a special program any of the programs under inquiry if, in its opinion, the programs meet the requirements of subsection (1).

6. A designation under subsection (3) or (5) expires five years after the day it is issued or at such earlier time as may be specified by the Commission.

7. If an application for renewal of a designation of a program as a special program is made to the Commission before its expiry under subsection (6), the Commission may,
renew the designation if, in its opinion, the program continues to meet the requirements of subsection (1); or

renew the designation on the condition that the program make such modifications as are specified in the designation in order to meet the requirements of subsection (1).

8. In a proceeding,

a. evidence that a program has been designated as a special program under this section is proof, in the absence of evidence to the contrary, that the program is a special program for the purposes of subsection (1); and

b. evidence that the Commission has considered and refused to designate a program as a special program under this section is proof, in the absence of evidence to the contrary, that the program is not a special program for the purposes of subsection (1).

9. Subsections (2) to (8) do not apply to a program implemented by the Crown or an agency of the Crown.

10. For the purposes of a proceeding before the Tribunal, the Tribunal may make a finding that a program meets the requirements of a special program under subsection (1), even though the program has not been designated as a special program by the Commission under this section, subject to clause (8) (b).

Canadian Human Rights Act

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 based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

(2) The Canadian Human Rights Commission, may
(*a*) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in subsection (1); and
(*b*) on application, give such advice and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in subsection (1) as will serve to aid in the achievement of the objectives the program, plan or arrangement was designed to achieve.

(3) It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is

intended to be used in adopting or carrying out a special program, plan or arrangement under subsection (1).

Charte des droits et libertés de la personne du Québéc:

86. The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment, or in the sector of education or of health services and other services generally available to the public.

An affirmative action program is deemed non-discriminatory if it is established in conformity with the Charter.

An equal access employment program is deemed not to discriminate on the basis of race, colour, gender or ethnic origin if it is established in accordance with the Act respecting equal access to employment in public bodies.

An equal access to employment program established for a handicapped person within the meaning of the Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration (chapter E-20.1) is deemed to be non-discriminatory if it is established in conformity with the Act respecting equal access to employment in public bodies (chapter A-2.01).

87. Every affirmative action program must be approved by the Commission, unless it is imposed by order of a tribunal. <<NOTE THAT THIS SECTION IS NOT IN FORCE>>

The Commission shall, on request, lend assistance for the devising of an affirmative action program.

88. If, after investigation, the Commission confirms the existence of a situation involving discrimination referred to in section 86, it may propose the implementation of an affirmative action program within such time as it may fix.

Where its proposal has not been followed, the Commission may apply to a tribunal and, on proof of the existence of a situation contemplated in section 86, obtain, within the time fixed by the tribunal, an order to devise and implement a program. The program thus devised is filed with the tribunal which may, in accordance with the Charter, make the modifications it considers appropriate.

89. The Commission shall supervise the administration of the affirmative action programs. It may make investigations and require reports.

90. Where the Commission becomes aware that an affirmative action program has not been implemented within the allotted time or is not being complied with, it may, in the case of a program it has approved, withdraw its approval or, if it proposed implementation of the program, it may apply to a tribunal in accordance with the second paragraph of section 88.

91. A program contemplated in section 88 may be modified, postponed or cancelled if new facts warrant it.

If the Commission and the person required or having consented to implement the affirmative action program agree on its modification, postponement or cancellation, the agreement shall be evidenced in writing.

Failing agreement, either party may request the tribunal to which the commission has applied pursuant to the second paragraph of section 88 to decide whether the new facts warrant the modification,

All modifications must conform to the Charter.

92. The Government must require its departments and agencies whose personnel is appointed in accordance with the Public Service Act (chapter F-3.1.1) to implement affirmative action programs within such time as it may fix.

Sections 87 to 91 do not apply to the programs contemplated in this section. The programs must, however, be the object of a consultation with the Commission before being implemented.

British Columbia Human Rights Code

42 (1) It is not discrimination or a contravention of this Code to plan, advertise, adopt or implement an employment equity program that
(a) has as its objective the amelioration of conditions of disadvantaged individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex, and
(b) achieves or is reasonably likely to achieve that objective.
(2) [repealed]
(3) On application by any person, with or without notice to any other person, the chair, or a member or panel designated by the chair, may approve any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups.
(4) Any program or activity approved under subsection (3) is deemed not to be in contravention of this Code.

Alberta Human Rights Act

> **11.** A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

Saskatchewan Human Rights Code

> 16 (10) This section does not prohibit an exclusively non-profit charitable, philanthropic, fraternal, religious, racial or social organization or corporation that is primarily engaged in serving the interests of persons identified by their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance from employing only or giving preference in employment to persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.
>
> 47(1) On the application of any person or on its own initiative, the commission may approve or order any program to be undertaken by any person if the program is 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, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry or place of origin of members of that group, or the receipt of public assistance by members of that group by improving opportunities respecting services, facilities, accommodation, employment or education in relation to that group or the receipt of public assistance by members of that group.
> (2) At any time before or after approval to a program is given by the commission, or a program is ordered by the commission or a human rights tribunal, the commission may:
> (a) make inquiries concerning the program;
> (b) vary the program;
> (c) impose conditions on the program; or
> (d) withdraw approval of the program as the commission thinks fit.
> (3) Nothing done in accordance with a program approved pursuant to this section is a violation of the provisions of this Act.

Manitoba Human Rights Code, C.C.S.M. c. H175

> **11** Notwithstanding any other provision of this Code, it is not discrimination, a contravention of this Code, or an offence under this Code

(b)to plan, advertise, adopt or implement an affirmative action program or other special program that
(i)has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and

(ii)achieves or is reasonably likely to achieve that object.

New Brunswick Human Rights Act/ Loi Sur Les Droits de las Personne de Nouveau-Brunswick

13(1) On the application of any person, or on its own initiative, the Commission may approve a programme to be undertaken by any person designed to promote the welfare of any class of persons.
13(2)At any time before or after approving a programme, the Commission may
(a)make inquiries concerning the programme,
(b)vary the programme,
(c)impose conditions on the programme, or
(d)withdraw approval of the programme,

as the Commission thinks fit.
13(3)Anything done in accordance with a programme approved pursuant to this section is not a violation of the provisions of this Act.

Nova Scotia Human Rights Act

6 Subsection (1) of Section 5 does not apply….

(i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

Prince Edward Island Human Rights Act

14. (1) Sections 2 to 13 do not apply
(c) to philanthropic, fraternal or service groups, associations or organizations, to the extent that they discriminate on the basis of sex in their qualifications for membership.

20. The Commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act.

Newfoundland Human Rights Code

19 (1) On the application of a person the Commission may approve programs designed to prevent, reduce or eliminate disadvantages respecting services, facilities, accommodation or employment that may be or are suffered by a group of individuals where those disadvantages would be, or are based on or related to the race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, physical disability or mental disability of members of that group or the age of that group.

(2) Before or after the Commission approves a program, the Commission may
(a) make inquiries concerning the program;
(b) vary the program;
(c) impose conditions on the program; or
(d) withdraw approval of the program as it thinks appropriate.
(3) Nothing done in accordance with a program approved under this section is a violation of this Act.

Yukon Human Rights Act

13(1) Special programs and affirmative action programs are not discrimination.
(2) Special programs are programs designed to prevent disadvantages that are likely to be suffered by any group identified by reference to a prohibited ground of discrimination.
(3) Affirmative action programs are programs designed to reduce disadvantages resulting from discrimination suffered by a group identified by reference to a prohibited ground of discrimination.

Northwest Territories Human Rights Act

7(5) It is not a contravention of subsection (1) for an organization, society or corporation to give preference in employment to an individual or class of individuals if the preference is solely related to the special objects in respect of which the organization, society or corporation was established and the organization, society or corporation
(a) is not operated for private profit; and
(b) is
(i) a charitable, educational, fraternal, religious, social or cultural organization, society or corporation, or
(ii) an organization, society or corporation operated primarily to foster the welfare of a religious or racial group.

67. (1) Nothing in this Act precludes any law, program or activity that has as its object the amelioration of conditions of

disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 5(1).

67 (2) Any program designed to promote the welfare of any class of individuals that was approved under section 9 of the Fair Practices Act, R.S.N.W.T. 1988, c.F-2, is deemed, for the purposes of subsection (1), to be a program that has as its object the amelioration of conditions of disadvantaged individuals or groups.

APPENDIX II: LIST OF ACRONYMS

HRTO – Human Rights Tribunal of Ontario

ODSP – Ontario Disability Support Program

OHRC - Ontario Human Rights Commission

SBT – Social Benefits Tribunal

ICCPR - International Covenant on Civil and Political Rights

CEDAW - International Convention on the Elimination of All Forms of Discrimination Against Women

ENDNOTES

[1] *Yukon Human Rights Act*, R.S.Y. 2002, c. 116, s. 13, online: Yukon Human Rights Commission <http://www.yhrc.yk.ca/pdfs/Unofficial%20Consolidation%20Eng.pdf> [emphasis added].
[2] Rosalie Abella, "Report of the Royal Commission on Equality in Employment" (Ottawa:1984), online: Library and Archives Canada <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/abella1984eng/abella1984-eng.htm> [Abella Commission]. Justice Abella authored the 1984 federal Royal Commission on Equality in Employment, in which she coined the term employment equity, a strategy for reducing barriers in employment faced by women, visible minorities, people with disabilities, and Aboriginal peoples.
[3] Abella Commission, note 2 at 7 [emphasis added].
[4] Mark Drumbl & John Craig, "Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997) 4 Rev. Const. Stud. 80 at 82.
[5] Global Rights, "Affirmative Action: A Global Perspective" (Washington: Global Rights: Partners for Justice, 2005), online: Global Rights <http://www.globalrights.org/site/DocServer/AffirmativeAction_GlobalPerspective.pdf?docID=2623> at 14 [Global Rights].
[6] Marcia Rioux & Tamara Daly, "Constructing Disability and Illness" in T. Bryant, D. Raphael & M. Rioux eds., *Staying Alive: Critical Perspectives on Health, Illness, and Health Care*, 2nd ed. (Toronto: Canadian Scholars' Press, 2010) at 347.
[7] Juha Mikkonen & Dennis Raphael, "The Social Determinants of Health: The Canadian Facts" (May 2010), online: Social Determinants of Health: The Canadian Facts <http://www.thecanadianfacts.org/authors.html> at 50 (last accessed: 30 June 2010).
[8] Council of Canadians with Disabilities, "As a Matter of Fact: Poverty and Disability in Canada" (2010), online: Council of Canadians with Disabilities <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/poverty-disability-canada> (last accessed: 30 May 2010). See also, Council of Canadians with Disabilities, "Poverty and Disability: Senate Committee Hears from Canadians with Disabilities" (April 2008) online: Council of Canadians with Disabilities <http://www.ccdonline.ca/en/socialpolicy/poverty/senate-committee> (last accessed: 30 May 2010). Marie White, Chairperson of the Council of Canadians with Disabilities (CCD) says, "Having a disability for many means a lifetime of living in poverty".
[9] Council of Canadians with Disabilities, note 8.
[10] Mikkonen & Raphael, note 7 at 50 -51.
[11] Errol Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12 N.J.C.L. 3 at 5.
[12] Anne Bayefsky, "Defining Equality Rights" in A. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1 at 1. Bayefsky described equality of results as "a principle requiring action, which will achieve more equality in resources and rights. Equality of results will sometime require inequality of opportunity."
[13] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 [*Andrews*].
[14] Mendes, note 11 at 5.
[15] *Andrews,* note 13 at 169. Justice McIntyre adopted the observation from Justice Dickson (as he then was) in *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at 347 that "the interests of true equality may well require differentiation in treatment."
[16] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. vol. 2 (Toronto: Carswell, 2007) at 55-53.
[17] Council of Canadians with Disabilities (CCD), "Factum of the Intervenor, R. v. Lovelace" (November 1999), at para. 22, online: CCD <http://www.ccdonline.ca/en/humanrights/promoting/lovelace> (last accessed: 16 April 2010) [CCD Lovelace Factum]. At para. 22, the intervener provided: "Governments say they would be discouraged from acting affirmatively if they must include all who would benefit from the outset."
[18] Colleen Sheppard, "Litigating the Relationship between Equity and Equality" (1993) Ontario Law Reform Commission Study Paper, online: Ontario Law Reform Commission

<http://people.mcgill.ca/files/colleen.sheppard/Litigating_Equity_Equality.pdf> at 61 (last accessed: 16 April 2010) [emphasis added]. Professor Sheppard found: "Nor should it violate the equality guarantees for the government to make certain choices in the kinds of initiatives or programs it wants to implement. It should be open to governments, for example, to decide to develop an urban housing project for single parents or a special education program for children with physical disabilities. The equality guarantees should not be reduced to a requirement that all problems be solved or addressed at the same time and allocated the same amount of resources."

[19] Edward M. Iacobucci, "Antidiscrimination and affirmative action policies: Economic efficiency and the Constitution" (1998), 36 Osgoode Hall L.J. 293.

[20] *Lovelace v. Ontario,* [2000] 1 S.C.R. 950, 2000 SCC 37 at para. 64 [*Lovelace*].

[21] *R. v. Willocks* (1995), 22 O.R. (3d) 552 (Ont. Ct. J. (Gen. Div.) at para. 86 [*Willocks*] [emphasis added].

[22] *Roberts v. Ontario (Ministry of Health)* (1989), 10 C.H.R.R. D/6353 (Ontario Board of Inquiry) [*Roberts OBI*]. Chairperson Backhouse in her Board of Inquiry decision found, "The Assistive Devices Program draws distinctions between able-bodies and physically disabled individuals, but this is not determinative of the issues of "equality" or "discrimination". In this situation, the able-bodied have no need of the devices within the program…The disabled, by contrast, have need of these devices if they are to obtain access to opportunities, benefits and advantages available to able-bodied members of society…The program does not violate notions of equality. Indeed the essence of equality requires that these distinctions be made."

[23] Drumbl &Craig, note 4 at 86 [emphasis added].

[24] Drumbl &Craig, note 4.

[25] Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* (New Haven:Yale University Press, 2005).

[26] M.B. Abram, "Affirmative Action: Fair Shakers and Social Engineers" (1986) 99 Harvard L.R. 1312 at 1323. Abram found that "perhaps the most ironic weakness of the social engineers' redistributive approach is that it fails to help those particular members of disadvantaged groups who are most in need of assistance".

[27] Frank De Zwart, "The Logic of Affirmative Action: Caste, Class and Quotas in India" (2000) 43 Acta Sociologica 235.

[28] *Pay Equity Act, R*.S.O. 1990, c. P.7.

[29] *Employment Equity Act*, S.C. 1995, c. 44. The *Employment Equity Act* sets as its goal "…giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of difference."

[30] Walter Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. B. Rev. 242 at 257.

[31] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15(2) [*Section 15(2)*].

[32] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [*McKinney*]. Justice LaForest held that "One need simply examine s. 15(2) which provides that s. 15(1) "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . .". There would be no need to refer to programs and activities if s. 15(1) were confined to legislative activity." In the same way, Justice Wilson found: ""Activity" cannot, in my view, be read narrowly in order to be equated with "law". Subsection (2) must be read together with subs. (1). It would not have been necessary to exempt programs and activities from the ambit of subs. (1) if they were not included in subs. (1) in the first place. I believe that the inclusion of these words in subs. (2) provides strong support for the proposition that s. 15(1) was not intended to apply only in the narrow context of discriminatory legislation or "rules" analogous thereto."

[33] *Human Rights Code*, R.S.O. 1990 [*Code*], c. H.19, s. 14(2).

[34] *Code*, note 33 at s. 14(2).

[35] *Code*, note 33 at s. 14(6).

[36] *Code*, note 33 at s. 14(8).

[37] *Code*, note 33 at s. 14(2).

[38] *Code*, note 33 at s. 14(9).

[39] *British Columbia Human Rights Code*, [RSBC 1996] c. 210, s. 42.

[40] *Saskatchewan Human Rights Code,* S.S. 1979 c. S-24.1, s.16.

[41] *Nova Scotia Human Rights Act*, R.S., c. 214, s.. 6.

[42] Saskatchewan Human Rights Commission, "Equity Works: The Equity Program of the Saskatchewan Human Rights Commission", online: http://www.shrc.gov.sk.ca/equity/whatis.html (last accessed: 30 June 2010).
[43] *Alberta Human Rights Act,* R.S.A., 2000, c. a-25.5.
[44] *Alberta Human Rights Act,* note 43 at s. 11.
[45] *Charte des droits et libertés de la personne du Québec*, LRQ, c. C-12, s. 87 [*Quebec Charter*].
[46] *Quebec Charter,* note 45.
[47] Global Rights, note 5.
[48] U. S. Const., Amend. V & XIV.
[49] Jason Morgan-Foster, "From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions" (2003) 9 Wash. & Lee Race & Ethnic Anc. L.J. 73, at 75.
[50] Roozbeh Baker, "Balancing Competing Priorities: Affirmative Action in the United States and Canada (2009) 18 Trans-national Law and Contemporary Problems 527 at 528 [emphasis added].
[51] Baker, note 50 at 532
[52] *Plessy v. Ferguson* (1896), 163 US 537 - 1896 (US Supreme Court) [*Plessy*].
[53] *Adarand Constructors Inc. v. Pena* 515 U.S.200 (U.S.1995) at 240.[*Adarand*]
[54] *Regents of the University of California v. Bakke*, 438 U.S. 265 (U.S.1978).[*Bakke*]
[55] *Gratz v. Bollinger*, 539 U.S. 244 (U.S.S.C. 2003),, online: Cornell University Law School <http://www.law.cornell.edu/supct/html/02-516.ZS.html> [*Gratz*].
[56] *Grutter v. Bollinger* 539 U.S. 306 (U.S.S.C. 2003), online: Cornell University Law School <http://www.law.cornell.edu/supct/html/02-241.ZS.html> [*Grutter*].
[57] - Morgan-Foster, - - - - (-, note 49 at 75.
[58] Morgan-Foster, note 49 at 81.
[59] -*The Constitution of the Republic of India,* Part XVI. Articles 330 - 342 on Reservations. "Nothing … shall prevent the State from making any special provision for the advancement of any socially and educationally backward class of citizens, or for the Scheduled Castes and the Scheduled Tribes."
[60] Shilpa Kannan, "Critics slam India's education quotas " (29 April 2008), online: BBC News <http://news.bbc.co.uk/2/hi/business/7371752.stm>.
[61] Global Rights, note 5 at 23.
[62] Rishab Dara, "*Ashoke Kumar Thakur v. Union of India and Others etc.,* [2007] RD-SC 609" (17 May 2007), online: Rishab Dara <http://www.rishabhdara.com/sc/view.php?case=22294>.
[63] *Equality Act,* UK 2010 c. 15 part 11.
[64] Government Equalities Office, "Equality Act 2010", online: Government Equalities Office <http://www.equalities.gov.uk/equality_bill.aspx> [emphasis added].
[65] Government Equalities Office, "Equality Act Impact Assessment" (UK, April 2010), online: Government Equalities Office <http://www.equalities.gov.uk/pdf/Equality%20Act%20Impact.pdf> at 179.
[66] *Charter of Fundamental Rights of the European Union*, 2000-12-18 EN Official Journal of the European Communities C 364 "Chapter III – Equality", online: Charter of Fundamental Rights <http://ec.europa.eu/justice_home/unit/charte/en/charter-equality.html>.
[67] *Kalanke v. Freie Hansestadt Bremen, 1995* E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995) [*Kalanke*].
[68] Manfed Zuleeg, "Gender Equality and Affirmative Action Under the Law of the European Union" (1999) 5 Colum. J. Eur. L. 319-328.
[69] Dagmar Schiek, "Sex Equality Law After *Kalanke* and *Marschall*" (2002) 4 European Law Journal 148.
[70] Louis Charpentier, "The European Court of Justice and the Rhetoric of Affirmative Action" (1998) Robert Schuman Centre Working Paper, No 98/30, online: Robert Schuman Centre<http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Publications/WorkingPapers/9830.aspx> (last accessed: 30 June 2010).
[71]Global Rights, note 5.
[72] *Convention on the Elimination of All Forms of Racial Discrimination,* G.A. Res. 2106 (XX), UN GAOR, 660 U.N.T.S. 195, (1965), Supp. No. 14, UN Doc. A/6014.
[73] *International Convention on the Elimination of All Forms of Discrimination Against Women*, U.N.G.A. Res. 34/180, G.A.O.R. 34th Session, Supp. No. 45, p. 193, 19 LLM 3 [emphasis added].
[74] *General Comment 18: Non-discrimination*, 37th sess., (1989), online: Office of the Commissioner of Human Rights

<http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument> at para. 10 [emphasis added].
[75] *International Convention on the Rights of Persons with Disabilities*, UN GAOR, 7th Sess., Annex II, A/AC.265/2006/2 (2006).
[76] This question was at issue in *Tranchemontagne v. Ontario (Director, Disability Support Program*), [2006] 1 S.C.R. 513, 2006 SCC 14 [*Tranchemontagne*].
[77] Russel Jurianz, "Recent Developments in Canadian Law: Anti-Discrimination Law Part 1" (1987) 19 Ottawa L. Rev. 447 at 486. Jurianz elaborated: "While the Court will not be able to review the content of government programs under the Charter, they will be able to review both the content of, and the pre-conditions for, all programs under existing human rights legislation."
[78] Jurianz, note77. He continued: "...subsection 15(2) will have no application to affirmative action voluntarily undertaken by private employers and institutions" at 482.
[79] Jurianz, note 77 at 483.
[80] Ontario Human Rights Commission, "Guidelines on Special Programs" (1997), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/Policies/specialprogramsen> (last accessed: 31 May 2010) [OHRC Guidelines on Special Programs].
[81] Beatrice 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*" (1990-1991) 4 C.J.W.L. 287.
[82] *Action Travail des Femmes v Canadian National Railway Co.,* [1987] 1 SCR 111 [*Action Travail*]. At page 1143, For the Court, Chief Justice Dickson held: "The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears."
[83] *Apsit Manitoba Rice Farmers Association v.The Manitoba Human Rights Commission*, [1987] 50 Man. R. (2d) 92 (Q.B.). [emphasis added] [*Apsit*].
[84] *Apsit, note 83.*
[85] *Silano* v. *British Columbia*, [1987] 42 D.L.R . (4th) 407 (B.C.S.C.) [*Silano*].
[86] *Andrews*, note 13.
[87] *Harrison v University of British Columbia*, [1990] 77 DLR (4th) 55 (SCC) at para. 66 [*Harrison*].
[88] *Ontario (Human Rights Commission) v. Ontario*, [1994], 19 O.R. (3d) 387 (C.A.) at 401 [*Roberts*] [emphasis added].
[89] *Eaton* v*. Brant County Board of Education*, [1995] 22 O.R. (3d) 1 at paras. 10-11 (Ont. CA) [reversed on other grounds, Supreme Court of Canada, No. 24668, October 9, 1996, [1996] S.C.J. No. 98 [*Eaton*][emphasis added].
[90] Drumbl & Craig, note 4 at 84.
[91] *Schafer v. Canada (Attorney General),* [1997] 149 DLR (4th) 705; 35 OR (3d) 1 (Ont. CA); leave to appeal dismissed, 2 SCCA no. 516 (S.C.C.) [*Schafer*].
[92] *Schafer*, note 91 at para. 157.
[93] *Schafer*, note 91 at para. 227.
[94] *Lovelace v. Ontario*, 33 O.R. (3d) 735 (Ont. C.A.) at paras. 65 [*Lovelace COA*].
[95] *Lovelace COA*, note 94 at para. 64.
[96] *Lovelace,* note 20 at para. 41.
[97] *Lovelace,* note 20 at para. 49.
[98] *Lovelace,* note 20 at para. 69.
[99] *Lovelace,* note 20 at para. 108.
[100] *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 at para. 38[*Kapp*].
[101] *Kapp,* note 100 at para. 38.
[102] *Kapp,* note 100 at para. 55. "Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs."
[103] *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development),* [2009] ABCA 239 atpara 19 [*Cunningham*].
[104] *Cunningham*, note 103 at para. 31.

[105] *Linda Jean, Chief of the Micmac Nation of Gespeg, in her own name and in the name of all the other members of her Band, et al. v. Minister of Indian and Northern Affairs Canada*, et al., [2009] FCA 377 [*Jean*].
[106] *Jean*, note 105 at para. 8-9.
[107] Women's Legal Education and Action Fund (LEAF), factum to Federal Court of Appeal, online: LEAF <http://www.leaf.ca/legal/facta/2009-micmac1.pdf> (last accessed: 30 May 2010). [LEAF Jean factum].
[108] LEAF Jean factum, note 107 at para. 23 [emphasis added].
[109] Cooper v. Ontario (Attorney General) (2009) 99 O.R. (3d) 25, 311 D.L.R. (4th) 480 at paras 14-16 [*Cooper*].
[110] Ena Chadha, "Running on Empty: the "Not so special status" of Para-Transit Services in Ontario" (2005) 20 W.R.L.S.I. 1.
[111] *Odell et al. v. Toronto Transit Commission*, [2001] OHRBID No. 2 at paras. 40 and 44 [*Odell*]. See also Chadha, note110.
[112] *Neusch and Fox v. Ontario (Ministry of Transportation) et al.*, [2002] O.H.R.B.I.D. No. 11 (Ontario Board of Inquiry (Human Rights Code) [*Neusch*].
[113] Ontario Human Rights Commission, "Position Paper: Whether the para-transit services provided by public transit services in the cities of Toronto, Hamilton, London, and Windsor are special programs under the Ontario Human Rights Code" (October 2006), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/discussion_consultation/ParatransitPaperEN> (last accessed: 16 April 2010) [OHRC Paratransit].
[114] *Wynberg v. Ontario (*2005), 252 D.L.R. (4th) 10 at para. 621 [*Wynberg Superior Court*].
[115] *Wynberg Superior Court, note 114* at para. 617 and para. 740.
[116] *Wynberg v. Ontario*, [2006] 82 O.R. (3d) 561 (C.A.) at para. 25 [*Wynberg CA*].
[117] *Ball v. Ontario (Ministry of Community and Social Services)*, [2010] O.H.R.T.D. No. 316, 2010 HRTO 360 [*Ball*].
[118] *Ball,* note 117 at paras. 120-121.
[119] *Ball,* note 117 at paras. 120-121.
[120] Justice Anne Molloy was on the 3-person panel. Interestingly, Justice Molloy was Mr. Roberts' counsel in *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387. (Ontario C.A.) [Roberts].
[121] *Larromana v. Director of Ontario Disability Support Program*, [2010] ONSC 1243. [*Larromana*].
[122] See, e.g., Daniel Del Gobbo and Stephanie DiGiuseppe, "Transposing *Tranchemontagne* into the *Charter* Context: Section 15(2) – Parts one and two" (March 2010) online: The Court <http://www.thecourt.ca/2010/03/23/transposing-tranchemontagne-into-the-charter-context-s-152/> (last accessed: 6 April 2010).
[123] *Larromana,* note121.
[124] Glenn Kauth, "Signs of trouble in the human rights system" (2009), online: Law Times <http://www.lawtimesnews.com/200909285489/Commentary/Editorial-Signs-of-trouble-in-the-human-rights-system> (last accessed: 16 April 2010).
[125] Michael McKiernan, "LAO vows to fix "unacceptable hotline waits" (10 May , 2010), online: Law Times < http://www.lawtimesnews.com/201005106844/Headline-News/LAO-vows-to-fix-unacceptable-hotline-waits >. See also Tracey Tyler, "Legal aid facing "troubling cuts: Loss of researchers especially worrying, storefront lawyers say", Toronto Star (Feb 18 2010), online: <http://www.thestar.com/news/ontario/article/767241--legal-aid-facing-troubling-cuts >. See also, Maria Calabrese, "Lawyers feel that Legal Aid is being dismantled in Ontario" (2010), online: The North Bay Nugget <http://www.nugget.ca/ArticleDisplay.aspx?e=2532488>.
[126] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* [2007] 1 S.C.R. 38.
[127]Marissa Olanick, "Reconsidering *Kapp* – An Unintended Barrier to Future Equality Claims?" (2009), online: The Court <http://www.thecourt.ca/2009/08/07/reconsidering-kapp-an-unintended-barrier-to-future-equality-claims>/>. Olanick found that "Many legal commentators have given up on s. 15 as a tool for advancing substantive equality."
[128] James R. Hendry, "Section 7 and Social Justice*"* (Presented at the 8th Annual Charter Conference, Ontario Bar Association, Toronto: 18 September 2009).

[129] Antonella Ceddia, "Alternatives for Advancing Social Justice – Human Rights – Alternative to Section 15" (Presented at the 8th Annual Charter Conference, Ontario Bar Association, Toronto: 18 September 2009).
[130] Jurianz, note 77 at 486. Jurianz pointed out: "While the Court will not be able to review the content of government programs under the Charter, they will be able to review both the content, of, and the pre-conditions for, all programs under existing human rights legislation."
[131] *Charter*, note 31 at s. 15(2).
[132] *Code*, note 33 at s. 14.
[133] Colleen Sheppard, "Litigating the Relationship between Equity and Equality" (1993) Ontario Law Reform Commission Study Paper, at 10. online: Ontario Law Reform Commission <http://people.mcgill.ca/files/colleen.sheppard/Litigating_Equity_Equality.pdf> (last accessed: 16 April 2010) [Sheppard] at 8.
[134] Sophia Moreau, "The Promise of Law v. Canada" (2007) 57 U. T. L. J. 415.
[135] Abram, note 26 at 1322.
[136] Drumbl & Craig, note 4 at 85.
[137] Drumbl & Craig, note 4 at 86
[138] Drumbl & Craig, note 4 at 86.

[140] Abella Commission, note 2 at 8.
[141] Abella Commission, note 2 at 13 – 14.
[142] Sheppard,note 133 at 24.
[143] Sheppard, note 133 at 10. She argued: "If one concentrated only on eliminating the discrimination and resulting inequality experienced by individuals on a one-by-one basis, equality, like a horizon, would never be reached. The egalitarian society which treats its members with equal concern and respect requires for its realization concepts that go beyond the traditional, purely individualistic notions predominant in nineteenth century thought."
[144] Sheppard, note 133 at 10.
[145] Sheppard*,* note 133 at 12 [emphasis added].
[146] Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Canadian Bar Review 433 at 462 and 470. Day and Brodsky found: "Dealing with accommodation as an individual matter when sex and race discrimination are at issue is a cop-out, a tactic that is likely to sidestep dealing directly with the social construction of the "normal" as male and white. However, with disability the subordinating effect of the category of disability can only be eliminated by 1) using group-based measures, such as making buildings, transportations and communication systems accessible and 2) making individualized adjustments to workplace or service systems."
[147] Ena Chadha & C. Tess Sheldon, "Promoting equality: economic and social rights for persons with disabilities under section 15." (2004) *National Journal of Constitutional Law* 16:1, 27 at 27.
[148] Sheppard, note 133 [emphasis added].
[149] T. Friesen "The Right to Health Care" (2001) 9 Health L. J. 205 at para. 2
[150] See e.g., *Symes v. Canada,* [1993] 4 S.C.R. 695 [*Symes*].
[151] Friesen, note 149 at para. 4.
[152] Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Canadian Bar Review 299. On page 329, Martin noted: "The Court said that the interests protected by human dignity relate to the realization of personal autonomy and self-determination, self-respect and physical and psychological integrity and empowerment. These rights fall within the classic liberal tradition …Dignity belongs more to the realm of individual rights than to group based historical disadvantage…. It removes from view how oppression operates."
[153] *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at para. 78 [*Eldridge*].
[154] Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, 2000).
[155] Sheppard*,* note 133 at 61.
[156] Sheppard*,* note 133 at 61.
[157] Sheppard, note 133 at 61. Professor Sheppard elaborated: "The *Charter* imposes on legislatures no obligation to redress all social or economic inequalities."

[158] See e.g.*, Egan v. Canada*, [1995] 2 S.C.R. 513. Justice Sopinka found at page 573 that "This court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so."
[159] Abella Commission, note 2 at 14.
[160] *Kapp*, note 100 at para. 55. The majority of the Court found that "Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs."
[161] Chadha, note 110 at 10.
[162] Chadha, note 110 at 12.
[163] *Eaton,* note 89 at para. 10.
[164] *Eaton,* note 89 at paras 10-11.
[165] The Centre for Universal Design (1997). The Principles of Universal Design, Version 2.0. Raleigh, NC: North Carolina State University. Copyright © 1997 NC State University, The Centre for Universal Design. Also see Molly Follette Story, "Principles of Universal Design" in Wolfgang F.E. Preiser *et al*. eds., *Universal Design Handbook*, (New York: McGraw-Hill, 2001) at 10.3.
[166] Vizkelety, note 81 at 291
[167] *Grutter,* note56.
[168] Pauline Rosenbaum & Ena Chadha, "Reconstructing disability: Integrating disability theory into Section 15" (2006) 33 (2d) Sup. Ct. L. Rev. 343.
[169] Ani B. Satz, "Disability, vulnerability, and the limits of antidiscrimination" (2008) 83 Wash. L.Rev. 513.
[170] Martha Albertson Fineman, "The vulnerable subject: Anchoring equality in the human condition" (2008) 20 Yale J.L. & Feminism 11.
[171] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [*Meiorin*] at para. 41.
[172] Day & Brodsky, note 146 at 462. The authors continued: "It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are 'accommodated' ".
[173] Day & Brodsky, note146.
[174] Jerome Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) at 237. Bickenbach describes accommodation as a "necessary condition of political equality".
[175] Yvonne Peters, "Twenty Years of Litigating for Disability Equality Rights: Has it Made a Difference?" An Assessment by the Council of Canadians with Disabilities" (January 2004), online: Council of Canadians with Disabilities <http://www.ccdonline.ca/publications/20yrs/20yrs.htm#IIIB1ciii> (last accessed: 20 August 2008).
[176] *Lovelace,* note 96 at para. 108. Justice Iaccobuci set out "…However, as already stated, we may well wish to reconsider this matter at a future time in another case". See also *Kapp,* note 100 at para. 41, where the Chief Justice and Justice Abella found: "However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point – one that is adequate for determining the issues before us on this appeal, but leaves open the possibility for future refinement."
[177] Edgar-Andre Montigny, "Tranchemontagne/Werbeski - The Saga Continues" (June 2009), online: ARCH Disability Law Centre <http://www.archdisabilitylaw.ca/sites/all/files/ARCH%20Alert%20-%20June%208%2009%20-%20Text.txt>. "The recentl Supreme Court of Canada decision in *R. v. Kapp* appears to raise the question of whether a court needs to consider the impact of the program or whether a court can simply accept the government's position that a program in question is an "ameliorative program". Even if the mere claim that a program is ameliorative is sufficient to protect it from claims of discrimination by those who are not part of the targeted group, it is far from certain whether the same could be said in cases where the claim of discrimination comes from a member of the very group the program is to benefit. It would seem in such cases there would be a greater need to examine the actual impact of the program rather that just accept a claim that the program was intended to benefit a disadvantaged group."
[178] Ankur Bhatt, "*Cunningham v. Alberta:* Aboriginal "Double Dipping"", (May 2003), online: The Court <http://www.thecourt.ca/2010/04/08/cunningham-v-alberta-aboriginal-double-dipping/> (last accessed: 23 May 2010) [emphasis added].
[179] *R. v. Willocks* (1995), 22 O.R. (3d) 552 (Ont. Ct. J. (Gen. Div.) [*Willocks*].

[180] *Willocks,* note 179.
[181] *Lovelace,* note 20 at para. 85 [emphasis added].
[182] Sheppard, note 133 at 60.
[183] Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?*, (Ottawa: Canadian Advisory Council on the Status of Women, 1989) chapters 7 and 8 at 30. [emphasis added].
[184] Abella Commission, note 2 at 13.
[185] Edward Iaccobucci, "Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution" (1998), 36:2 Osgoode Hall L.J. 293 at 326 [Emphasis in original].
[186] *R. v. Turpin*, [1989] 1 S.C.R. 1296 [*Turpin*].
[187] *Kapp,* note 100 at para. 55.
[188] *LEAF Jean factum,* note 107 at para. 39 .
[189] *Lovelace,* note 20 at para. 69.
[190] *Lovelace,* note 20 at para. 70.
[191] *Eldridge*, note 153 at para. 56 per La Forest J.
[192] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54 at paras. 86-88 [*Martin & Laseur*]. Justice Gonthier for the unanimous court found that the exclusion of "chronic pain" from workplace compensation programs constituted a violation of Section 15(1) of the Charter, unjustified by Section 1. See also *Cunningham*, note 119 para. 41.
[193] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 [*Law*][emphasis added].
[194] *Kapp,* note 100 at para. 54.
[195] *Martin & Laseur*, note 192 at para. 76 [emphasis added].
[196] Sheppard, note 133 at 9-10. Professor Sheppard found: "Defining a "social group" may create difficulties; moreover, deciding who is entitled to represent a particular social group may cause further problems, particularly if there is intra-group conflict."
[197] Abram, note 26 at 1321.
[198] Sheppard, note 133 at 23.
[199] Fiona Sampson, "*Granovsky v Canada (Minister of Employment and Immigration)*: Adding Insult to Injury" (2005) 17 C. J. W. L. 72.
[200] *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 [*Gibbs*]. In *Gibbs*, the Court held as discriminatory an insurance scheme which offered reduced benefits to persons with mental health issues, than not persons with other kinds of disabilities.
[201] *Vriend v. Alberta,* [1998] 1 S.C.R. 493 [*Vriend*]. The Court found that the exclusion of the ground of "sexual orientation" from Alberta's human rights statute violated Section 15(1), unjustified by Section 1 of the Charter. As a remedy, the words "sexual orientation" were ordered to be read into the prohibited grounds of discrimination in the statute.
[202] *Martin & Laseur*, note 192. Justice Gonthier for the unanimous Court found that the exclusion of "chronic pain" from workplace compensation programs constituted a violation of Section 15(1) of the Charter, unjustified by Section 1.
[203] *Kapp,* note 100 at para. 28 [emphasis added].
[204] *Kapp,* note 100 at para. 60.
[205] *Roberts*note 88 at 339. The Court of Appeal found that "Special programs must be designed and must operate so that restrictions within [the] 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."
[206] OHRC Guidelines on special programs, note 80 [emphasis added].
[207] *Apsit,* note83. The Manitoba Court of Queens Bench found: A bald assertion by government that it has adopted a program which "has as its object the amelioration of conditions of disadvantaged individuals or groups …" does not *ipso facto* meet the requirements to sanctify the program under section 15(2) of the Charter. The government can not employ such a naked declaration as a shield to protect an activity or program which is unnecessarily discriminatory. "
[208] *Kapp,* note 100 at para. 54. Chief Justice McLachlin and Justice Abella provided as follows: "Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts."

[209] *Kapp,* note 100 at para. 45 [emphasis added].
[210] *Kapp,* note 100 at para. 115. Justice Basterache found: "The declarations of Minister Crosbie and government officials explaining the rationale for the program clearly relate to agreements with bands on the regulation and management of the fishery."
[211] *Kapp,* note 100 at para. 48.
[212] *Gibbs*, note 200 at para. 39. Justice Sopinka provided: "By following an approach to defining the purpose of the insurance scheme that is consonant with the goals of human rights legislation, the narrow, formalistic approach to discrimination found in earlier pregnancy cases [see *Bliss*] is avoided under the analysis here and in *Brooks*."
[213] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 483-85 [*Morgantaler*].
[214] *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 212 [*Miron*] [emphasis added].
[215] *Ball,* note 117 at para. 77 [emphasis added].
[216] Martin*,* note 152 at 332.
[217] CCD Lovelace Factum, note 17 at para. 26 [emphasis added]. "Persons with disabilities experience discrimination not only as a result of prejudice and stereotyping, but as a consequence of neglect and paternalism. It is no exaggeration to say that people with disabilities have been killed by good intentions….A program that was benign and ameliorative at the outset, may become discriminatory as attitudes change or new evidence about a programs effect becomes available."
[218] CCD Lovelace Factum*,* note 17 at para. 29 [emphasis added]. "The reasons for retaining a program may be completely different from the reasons for having initiated it, particularly after the adverse effect of the program on its supposed beneficiaries have been drawn to the attention of the government."
[219] *Andrews,* note 13 at 152*. Justice McIntyre:* "While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others."
[220] *Kapp,* note 100 at para. 54.
[221] *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 at para. 41 [*Gosselin*]: "The government's short-term purpose in the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills."
[222] *Kapp,* note at para. 48.
[223] Jurianz, note 77 at 493.
[224] David Lepofsky & Jerome Bikenbach , "Equality rights and the physically handicapped" in AF Bayefsky and M. Eberts eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 323 at page 355. [emphasis added] "the better view is that the defendant must establish that the impugned program has some serious likelihood of achieving its ameliorative goal."
[225] Lepofsky & Bickenbach, note 224 at 355.
[226] CCD Lovelace Factum*,* note 17 at para. 31.
[227] *Kapp,* note 100 at para. 23 .
[228] *Cunningham*, note 103 at para. 21.
[229] *Cunningham*, note 103 at 37 [emphasis added].
[230] *Law*, note 193 at para. 72.
[231] *Martin & Laseur*, note 192 at paras. 86-88; see also Cunningham, note 119 at para. 41.
[232] *Charter*, note 54 at s. 1.
[233] *R. v. Oakes* [1986] 1 S.C.R. 103 [*Oakes*].
[234] Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 44:3 U.T.L.J. 291 at 8.
[235] Martin, note 152 at 327.
[236] Martin, note 152 at 321.
[237] *Law*, note 193 at para. 105.
[238] *Law*, note 193 at para. 106. Justice Iaccobucci found: "Parliament is entitled, under these limited circumstances at least, to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the *Charter* and being required to justify its position under s. 1. I emphasize, though, that under other circumstances a more precise correspondence will undoubtedly be required in order to comply with s. 15(1). In particular, a more precise correspondence will likely be important where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society."

[239] *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 at para. 67 [*Granovsky*] . Justice Binnie held: "I do not suggest that s. 15 claims can properly be decided by pitting groups of disadvantaged people against each other to determine who is *more* disadvantaged. The fact the CPP drop-out provision "corresponds to the greater need or the different circumstances" of the permanently disabled is, however, a relevant contextual factor."
[240] *Lovelace COA* note 94 at para. 64. The Court of Appeal found that "If government affirmative action programs can be too readily challenged because, for example, they do not go far enough in remedying disadvantage, governments will be discouraged from initiating such programs."
[241] Sheppard*,* note 133 at 23.
[242] LEAF Jean factum, note 107 at para. 12 [emphasis added].
[243] Lepofsky & Bickenbach, note 224 at 355.
[244] CCD Lovelace Factum*,* note 17 at para. 11.
[245] *Kapp,* note 100 at para. 41.
[246] Jonnette Watson Hamilton, "A Vote for *R. v. Kapp* as the Leading Equality Case of the Past Decade", (January 2010), online: The University of Calgary Faculty of Law Blog on Developments in Alberta Law <http://ablawg.ca/2010/01/13/a-vote-for-r-v-kapp-as-the-leading-equality-case-of-the-past-decade/> (last accessed: 31 May 2010).
[247] *McKinney v University of Guelph,* [1990] 3 S.C.R. 229 [*McKinney*]. The Supreme Court found that excluding persons over 65 years of age from human rights protections violated Section 15(1).
[248] But see *Brown v. British Columbia (Minister of Health)*, (1990), 66 DLR (4th) (BSSC) [*Brown*]. In that case, the exclusion of AZT from a drug funding program was found not to offend Section 15(1). *Brown* is sometimes characterized as a barrier to the development of positive rights.
[249] *Bliss v. Attorney General of Canada*, (1979] 1 S.C.R. 183 [*Bliss*].
[250] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 [*Brooks*].
[251] *Brooks,* note 250 at 1240. [emphasis added].
[252] Sheppard, note 133 at 60.
[253] *Eldridge*, note 153 at para. 73.
[254]OHRC Paratransit, note113.
[255] OHRC Guidelines on Special Programs, note 80.
[256] *Vriend,* note 201..
[257] *Roberts* note 88 at 402.
[258] Sheppard, note 133 at 33 [emphasis added].
[259] CCD Lovelace Factum, note 17.
[260] *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 at 1120 [*Dickason*].
[261] *Lovelace,* note 96 at para. 106.
[262] *Lovelace,* note 96 at para. 107.
[263] Chadha, note 110 at 10.
[264] Chadha, note 110 at 12.
[265] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo*].
[266] *Tarnopolsky,* note 30 at 257-259.
[267] *Lovelace COA,* note94.
[268] Lepofsky & Bickenbach, note 224 at 354.
[269] OHRC Guidelines on Special Programs*,* note80.
[270] *Roberts*, note 88 at 13.
[271] Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 5, (December 9, 1980) at 5096-5098.
[272] Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 4 (December 1, 1981) at 4114.
[273] *Eldridge*, note 153 at para. 56.
[274] *Granovsky*, note 239 at para. 67.
[275] *Lovelace,* note 20 at para. 69.
[276] *Martin & Laseur*, note 192.
[277] *Hodge v. Canada (Minister of Human Resources Development*), [2004] 3 S.C.R. 357, 2004 SCC 65 [*Hodge*]. In *Hodge*, the widow of a common-law relationship was unable to access CPP survivor benefits. Non-married spouses were required to be living with the contributor for a specified period. A survivor who

divorced would not have been able to access the CPP benefits. The Court replaced the claimants chosen comparator (“separated married spouses”) group with “divorced spouses”.