TEST CASES

&

INTERESTING & IMPORTANT LITIGATION

DONE BY

COMMUNITY LEGAL ASSISTANCE SOCIETY

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INTRODUCTION

The Mission Statement of the Community Legal Assistance Society ("CLAS") is to provide legal assistance to persons who are physically, mentally, socially, economically or otherwise disadvantaged and to develop law that will benefit disadvantaged groups as a whole. This volume lists some of the more important cases that CLAS has been involved in to fulfil this Mission Statement.

BRIEF HISTORY

The Vancouver Community Legal Assistance Society has its roots in the reform zeal of the 1960's. The present structure of our Society evolved from the reform oriented activities of two different groups of that era.

In the late 60's a group of seminary students received government funding to deal with the social problems of the inner core of Vancouver. The project was to last one summer; However, it expanded and was continued the following summer and included a law student as part of the program. The program was then put on a full-time basis and was called the Inner City Project.

The basic purpose of the Inner City Project was to foster community-based organizations dealing with social issues. To that end, all social agencies as well as the law student, now a graduate lawyer, operated from one building and approached problems on a co-operative basis. Yet, the most important aspect of the project was that they saw their purpose as a limited one and early in 1971 the organization wound up and each group was told it had to make it on its own. From the law student group, with Michael Harcourt at its head, there evolved the Community Legal Assistance Society. The Society was incorporated in 1971 and the organization has been independent ever since.

During the late 60's and early 70's the law students at the University of British Columbia began operating free legal advice clinics. The students came to Community Legal Assistance Society to get assistance in obtaining supervising lawyers. This service we agreed to provide and still do.

In the following years, new programs were added in, the Mental Health Law Program and the Disability Law Program.

The roots of the Vancouver Community Legal Assistance Society are two in number - community organizations and the law students. It is now funded by the City of Vancouver, Legal Services society of B.C. and the Law Foundation.

This booklet is a collection of cases we have done. Listed below is a short list of cases we have been involved with at the Supreme Court of Canada level.

Leave Applications Granted to CLAS

1. *Bliss v Attorney-General Canada*, [1979] 1 S.C.R. 183

2. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) Terry Grismer, Estate* [1998] S.C.C.A. No. 69 .

3. *Cornish-Hardy v UIC Board*, [1980] S.C.R. 1218

4. *Winko v. British Columbia (Forensic Psychiatric Institute)* [1997] S.C.C.A. No. 117.

5. *Bese v. British Columbia (Forensic Psychiatric Institute)* [1997] S.C.C.A. No. 116.

6. *Law v. Canada (Minister of Employment and Immigration)* [1996] S.C.C.A. No. 306.

7. *Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue - M.N.R.)* [1996] S.C.C.A. No. 290.

8. *University of British Columbia v. Berg* (S.C.C.) [1991] S.C.C.A. No. 370.

9. *Jove v. Canada (Umpire, Unemployment Insurance)* [1988] S.C.J. No. 64.

Leave Applications Refused CLAS

10. *Donohue v. Canada (Attorney General) The Attorney General of Canada* [1998] S.C.C.A. No. 457.

11. *Fenton v. British Columbia (Forensic Psychiatric Services)*, [1991] S.C.C.A. No. 346.

12. *Winder v. British Columbia (Mental Health Act, Review Panel)* [1994] S.C.C.A. No. 146

Leave Applications Refused the Other Side

13. *Zutter v. British Columbia (Council of Human Rights)* (S.C.C.) [1995] S.C.C.A. No. 243.

Interventions

14. *Rodriguez v. British Columbia (Attorney General)* [1993] S.C.J. No. 94.

15. *R v O' Connor* [1995] S.C.J. No. 98.

16. *British Columbia Human Rights Commission v Blencoe SCC* file no. 2678.

17. WCB v Kovach File No. 25784.

A. POOR PEOPLES' RIGHTS

1. Dennis v. Minister of Rehabilitation and Social Improvement, [1972] 6 W.W.R. 214 (B.C.S.C.).

"A Mean to help poor Persons in their Suits", 1494, 2 Hen. VII, c. 12. An old English law allows poor people to sue without paying legal fees. The existence in the Province of a legal aid scheme cannot be regarded as a "local circumstance" within the meaning of the *English Law Act*, R.S.B.C. 1960, c. 129, receiving into British Columbia the laws of England on November 19, 1958. The local circumstances referred to are those existing in 1858 and not 1972. Accordingly, where it is shown that an intended plaintiff, in a proceeding seeking the appointment of a Board of Review by the Minister of Rehabilitation and Social Improvement, is a pauper in receipt of the maximum social assistance of $102 per month, the application can be granted.

Held: On an application for leave to commence an action in forma pauperis and for an order exempting the applicant from the payment of the fee required to commence the action, the application should be granted. Statutes which deprive the citizen of his right of access to the Courts for the redress of wrongs should be strictly construed.

2. Chastain v. B.C. Hydro and Power Authority, [1973] 2 W.W.R 461 (B.C.S.C.).

Plaintiffs sued on their own behalf and on behalf of others in the like position to themselves for a declaration that security deposits demanded by the defendant as a condition precedent to the supply, or the continued supply, of electrical power and gas, were illegal; and they asked for a permanent injunction. It appeared that it was the practice of the defendant in the case of customers who were not home owners, or who had not established a good record of payments as consumers, to require a payment roughly equivalent to the cost of two months' supply as a condition precedent to supplying power, or of continuing such supply; customers who failed or refused to pay had their power cut off. The selection of consumers who were required to pay security deposits were made by the defendant as a matter of internal management.

Held: The plaintiffs were entitled to the declaration and other relief sought, but limited to residential as distinct from commercial consumers. Although not subject to the provisions of *The Public Utilities Act*, R.S.B.C. 1960, c 323, the defendant was, none the less, a public utility; it enjoyed, certainly in the area where the plaintiffs lived, a monopoly in the supply of power; its duty was to supply its product to all who required it for a reasonable price without discrimination between all those who were similarly situated or who fell into one class of consumers. Nowhere in *The British Columbia Hydro and Power Authority Act*, 1964 (B.C.), c 7, was there to be found a power to require payment of a security deposit; nor was it open to the defendant to argue that since, in applying for services, the plaintiffs had expressly agreed to pay in accordance with defendant's tariffs and the terms and conditions thereof, they were bound to pay the deposit. If the deposit was illegal they were not bound. The demands to the which the plaintiffs, and others in like position, had been subjected were discriminatory and unlawful.

Comment: This was the first modern consumer class action in Canada. This successful Court action resulted in about one million dollars being returned to thousands of consumers. The vast majority of these people were low income persons.

3. Jensen v. The Queen (1985), 61 B.C.L.R. 54 (B.C.C.A.).

The petitioner was in receipt of income assistance administered by the respondent under the *Guaranteed*

Available Income for Need Act and he was also receiving an allowance of $50 per month for participating in a community involvement program established under the regulations. Due to a change in government policy, this programme was cancelled. The petitioner, upon being notified of the termination of his involvement in the program, appealed under s. 25(1) of the *Act*. The respondent refused to authorize the setting up of a tribunal on the grounds that the programme was a "social service" as defined in the *Act* and therefore unappealable as opposed to being an appealable matter respecting "income assistance" under s. 25(1). The petitioner obtained a declaration that this appeal was an income assistance matter and the government appealed.

Held: Appeal dismissed.

It is only necessary that the payments be categorized as income assistance in order that this matter be appealable whether or not they could also be categorized as social services need not be decided. It was the petitioner's poverty which necessitated the payment of $50 per month to enable him to participate in the programme and accordingly the payment fits within the definition of income assistance under the *Act* as "financial assistance... that is necessary for the purpose of relieving poverty" (s. 1).

Comment: This Court case was the result of the B.C. governments restraint program in 1983. Hundreds of handicapped persons on welfare had their $50 per month incentive allowance eliminated. This decision allowed such persons to appeal to a welfare appeal tribunal. In the end, hundreds of handicapped got their $50 per month payments reinstated retroactively.

4. Re Ewing and Kearney v. Queen, [1974] 18 C.C.C. (2d) 356 (B.C.C.A.).

Appellants, both 18 years of age at the time of their arrest (having just finished high school), were charged with two counts of possession of narcotics. When they appeared in Provincial Court they indicated they wished to plead not guilty and their cases were adjourned to give them an opportunity to obtain counsel. Owing to a lack of funds they were unable to obtain counsel privately, since they could not afford the necessary retainer, and as a matter of policy they were refused legal aid on the ground that their conviction was not likely to result in imprisonment or a loss of livelihood. As a result, when they appeared for trial the Provincial Court the Judge felt impelled to proceed. A motion for prohibition was dismissed and on appeal from that decision, held, Farris, C.J.B.C., and Branca, J.A., dissenting, the appeal should be dismissed.

The *Criminal Code* contemplates that an accused can make full answer and defence either personally or by counsel or agent. The common law did not guarantee a trial with counsel. While representation by counsel is desirable, there is no authority that it is a mandatory necessity so as to preclude the trial of an accused who desires, but cannot afford, counsel. The Canadian *Bill of Rights* guarantees the right to retain counsel, not to have one provided.

Per Farris, C.J.B.C., Branca, J.A., concurring, dissenting: An accused is entitled to a fair trial which cannot be assured without the assistance of counsel and therefore if, owing to a lack of funds, he cannot obtain counsel, the State has an obligation to provide one.

Comment: This is the leading right to counsel case in Canada. Although the appellants lost 3:2, the Court left open the possibility that a trial Judge could stop a criminal trial if he thought the accused would be unduly prejudiced by the lack of counsel. Shortly after the case, legal aid was expanded to cover these types of cases.

5. Topless v. Queen, [1983] B.C. Civ. Div. 3993-01 (B.C.S.C.).

Decision: Petition dismissed.

Facts: On November 10, 1982, the Minister of Finance for B.C. announced suspension of payment of the personal income tax and renters' credits payable in accord with the *Income Tax Act* and the *Financial Administration Act*. The petitioner contends that his action is unlawful.

Reasons: The above provisions use the mechanism of the *Income Tax Act* (Canada) and the Federal Collection and refund system to effect transfer payments to persons who pay less tax than the amount of the credits, or to persons who pay no tax at all. They are the embryo of a "reverse income tax" system of transfers to low income earners. But the language of the provisions is permissive. The announcement by the Minister was, in effect, a warning that future credits would not be allowed; he cautioned applicants not to apply for such, and made arrangements with the Federal authority not to allow such credits. In other words the Minister exercised his right to direct that such transfers not be made in future; he was legally empowered to so act. The executive cannot suspend the operation of laws enacted by the Legislature, citing in support *Fitzgerald v. Muldoon* (1976) 2 NZLR 615; the *Bill of Rights* (1688). The petitioner is wholly correct; that is trite law; an attempt by the Minister to suspend the law would have been illegal; see: *R. v. Catagas* (1978) 1 WWR 282. But the Minister did not attempt to suspend the operation of the *Income Tax Act*, he simply exercised the authority granted to him by that *Act*. The petitioner then submits that the *Financial Administration Act*, ss. 18 and 24 authorizes the Minister to "limit, restrict and regulate" expenditures, but not to prohibit them, and that the present directive is prohibitory, thus illegal. Authorities are cited, including *Re Britain Steel Fabricators* (1963) 42 WWR 586. However, the Court finds that the actions of the Minister were authorized by s. 24 of the *Financial Administration Act*, and this challenge must fail as well.

6. Nelson v. Hilliard, [1976] 4 W.W.R. 761 (B.C.C.A.).

Decision: An appeal by the City of Nelson from a decision holding that Nelson had no authority to require security deposits from tenant users of electricity is allowed. The Nelson by-law authorizing the requirement of such security deposits is a valid enactment under s. 568 of the *Municipal Act*. The trial Judge's holding that s. 568(3) provided for classification only on the basis of use was rejected by the Court of Appeal. The trial Court had considered s. 568 (3) in isolation, and had ignored the fact that subsection (3) applies to by-laws made under subsection (1). The latter subsection gives authority to fix rates, terms, and conditions under which electrical energy "may be supplied and used". Thus, stated the Court, "when ss. 3 refers to 'different users' it has reference to a by-law dealing with the rates, terms and conditions under which electrical energy is supplied and used. One of the conditions under which electrical energy is supplied is that it will be paid for. With users who are tenants there may be different problems securing payment than with users who are owners. Therefore, s. 568 read as a whole contemplates that different terms and conditions may be enacted in respect of the supply to different users" (Court's own emphasis). *Chastain, et al. v. B.C. Hydro* (1973) 2 W.W.R. 481 distinguished on the ground the s. 57 of the *B.C. Hydro and Power Act* was not comparable to s. 568 of the *Municipal Act*.

7. Collishaw v. Dir. of Rehabilitation and Social Improvement (1973), 36 D.L.R. (2d) 760 (B.C.C.A.).

This was a mandamus application on behalf of a welfare recipient to enforce a decision of a welfare appeal board. The B.C.C.A. ultimately held that the regulations setting up the appeal system were ultra vires.

Comment: Shortly thereafter, the B.C. government passed legislation setting up a new welfare appeal

system. CLAS was instrumental in having included in the legislation a provision that a person has to be put back on welfare pending the outcome of the appeal.

8. R. v. Natrall, [1973] 22 C.C.C. (2d) 502 (B.C.C.A.).

It is the duty of a County Court Judge hearing a sentence appeal under Code s. 755(3) to "consider the fitness" of the sentence imposed; the fitness of the sentence is to be considered as of the time when it was imposed as well as at the time of review in the light of further evidence or information. Additionally, on such review, the County Court Judge should consider the legality of the sentence, and whether or not there was any error of principle in the lower Court.

There is no conflict between the provisions of Code s. 722 and ss. 1(b) or 2(a) or (b) of the *Bill of Rights*; provided that a proper inquiry is made as to the ability of a convicted person to pay a fine, the imposition of a sentence of imprisonment in default of payment does not, in the case of a person in impecunious circumstances, constitute an abridgment of his right to equality before the law as declared by the *Bill of Rights*.

9. Gill v. Queen, (Unreported, 1983) (B.C.S.C.).

Decision: Subpoena issued that the Ministry of Human Resources produce the Gill's welfare file at the welfare hearing.

Facts: The Gill's launched an appeal from their termination of welfare benefits. The welfare tribunal did not have any power to subpoena documents.

Reasons: Where an inferior tribunal does not have any power to issue subpoenas, then the Supreme Court of B.C. has an inherent power to issue such subpoenas on behalf of the tribunal, at the request of the tribunal or the individual litigants.

10. Parmiter v. Van. Resources Board, (Unreported, November, 1977) (B.C.S.C.).

Decision: The tribunal created for the purposes shall hear and determine the petitioner's appeal.

Facts: The petitioner has been, until May, 1977, in receipt of monthly payments of $100.00 as an incentive allowance. After termination of such, she sought to appeal the decision to terminate. The respondent maintains that, the payments, being in the form of "social services" no appeal lies in that Sec. 25(2a) not being proclaimed, no basis for an appeal exists.

Reasons: The Court reviews the definition portions of the *Act*, being Sec. 2, which deals with the meaning both of the words, "income assistance" and "social services". In respect to the former a right of appeal lies. Counsel for the petitioner contends that the payments fall within the definition set out in Sec. 2, i.e. "necessary for the purpose of relieving poverty, neglect or suffering". The Court considers that the nature of the assistance was more closely related to the income assistance definition than to the social services definition, and that the right of appeal lies.

11. Louis v. Income Assistance Appeal Tribunal, [1981] B.C.D. Civ. 3933-01 (B.C.S.C.).

Decision: Petition dismissed.

Facts: The petitioner, a recipient of income assistance under the *Act*, seeks a declaration to the effect that regulation 13(2) of the *Act* is ultra vires, being inconsistent with the provisions of the *Act* under which it is authorized for passage. The regulation limited welfare recipients from attending more than 2 years of college.

Reasons: The *Act* is a general statute, leaving the refinements of its administration to be guided by *Regulations*. Section 26 deals with the powers of the Lt. Gov. in Council; clearly, Regulation 13(2) falls within the regulatory power set out in s. 26 and is not inconsistent with the purposes and intent of the *Act*. The *Act* is one which the Legislature has seen fit to enact in a "skeleton" form, leaving the broadly-defined powers set out therein to be specified and carried out pursuant to *Regulations* made by the Lt. Gov. in Council, no doubt at the suggestion and submission to that body by the Minister responsible for the administration of the *Act*. That latter official has, as is intended, "great discretion" in the administration of the statute.

12. **Sandra Norton, et al. v. Attorney General of B.C. (B.C.S.C.).**

Decision: the provincial government repealed the regulations under attack just before trial.

Facts: The day s. 15 of the Charter came into force Sandra Norton brought a class action on behalf of herself and all other handicapped persons on welfare. The Court action sought to strike down a regulation that gave a Christmas bonus of $20.00 to all welfare recipients except persons with disabilities. The challenge was based on the equality provisions of the Charter.

Comment: As a result of this case all handicapped persons on welfare now receive a Christmas bonus. This put $600,000.00 per year in the hands of persons with disabilities.

13. **B.C. (Minister of Social Services and Housing) v. Davies (1992), 92 D.L.R. (4th) 326 (B.C.S.C.).**

The *Guaranteed Available Income for Need Act*, R.S.B.C. 1979, C. 158, ("*G.A.I.N. Act*") and the regulations made thereunder, establish a program of income assistance for persons in need. Under the scheme benefits are ordinarily not payable to individuals enroled in full-time education; the basic condition for entitlement of an employable person is that he or she be actively seeking employment. However, pursuant to s. 3.2(3) of B.C. Reg. 479/76, a recipient of income assistance can be relieved of this obligation if he or she is, with the approval of the Minister, enroled in a program that is designed to prepare the person for employment. In addition, s. 4(1) allows the Minister to authorize benefits to a person not otherwise entitled where undue hardship would occur if benefits were not provided.

The respondent was a parent of two young children. In the middle of his first year of law school his common law relationship broke down and he was left with sole custody of the two children. He applied for and was granted income assistance to the end of the term on a hardship basis. Although the respondent received student loans and bursaries, he used them to pay off pressing creditors. He therefore applied for continuation of benefits during the next academic year. His application was denied by the Ministry on the grounds that the legislation was not intended to finance university education and furthermore, that the student loans and bursaries which the respondent had received put him at an income level which made him ineligible for income assistance to an appeal tribunal. The tribunal determined that the respondent was entitled to income assistance for the remainder of his law school program. The tribunal found that the

respondent and his children were in a situation of undue hardship and that in the circumstances he should be considered to be enroled in an eligible program of studies as provided by s. 3.2(3) of the regulations. The Minister sought judicial review of the decision of the appeal tribunal on the grounds, *inter alia*, that the appeal tribunal acted in excess of jurisdiction and that it erred in law.

Held: The application should be dismissed.

The appeal tribunal had the power to reverse a Ministry decision. The tribunal did not act in excess of jurisdiction. It did not award benefits for the purpose of giving the respondent a law degree, rather it determined that a situation of undue hardship, as defined by s. 4.1 existed. The tribunal did not err in law in concluding that the respondent was enroled in an eligible program of studies pursuant to s. 3.2(3). Under s. 3.2(3) there is no requirement of prior approval of the program of studies by the Minister. Nothing in the *Act* or regulations limits hardship benefits under s. 4(1) to lump sum benefits rather than periodic benefits. Finally, the tribunal's interpretation of "undue hardship" in s. 4(1) is a question of fact rather than a question of law and is therefore not subject to review.

14. Minister of Social Services and Housing v. Wiehardt, [1991] BCJ No 2406 (B.C.S.C.).

The Minister of Social Services and Housing brought an application for judicial review to quash the decision of an income assistance tribunal (welfare) under the *G.A.I.N. Act*. The respondent was to receive the sum of $200.00 per month from her ex-husband to pay off some $2,500.00 in maintenance arrears. The welfare department took $200.00 per month from Weihardt's monthly cheque. The welfare recipient appealed that decision to a welfare appeal board which held that she could apply the $200.00 per month to build up her asset exemption to $1,500.00 and the $200.00 was wrongfully taken off her cheque. Families on welfare can have $1,500.00 in assets and still be on welfare.

Held: The application of the Ministry allowed.

Reasons: The Court held that "maintenance arrears" are unearned income and are to be deducted from a recipient's cheque. The recipient cannot use such money to build up her asset exemption.

15. Pelletier v. Queen in the Right of B.C., (Jan. 1989) (B.C.S.C.).

This was a declaratory action in the Supreme Court of B.C. Deborah Pelletier, a single parent on welfare, and her four children: Gabriel, age 15; Maya, age 10; Urmila, age 7; and Michael, age 5, brought the action against the Provincial Government in the B.C. Supreme Court.

The lawsuit sought a Court order that the government regulation that reduced welfare payment by $50.00 per month for single parents with less than two children under six years of age was unconstitutional as being age discrimination contrary to the *Canadian Charter of Rights and Freedoms*. The Court papers alleged that children over and under six years of age are treated differently. The infant children of Deborah Pelletier were practically denied equal benefit and protection under the law as their welfare is reduced proportionately by $50.00 per month and they have no opportunity to work, as they are too young to work. The purpose of the regulation was to force single parent mothers to go out and seek employment no matter how many children they have. The effect of the legislation was to penalize young children who have no opportunity to work themselves because of their age.

Prior to trial, the government repealed the impugned legislation.

16. Carlos Leighton v. The Attorney General of British Columbia, (1991) (BCSC).

There is an exemption under the *GAIN Regulations* which allows welfare recipients to keep the first $100.00 they earn from working. The exemption is an incentive. However, the exemption does not apply to persons over 65. CLAS was going to argue that is contrary to the equality provisions of the *Charter* to exempt persons over 65 years of age. The regulation was repealed by the government before the trial commenced.

17. Atchison v. The Ministry of Social Services and Housing (1990), 90 D.L.R. (4th) 205 (B.C.S.C.).

This was an application by our client, Arlene Atchison. Arlene Atchison sought to enforce a decision of a welfare tribunal which had ordered the Ministry of Social Services and Housing to provide private schooling to Arlene Atchison's child, Angelica Selinger. Angelica Selinger had a learning disorder and the local school board had not provided the necessary support services for the child. Arlene Atchison then went to a welfare tribunal and got an award from the welfare tribunal to pay for private schooling for her child. CLAS attempted to enforce the decision of the welfare tribunal but the B.C. Supreme Court held that the tribunal did not have jurisdiction to make the award it did.

18. Rosenberg v. The Attorney General of British Columbia, [1991] B.C.J. No. 926 (B.C.S.C.).

The Rosenberg family sued the Attorney General of B.C. for a declaration that certain provision of the welfare regulations are contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*. The welfare regulations allow a $100 maintenance exemption for families, primarily single parent families. However, there is no sliding scale based on the number of children in the family. There is an earning exemption for those who work and there is a sliding scale depending on how much is earned. Our position was that the failure to have a sliding scale for the maintenance exemption is contrary to s. 15 of the *Charter*. The trial was set for April, 1991 and the Rosenbergs lost at trial.

19. Theresa Tresidder v. The Attorney General of British Columbia, (1991) (B.C.S.C.).

CLAS, in conjunction with FLAW and ELP, dealt with the question of forced employment of single parents. Under the present welfare legislation any single parent with a child over the age of six months is required to seek employment. Many single mothers on welfare do not wish to seek employment because of child care responsibilities. CLAS has started a test case on behalf of two single mothers with three children each. This case is based on the *Charter of Rights and Freedoms* and seeks to allow such single parents to stay home with their children. The matter was set for trial in March, 1992. However, prior to commencement of the trial, the government repealed the legislation.

20. Martinusen V British Columbia ,(1997) 41 B.C.L.R. (3d) 28 (B.C.S.C.).

The petitioners sought judicial review of the decisions of the Income Assistance Appeal Board that held that they were ineligible for income assistance benefits under the Guaranteed Available Income for Need Act (GAIN). The petitioners were between the ages of 60 and 64 and were in receipt of income assistance under the GAIN Act. They had made contributions to CPP and would be entitled to retirement pension and death benefits pursuant to CPP upon reaching the age of 65. In October 1995, a new policy was introduced

which required applicants to apply for early CPP retirement benefits commencing at age 60 or else face disentitlement under the GAIN Act. The petitioners sought a declaration that their refusal to apply for CPP benefits prior to age 65 did not disentitle them to income assistance, and that the new policy was invalid. The petitioners applied to quash the decision of the Board on several grounds.

HELD: Application allowed. The Board committed an error of law as it failed to answer the question put before it, namely whether the petitioners could be validly compelled under the new policy to take early CPP retirement benefits. The Board chose instead to address another issue that was not in dispute. The new policy was too rigid and unreasonable. It fettered the exercise of judgment in individual cases and failed to allow for a consideration of each case on its merits. The new policy should be read to involve the exercise of discretion in individual cases to determine whether reasonable efforts had been made by an applicant to obtain income. When read in that light, the new policy was not inconsistent with section 17 of the GAIN Act and, therefore, not ultra vires. The Board further erred in the denial of natural justice by failing to provide copies of the respondent's reply to several of the petitioners.

21. Minister of Social Services v Dungey [1995] B.C.J. No. 2683 (B.C.S.C.).

This was an application for judicial review to quash decisions dismissing an application to require deduction of CPP payments from seven recipients of social assistance. Each recipient was suffering from AIDS. The applicant argued the tribunals exceeded their jurisdiction or were biased. The latter allegation was based on a nominee of the respondents having acted as their advocate by reading in a written submission and refusing to give a copy to the Ministry until after the hearing and an interruption by another of their nominees of certain submissions by saying "How can you possibly say that?" or words to that effect. The tribunals had found sections 1(a) and (h) of the Guaranteed Income for Need Act regulations and section 12 of the Act precluded the deductions.

HELD: The application was allowed on the basis that the tribunals had exceeded their jurisdiction. Nothing in sections 1(a) and (h) or section 12 prevented the Cabinet from passing regulations requiring a recipient to account for CPP benefits. The tribunal did not have a general equitable jurisdiction to interpret the legislation in a manner that would help alleviate poverty and suffering. There was no need to deal with the bias argument.

22. Federated Anti Poverty Groups of BC v B.C. (1996) 41 Admin L.R. (2d) 158 (B.C.S.C.).

This was a petition to challenge Regulation 462/95. The Regulation was imposed by an Order in Council and established a 90-day residency qualification for a person seeking income assistance under the Guaranteed Available Income for Need Act. The qualification was contrary to an agreement the Federal Government had with the provinces prohibiting provincial length of residency qualifications. The petitioner Anti-Poverty Groups argued that the Regulation was ultra vires the provincial government. The respondent Minister argued that it had the power to impose the residency requirement under section 26(2)(d) of the Act, which provided that the Lieutenant Governor in Council could make regulations prescribing rules for eligibility for income assistance.

HELD: The petition was allowed. The regulation was declared to be void as ultra vires the Lieutenant Governor in counsel. The Regulation was ultra vires as beyond the express and implied powers given to the Lieutenant Governor in Council under the Act. The statutory purpose of the Act was to relieve poverty and to do so within the budgetary allowance provided by the legislature. Section 26(2)(d) did not give an unlimited power to pass a regulation relating to eligibility for income assistance. The Regulation was removed from the purpose of the Act. The Act did not give the express power to the government to

exclude any resident of the province from receiving financial assistance based on the length of residence in the province. Assistance was to be provided based on the absence of income. Neither was the power bestowed on the Lieutenant Governor by implication. The word eligibility in section 26(2) (d) could not be extended to include residency requirements.

23. Dulay v BC Benefits Appeal Board [1999] B.C.J. No.1237 (B.C.S.C.).

Since June 1996, the petitioner and his wife had been o income assistance because they were disabled. At the time of the application for income assistance, the petitioner and his wife had a home they owned. They found it increasingly difficult to make the mortgage payments. Their daughter paid $80,000 to prevent foreclosure. She helped her parents in other ways by supplying food and clothing and helping with housework. In March 1997, the petitioner transferred the home to his daughter for $1 because of the contributions she had made and to relieve him and his wife of the debt load. The respondent terminated the petitioner's welfare on the grounds that he had disposed of an asset for inadequate consideration. The petitioner appealed pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

HELD: The application was dismissed. According to *Tin v. British Columbia (Ministry of Human Resources)* (October 9, 1998), Vancouver Registry, A981449 (B.C.S.C.), the standard of review on questions within the board's jurisdiction is "reasonableness *simpliciter*". The respondent did not decide that the disposition of property inadequately automatically led to disqualification from benefits. The respondent did not fail to recognize the existence of its discretion but failed to exercise its discretion in favour of the petitioner. The petitioner had not demonstrated that the respondent's failure to consider the efforts of the family to care for the petitioner was an error of law. "The fact that a home would otherwise be an excluded asset does not mean that disposition of the home for inadequate consideration does not trigger the consequences of s. 10(2) of the "*Act*". The finding that the respondent could consider evidence of the daughter's declaration was reasonable.

24. Gilmore v British Columbia, [1995] B.C.J. No. 1475 (B.C.S.C.).

The Court held that the administrative head exceeded its jurisdiction in awarding retroactive benefits. Decision: Application granted. Administrative decision quashed.

Facts: The petitioner seeks an order pursuant to s. 2(2) of the Judicial Review Procedure Act, declaring invalid and quashing a decision of the appeal tribunal constituted under s. 25 of the Guaranteed Available Income for Need Act. The arbitration tribunal ruled that the appellant received income assistance benefits as a "handicapped person" retroactive to October 21, 1992 - 12 months before his application for benefits was made. The petitioner submits that the Board exceed its jurisdiction in recommending that income assistance benefits be paid retroactive to October 21, 1992.

Reasons: "The Act which defines 'income assistance' broadly to include benefits 'necessary for the purpose of relieving poverty, neglect or suffering,' is social welfare legislation. It is settled law that doubt or ambiguity involving social welfare legislation should be resolved in favour of the applicant seeking benefits: Abrahams v. Canada (Attorney General), [1983] 1 S.C.R. 2; Wedekind v. Director of Income Maintenance (Ont.) (1994), 75 O.A.C. 358.In my view, the meaning of s. 6 of the Regulations is clear and unambiguous: (a) ordinarily, income assistance benefits are not retroactive; (b) where a person is designated handicapped by the director, he or she receives benefits retroactive to the first day of the month following the day he or she is so designated; (c) in the event of undue delay in the system between designation and payment, that retroactive period is limited to 12 months; (d) where the designation is made

on review or appeal, it is deemed to have been made at the time of the director's initial decision...Accordingly, the 'retroactive period of eligibility' in this case must refer to the period between the director's first designation (November 30, 1993) and the favourable determination by the Tribunal (April 12, 1994) which is less than 12 months. Mr. Gilmore was not eligible for benefits before the date of his application. Accordingly, the benefits were payable back to the first day of the month following the designation (December 1, 1993)".

25. Clark v British Columbia, [1995] B.C.J. No. 1861 (B.C.S.C.).

Applications for orders quashing the decisions of the income assistance appeal tribunal which ruled on the allowable exemption for maintenance payments paid in lump sum arrears from income assistance received pursuant to the Guaranteed Available Income for Need Act. With respect to the first two applicants, the ruling was that they were entitled to a maintenance exemption of $100 only for the month in which the maintenance payments were actually paid so that the balance of the maintenance arrears payment was to be deducted from their income assistance payments. In the case of the application brought by the Minister of Social Services, the tribunal considered maintenance arrears of $800 to be a financial award that could accrue until an asset level of $3,000 was reached and so was not to be deducted from income assistance payments.

HELD: Applications allowed Family maintenance was considered to be unearned income within the scheme of the Act and the exemption in section 14(1) of the Regulations was an exception to the general rule that unearned income was to be totally deducted from income assistance payments The absence of words to the effect that the exemption was only to be applied in the month when the maintenance payment was actually received suggested that it was not intended to be applied in that restrictive manner . This interpretation was consistent with the words of the section and its purpose. It was reasonable that the section should be interpreted to encourage maintenance enforcement and that the maintenance recipient should not receive less income assistance because the payor had been delinquent, unless the statute expressly provided for this. The tribunal was clearly in error in treating maintenance arrears as an asset.

26. Hodgson v British Columbia Appeals Board [1997] B.C.J. No.1233 (B.C.S.C.).

Facts: The petitioner applied for income assistance pursuant to the Guaranteed Available Income for Need Act. The petitioner was found to be ineligible on the basis that he held assets of $15,000. The petitioner argued that the property was held in trust for others in his family. The decision was upheld on review by the area manager, by the Income Assistance Appeal Tribunal, and by the Income Assistance Appeal Board (now the British Columbia Benefits Appeal Board). The petitioner applied for judicial review.

Held: The application was successful court rejected the notion that the true nature of the appeal before the board had been a review of the tribunal's fact findings. The issue which the petitioner had repeatedly raised at each level of appeal concerned the nature of his legal interest in the property and the extent to which other members of his family held a beneficial interest in the property. The appeal board had proceeded on the notion that the property was held in trust for the petitioner's children, which the petitioner conceded was caught by the regulations. The court stated that this had been an error, as the appeal board had not grasped that the property was held in trust for the petitioner's children and other members of his family, a fact that would lead to a very different conclusion at law. The petitioner's legal interest in the property had never been properly characterized in law, and therefore what had occurred amounted to an error in law. The decision was quashed. However, the matter was not directed back to the appeal board or to the tribunal

as the court had no jurisdiction to do so.

27. Christine Chipperfield v British Columbia (1997) 30 CHRR D/262

HELD: The Tribunal rules that the Ministry of Social Services should pay part of the cost of car repairs for a social assistance recipient with a disability.Christine Chipperfield suffers chronic pain resulting from severe cervical disc disease, fibromyalgia, and arthritis. Because transportation affects her pain, the best mode of transportation for her is her own car . She was designated as "handicapped" by the Ministry. However, the Ministry refused to pay for car repairs for Ms. Chipperfield. The Tribunal finds that none of the allowances available under social assistance regulations provided the same level of transportation subsidy to a disabled person who needed to use her own car as is provided to persons with other kinds of disabilities who can use other types of transportation. The Tribunal finds that there was no reasonable justification for the refusal to pay for car repairs, and that the policy discriminated against persons whose disabilities made the use of a personal car the best form of transportation. The Tribunal orders the Ministry to revise its policy within six months to provide a non-discriminatory transportation subsidy to all recipients with disabilities. The Tribunal also orders the Ministry to reimburse Ms. Chipperfield $634.18 for 50 percent of the cost of car repairs. The Tribunal further orders the respondent to pay $1,200 in compensation for injury to dignity, feelings and self-respect.

.28. Patterson v British Columbia [1999] B.C.J. No. 2516 (B.C.C.A.).

Decision: Appeal dismissed.

Facts: The petitioners received income assistance pursuant to the B.C. Benefits (Income Assistance) Act, R.S.B.C. 1996, c. 27. In January 1998, the provincial government indicated that it would require all recipients to fill out consent forms for disclosure of information. The consent form was created by way of the Income Assistance Regulation. The petitioners argued that the consent form was beyond the scope of the power delegated by statute to the Minister. The petition was dismissed. The petitioners appealed.

Reasons: The purpose of the grant of power in s. 8 of the Act was to allow the Minister to ascertain the eligibility criteria of applicants for income assistance in order to maintain financial and administrative accountability for public funds. Section 19 allowed the Minister to prescribe forms to be used. The combined powers of ss. 8 and 19 gave the Minister authority to include a mandatory consent provision in the application forms for income assistance. Further, the collection of the information did not infringe ss. 7 and 8 of the Charter. The information was only collected for verification purposes, outside agencies could refuse to release information irrelevant to the assistance issue, and only the organizations listed in the consent form could be asked for information.

29. Grace v British Columbia [2000] B.C. J. No. 1201(S.C.)

The petitioners, Grace and others, were denied income assistance in B.C. because of warrants for their arrest on criminal charges in other provinces. They were told that they could obtain benefits if they waived in the charges from the other jurisdictions to B.C. and pleaded guilty .The petitioners claimed that they agreed to plead guilty and waive the charges into B.C. because they were desperate for money for food and shelter. The petitioners challenged the validity and constitutionality of Regulation 12 under the B.C. Benefits (Income Assistance) Act, Regulation 9 under the B.C. Benefits (Youth Works) Act, and Regulation 10 under the Disability Benefits Program Act, which denied income assistance and benefits to

B.C. residents and their dependants if the resident was subject to an unexecuted arrest warrant for an indictable offence.

Held: Petition granted. The regulations were declared ultra vires the acts and of no effect. The acts did not authorize regulations that discriminated against persons in need of assistance on the basis of factors unrelated to the purpose of the legislation. The regulations were inconsistent with the intent and purpose of the statutes. They were unreasonable in that they discriminated against certain individuals and their dependents on the basis of a factor that was not related to need, financial accountability, efficiency or effectiveness.

WOMEN'S RIGHTS

30. Bliss v. Attorney General of Canada, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711 (S.C.C.)

This case was a challenge under the equality provision of the *Canadian Bill of Rights* to a provision of the *U.I. Act* which deprived pregnant women of the right to receive regular U.I. benefits for a period of time surrounding the birth of the child. While some women were eligible for pregnancy benefits during that time, others were not. It was argued that the provision discriminated on grounds of sex, and was therefore inconsistent with the *Bill of Rights*. The Supreme Court disagreed, finding instead that any inequality was due to "nature" rather than to the law. The Court took the view that the law did not discriminate on the basis of sex, but rather on the basis of pregnancy. Despite the fact that Ms. Bliss lost, the case was an extremely important step in the development of equality rights in Canadian law. It was a major factor in the increasing criticism of the *Bill of Rights*, which in turn lead inclusion of much stronger language under s. 15 of the *Charter of Rights and Freedoms*. In the *Andrews* case, when the Supreme Court first dealt with s. 15, McIntyre J. referred to the *Bliss* case. Likewise, the Supreme Court of Canada commented favourably on the *Bliss* case in *Brooks v. Canada Safeway*, making it clear that the Court now would consider discrimination on the grounds of pregnancy to be sex discrimination.

31. F v. Minister of Employment and Immigration (1995) 128 DLR 481(F.C.A.)

Application for judicial review of the decision of an Umpire. The respondent voluntarily left her employment on September 14, 1991 in order to care for her daughter whose condition required special attention She made an initial application for benefits and a benefit period was established. Noting that on her weekly report cards the respondent was showing that she was not available for work, the Unemployment Insurance Commission advised her on November 7, 1991 that she was not entitled to receive benefits from September 15, 1991 as she had not proven her availability for work during those weeks as required by section 14 of the Act. The respondent objected and then proceeded to provide additional information demonstrating that the situation had changed and that she was now in a position to return to work. The Commission advised her that its ruling on November 7 stood but her disentitlement terminated effective November 13, 1991. The Board of Referees allowed the respondent's appeal against the ruling of disentitlement for the period preceding November 13, 1991 Interpreting sections 14 and 28 of the Act, the Umpire, to whom the Commission appealed, held that the respondent should not have been "disqualified" since she fell within the exception in section 14(b) of being incapable of work by reason of a prescribed illness, namely, that of her child.

HELD: Application allowed. The respondent, the Board of Referees and the Umpire all confused eligibility for benefits with just cause for leaving employment. The requirement in section 14 of the Unemployment Insurance Act that a claimant be available for work was completely separate and

independent from the disqualification established pursuant to section 28 of that Act. Contrary to the Umpire's conclusion, there was nothing contradictory in those two sections of the Act. A person who quit her job to care for a sick child would not be disqualified, but he or she would not be eligible to start receiving benefits until he or she was available for work.

32. Shewchuck v. Ricard, [1986] 4 W.W.R. 289 (B.C.C.A.)

The respondent, the putative father in proceedings brought pursuant to the *Child Paternity and Support Act*, appealed a decision of the Supreme Court allowing an appeal from a Provincial Court judgment declaring that the *Child Paternity and Support Act* was of no force and effect as it violated s. 15 of the Charter of Rights and Freedoms.

Held: Appeal dismissed.

Per MacFarlane J.A. (MacDonald J.A. concurring): Where a person is before the Provincial Court upon a charge, complaint or other proceeding properly within its jurisdiction, the Court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the Charter.

The Supreme Court Judge was wrong in deciding that the *Child Paternity and Support Act* does not discriminate on the basis of sex, contrary to s. 15(1) of the Charter. At face value, the *Act* places the state on the side of the mother, and against the putative father. Legal assistance may be provided to the mother and not to the father. The father may be arrested to ensure his appearance and the machinery of the *Offence Act* may be set in motion against him. No such sanctions are available against the mother. The *Act* violates s. 15(1).

The *Act* does not fall within the saving provision of s. 15(2) of the Charter which excuses discrimination if the object of the discrimination is the amelioration of conditions of disadvantaged individuals or groups. The fact that only women can apply for a remedy under the *Act* cannot be said to advance the cause of ensuring the maintenance of illegitimate children. The Supreme Court Judge erred in holding otherwise.

However, the Supreme Court Judge was correct in finding that the limit upon the right of a father to apply for relief under the *Act* is a reasonable limit prescribed by law under the Charter, s. 1. Denying a putative father the right to seek a maternity order does not seem so important when compared with the broad, public purposes of the *Act*, which is to establish paternity and therefore provide a basis for shifting the financial responsibility for the child from the public to the private domain. The means by which that purpose is achieved are reasonable and interfere "as little as possible" with the right of the father to have a remedy.

Comment: LEAF and CLAS intervened in this case on behalf of various community groups. CLAS developed and argued the American Constitutional Doctrine of Extension. Although the argument was not dealt with by the Court in its reasons, CLAS laid the foundation for this legal argument in future Court cases.

Extension basically extends the coverage of a statute to protect the group being discriminated against. It deals with the problem of under-inclusiveness.

33. **Fisher v. Minister of National Revenue, [1980] 3 W.W.R. 680 (F.C.A.)**

The appellants were wives who fished with their husbands and had been denied unemployment insurance as s. 195(2) of the *Unemployment Insurance Act Fisherman's Regulations* provided that, where a wife of a fisherman shared as a member of the same crew as her husband, her share of earnings would be added to his earnings. The appellants claimed the regulation was ultra vires, and denied equality before the law contrary to the *Bill of Rights*.

Held: The appeal was allowed.

Section 146 of the *Unemployment Insurance Act* authorized the Employment and Immigration Commission to make regulations in respect of fishermen, but there was no authorization for a regulation transferring earnings of a wife to those of her husband. The applicability of the Canadian *Bill of Rights* was not decided.

34. Attorney General of Canada v. Yu (1980), 105 D.L.R. (3d) 189 (F.C.A.)

The applicant had been on maternity leave and two months after her return to her employment she received a lump sum payment from her employer, consisting of her employer's portion of unemployment insurance premiums and the difference between the unemployed insurance maternity benefits received and the employee's normal salary. An Umpire under the *Unemployment Insurance Act*, 1971, 1970-71-72 (Can.) s. 48, held that the money so paid, being her salary, should be allocated to the period after the appellant returned to work. On application to quash that decision,

Held, Pratte J., dissenting, the application should be dismissed.

Per Heald. J. Smith, D.J. concurring: The decision of the Umpire was correct in that s. 173(4) (rep. & sub. SOR/71-324 s.5) of the *Unemployment Insurance Regulations*, P.C. 1154-2064, SOR Con. 1955 vol 3 p. 2858, provides that the salary of services and monies payable in consideration of an employee returning to work shall be allocated to the period for which the monies are payable. The purposes of the provision in the collective agreement was to encourage skilled employees to return to work, as appears from the fact that the monies were not payable for two months after their return.

35. C.(J.) v. B.C. (Forensic Psychiatric Services Commissioner) (1992), 65 B.C.L.R. (2d) 386 (B.C.S.C.).

In 1980 the plaintiff was found not guilty by reason of insanity of the attempted murder of a child. She had been confined every since "at the pleasure of the Lieutenant Governor" in the Forensic Psychiatric Institute, pursuant to s. 614(2) of the *Criminal Code*. The institute was operated by the defendant commissioner under the provisions of a provincial statue. The federal government did not fund any programs there except shared medical services, and exercised no control over the institute. The plaintiff progressed after her committal to the point of being granted a conditional discharge which permitted her to live in the community during the week. However, due to the lack of suitable accommodation in the community she continued to reside at the institute. The institute consisted primarily of a main building, a collection of mobile units, and three "cottages"; patients generally progressed from the main building to the mobile units to the cottages. The latter facilities were an integral part of the rehabilitation scheme and only they offered a significant indication of progress to patients. Cottages were the ultimate goal. They comprised old homes used to house 18 patients, all male, and offered patients privacy and independence in home-like setting in preparation for their return to the community. The plaintiff was considered by the institute staff to be a good candidate for the cottages, and would have resided there but for her sex. Budget restrictions prevented provision being made for the accommodation of female patients in the cottages. The plaintiff

sought a declaration that the institute's policy of not permitting female patients to reside in the cottages was discriminatory and in breach of s. 15 of the *Canadian Charter of Rights and Freedoms*.

Held: Judgment for Plaintiff.

The "laws" pursuant to which the plaintiff was confined, classified and treated were the *Criminal Code* and the *Forensic Psychiatric Act*. It was the administration of those laws which resulted in a denial of the plaintiff's s. 15 rights. The violation of equality was discriminatory. If, as the defendants argued, there was an implied direction in the *Forensic Psychiatric Act* to accomplish its objectives within budgetary restrictions, that objective was not sufficiently important to warrant the limitation of the s. 15 right. Although there was a rational connection between the objective and the exclusionary policy, it was not strong, since there was no evidence that other funds could not be made available or other changes made. Nor was there evidence that the exclusionary policy was the least drastic measure that could have been taken. No alternative means were ever explored. Finally, the effect of the policy was that female patients were denied an equal right to treatment which was considered by the staff to be critical to their rehabilitation. The s. 15 violation was therefore not justified by s. 1 of the *Charter*.

36. R v O'Connor (1993) 105 DLR (4th) 110 (B.C.C.A.).

Applications for intervenor status in Crown appeal from stay of proceedings against accused charged with what was now the offence of sexual assault. The charges were of rape and sexual assault. The first application was from the four complainants. The second was by four national women's organizations. The third was from the Canadian Mental Health Association All sought leave to make submissions concerning proper law and procedure with respect to disclosure of confidential information relating to complainants in sexual assault cases. The stay had been granted on the basis of R. v. Stinchcombe, [1991] 3 S.C.R. 326. The Crown supported the complainants' application but opposed the organizations' application. The Crown argued on the merits non-compliance with section 698, and the public interest in non-disclosure. HELD: Application by applicants dismissed; applications by organizations granted, but submissions limited.

37. R v O'Connor [1995] 4 S.C.R. 411

Appeal by the accused from an order for a new trial. The accused, a Catholic bishop and school principal, was charged with several sexual offences The proceedings were stayed at trial due to the failure of the Crown to make adequate disclosure of the medical, counselling and school records of the complainants. The Crown appeal was allowed and a new trial ordered. In issue was whether the lack of disclosure justified a stay, and the proper procedure to be followed when an accused sought production of medical or therapeutic records from third parties.

HELD: Appeal Dismissed. No distinction needed to be made between the common law doctrine of abuse of process and the requirements under the Canadian Charter of Rights and Freedoms with respect to abusive conduct. To establish violation of section 7 of the Charter due to non-disclosure, prejudice or adverse effect on the ability to make full answer and defence had to be proven on a balance of probabilities. Crown conduct or intention was not necessarily relevant to whether the right to fair trial was infringed. The test was the effect of the non-disclosure. If it was not possible to remedy the prejudice, then in the clearest of cases the appropriate remedy was a stay of proceedings. Although the Crown's conduct was inappropriate in this case, the non-disclosure did not violate the accused's right to full answer and defence. There was no prejudice and the Crown was right in trying to protect the interests of justice. The

Crown's disclosure obligations were unaffected by the confidential nature of the therapeutic records because concerns relating to privacy or privilege disappeared when the documents went into the Crown's possession. The accused must bring a formal written application supported by affidavit evidence for the production of documents in the possession of third parties. Notice must be given to those in possession and those with a privacy interest. The test of relevance in the context of production is the higher threshold of whether there is a reasonable possibility that the information is logically probative. The documents are produced to the judge who determines the extent of production by weighing the effects of such an order. In balancing the competing rights involved the following factors should be considered; (1) the accused's need of the record to make full answer and defence; (2) probative value; (3) expectation of privacy (4) whether production would be based on discrimination or bias; and (5) potential prejudice to the complainant's dignity, privacy or security of person.

38. Re: K., et al. (Criminal Injury Appeal)

Four native indian women were sexually abused by their foster father over a long number of years. They each made claims to the Criminal Injury Compensation Board and were awarded $10,000.00 each. We appealed this decision. The issue is how the Criminal Injury Board calculates damages for sexual assault.

Status: We won the case and each of the four native women were awarded $20,000.00 instead of $10,000.00.

39. Law v. Canada (Minister of Employment and Immigration)[1999] 1 S.C.R. 497

This was an appeal by Law from a decision of the Federal Court of Appeal dismissing her appeal from denial of benefits under the Canada Pension Plan. Law was 30 and had no children when her husband died. Section 44(1)(d) of the Plan set out eligibility criteria for benefits to be paid to a surviving spouse. Those spouses 45 and older, or those with dependant children, where entitled to the pension at the full rate. However, under section 58 of the Plan, pensions for surviving spouses between 35 and 45 without dependant children were gradually reduced. Surviving spouses under 35 without dependent children were precluded from receiving a survivor's pension until they were 65.

HELD: Appeal dismissed. A court called upon to determine a discrimination claim should make three broad inquiries in order to determine whether there was differential treatment and whether the differential treatment constituted discrimination in the substantive sense intended by section 15(1).These were whether the law drew a formal distinction on the basis of personal characteristics or failed to take a claimant's already disadvantaged position into account, whether the claimant was subject to differential treatment based on enumerated and analogous grounds, and whether the differential treatment discriminated against the claimant by imposing a burden or withholding a benefit in a manner which reflected the stereotypical application of characteristics, or which had the effect of perpetuating or promoting the view that the individual was less capable or worthy of recognition or value. The purpose of section 15(1) was to prevent the violation of essential human dignity and freedom and to promote a society in which all persons enjoyed equal recognition. The court was required to establish comparators to determine whether a discrimination claim was well-founded. The relevant point of view was the reasonable person, in circumstances similar to those of the claimant, who took into account the contextual factors relevant to the claim. Law asserted her claim solely on the basis of being an adult under the age of 45. As this group had not been consistently and routinely subjected to the discrimination faced by some of Canada's minorities, it would be more difficult for the court to reason that the legislative distinction violated Law's human dignity. In enacting the provisions, parliament's intent was to allocate funds to those whose ability to overcome need was weakest.

This accorded well with the fundamental purposes of section 15(1). The differential treatment of younger people did not reflect or promote the notion that they were less capable or less deserving of concern, respect and consideration

C. ABORIGINAL RIGHTS

40. **Brown, et al. v. B.C. Hydro and Power Authority, [1980] 3 W.W.R. 360 (B.C.C.A.).**

The plaintiff-appellant, an Indian living on a reserve in British Columbia, sued for a declaration that social services tax imposed on the purchase price of electricity sold and delivered to her home was ultra vires. The *Social Services Tax Act* provided for a percentage tax on personal property and specifically included "electricity" in the definition of "personal property". Section 87 of the *Indian Act* exempted from taxation personal property of an Indian or band situated on a reserve. The plaintiff claimed to be entitled to this exemption, and the defendant argued that electricity was not personal property within the meaning of s. 87, or, alternatively, that s. 87 was ultra vires of the federal Parliament. The action was dismissed at trial and the plaintiff appealed.

Held: The appeal was allowed.

Electricity is personal property within the meaning of s. 87.

Section 87 is intra vires as the pith and substance of the *Indian Act* is the protection of Indians in their ordinary lives, including protection of their property. Also held that s. 87 exempted Indians from paying sales tax on their electricity.

Comment: This was the first successful Indian Tax case in Canada. The decision affected thousands of Indians across Canada.

41. **Danes & Watts v. The Queen, [1985] 61 B.C.L.R. 257 (B.C.C.A.).**

Both plaintiffs were registered Indians who lived on reserves and purchased motor vehicles located on their reserves at the time of purchase. The plaintiffs were required to pay tax under the *Social Service Tax Act* when they had their respective vehicles licensed and insured for use in the province both on and off their reserves. At the trial of a special case, the trial Judge held that the social service tax was payable on the purchases and the plaintiffs appealed.

Held: Appeal allowed.

Section 87 of the *Indian Act* provides that no Indian is subject to taxation in respect of the ownership, possession or use of the personal property of an Indian situate on a reserve. The social service tax imposed in these instances was with respect to the "personal property of an Indian" given that the tax could only be levied at the time of purchase by the plaintiffs. The vehicles were "situated on a reserve" at the time of purchase as it is the actual location of the property at the time the exemption is to apply which is determinative, not other factors such as the intention of the purchaser to use the property off the reserve. The purchasers were therefore exempt from social service tax pursuant to the *Indian Act*.

42. Lessor of Area #25 v. N. & V. Johnson Services Ltd., (1991) 4 WWR 527 (B.C.C.A.).

The case dealt with an Indian taxation issue. The point involved was whether a company exclusively owned by an Indian was entitled to the tax exemption found in s. 67 of the *Indian Act* The Court ruled that the corporate veil could not be lifted and the Indian corporation was liable for taxation.

D. CHARITABLE TAX LAW

43. Native Communications Society of B.C. v. MNR, 86 D.T.C. 6353 (F.C.A.)

The taxpayer was a non-profit corporation whose main objects were to produce radio and television programs of relevance to native people in British Columbia, to train such people as communications workers and to publish a newspaper on subjects of relevance to such people. The taxpayer also had a number of subsidiary objects, one of which was "to procure and deliver information on subjects relating to the social, educational, political and economical issues facing native people of British Columbia". The Minister refused the taxpayer's application for registration as a charitable organization on the basis that the taxpayer's purpose were not exclusively charitable and the taxpayer appealed to the Federal Court of Appeal.

Held: The taxpayer's appeal was allowed. The Court found that the purpose of the taxpayer were beneficial to the community and therefore charitable. In this respect, the special legal position of native people in Canada was a matter to be taken into account. Furthermore, the taxpayer's activities could well instill a degree of pride of ancestry, deepen an appreciation of Indian culture and language and thereby promote a measure of cohesion among the native people of British Columbia that might otherwise be missing. Despite the use of the word "political" in the subsidiary objects, there was no evidence that the taxpayer engaged or intended to engage in political activities and, if it did, the Minister could always revoke the registration.

Comment: This was the first successful charitable tax registration appeal in Canada. It established the principle that incidental political activities could be carried on by registered charities.

44. Polish Canadian Television Production Society V. MNR. [1987] 87 DTC 5216 (FCA).

The taxpayer applied for registration as a charitable foundation. The Minister refused the application and the taxpayer appealed to the Federal Court of Appeal.

HELD: The taxpayer's appeal was dismissed. The Minister did not err in refusing to register the taxpayer as a charitable organization. On the record of the present case, it would be unwise to express concluded opinions on whether, in Canada, the advancement of multiculturalism generally or of the cultural interests of an individual component of the national mosaic were to be considered as charitable objectives.

45. Everywoman's Health Centre Society (1988) v. MNR [1991] 2 C.T.C. 320 (F.C.A.)

This case concerns the failure of the MNR to grant charitable tax status to the Everywoman Clinic, a free-standing abortion facility. The case was won. This case was heard in front of the Federal Court of Appeal. The appeal was taken under subsection 172(4) of the *Income Tax Act*. The appellant sought to be registered as a charitable organization. It had no intention of making a profit. Its directors would not be paid. Its immediate goal was to set up an abortion clinic and its long-range goal was to operate a reproduction centre. It would operate within the law and its doctors would be paid through the Medical Services Plan of the Province of British Columbia. The basic issue was whether the provision of a free-standing abortion clinic is a charitable activity on the ground that it is for purposes beneficial to the community.

Held: In a Canadian context health care services equate with medical care for the sick and this accords with the language in the *Canada Health Act*. The Minister's refusal to register was based on the law of clear statements of public policy and of consensus that, it was felt, cast doubt on the appellant's activities as being beneficial to the community in a way that the law regards as charitable. The controversial nature of the organization, in the Minister's view, militate against it being considered charitable.

The organization's activities are not illegal and cannot be contrary to public policy when there is none. Public funds support abortion and may be presumed to be for the public good. No authority was found for the need of consensus. Other cases concerned trusts for political purposes or for alteration of the law and were not comparable.

The purposes and activities of the appellant are beneficial to the community. It is a charitable organization within the evolving meaning of charity at common law and, accordingly, qualifies under paragraph 149.1(1)(b). Appeal allowed.

Comment: The importance of this case deals with the relationship between abortion services and medical services. The Court held that abortion services are like any other medical services that are provided. Therefore, this Court decision set an important principle; that is, that abortion services should be treated like any other type of medical service.

46. **Vancouver Society of Immigrant and Visible Minority Women v MNR [1999] 1 SCR 10**

Appeal by the Vancouver Society of Immigrant and Visible Minority Women from a decision of the Minister refusing it registration as a charitable organization under the Income Tax Act. The Society provided educational forums, classes, workshops and seminars designed to assist immigrant and visible minority women to find employment. It was refused registration because the Society's objectives were too broadly and vaguely worded and Revenue Canada was not convinced it was constituted exclusively for charitable purposes as required by the Act. The Federal Court of Appeal refused the Society's appeal and it appealed to the Supreme Court of Canada.

HELD: Appeal dismissed. Under the Act, an organization had to define the scope of its activities as charitable and all its resources had to be devoted to these activities. The Society's activities as well as its purposes had to be charitable. Under the Pemsel test, "charitable" was defined as a purpose that was for the benefit of the community or an appreciably important class of the community rather than for private advantage. Some of the Society's purposes as stated in its constitution contemplated charitable activities. Under an expanded definition of education, training immigrant women to find employment was a charitable activity with a charitable purpose. However, the Society's constitution did not restrict it to charitable activities alone. Therefore, it did not qualify for registration. The charitable registration scheme under the Act applied uniformly to every organization seeking charitable status and did not violate section 15 of the Canadian Charter of Rights and Freedoms.

E. LANDLORD AND TENANT

47. Davies v. Vivara Industries Ltd. (1977), 2 B.C.L.R. 255, 1 R.P.R. 197 (B.C.S.C.).

Decision: Tenant's action to recover excess rents paid to landlord Vivara is stayed.

Facts: In August, 1975, the tenant commenced an action claiming that a rental increase was unjustified; the tenant proceeded under Part IV of the *Act* involving the Rent Review Commission. On February 26, 1976, the Commission determined that the plaintiff had overpaid defendant Vivara by $2,625.20, but did not order that the sum be repaid to plaintiff. Vivara then applied for a notice of review in the County Court pursuant to s. 54 of the *Act*. Plaintiff tenant contends that the issue of the lawfulness of the rent increases has been decided, and presumably because the Commission did not order repayment, the tenant has brought this action in County Court by a writ of summons claiming $2,942.90 (the amount overpaid rent plus interest presumably). Defendant seeks to dismiss the writ as an abuse of process.

Reasons: The Court, after paraphrasing ss. 25, 29F, 45A, 45(5), 50(3), 50(5), 54 and 55 of the *Act*, concludes "that both the Rentalsman and the County Court have jurisdiction with respect to the rental allegedly overpaid"; that "it is not proper or seemly that a proceeding under Part IV should proceed simultaneously with...an ordinary action in the County Court involving substantially the same issues"; and "that the process started first should be carried to its logical conclusion", i.e. review pursuant to s. 54. *Kybich v. Mangus* (1919) 3 W.W.R. 532; *Flambro Realty Ltd. v. Peter Pan Drive In Ltd.* (1975) 4 O.R. (2d) 454 considered.

48. McDougall v. Nottingham Developments Ltd. (1982), 47 B.C.L.R. 145 (B.C.C.A.).

The Rentalsman granted the landlord an increase in rent to compensate for high interest costs. On the tenants' appeal the chambers Judge affirmed the increase but ordered that it be limited to one year and that it not have the effect of taking the premises out of rent control. It was common ground that the increase was justified. The landlord appealed the two orders made by the chambers Judge.

Held: Appeal allowed.

The conditions imposed by the chambers Judge were inconsistent with the legislative scheme of the *Residential Tenancy Act*. There was no provision in the *Act* or regulations that would permit the Rentalsman or a Judge to order that a rent increase not be taken into account when calculating whether the property was within or without rent controls. Similarly, it was not open to the Rentalsman to fix the rent for a single year. The *Act* made no provisions for applications by tenants for rent reductions and gave the Rentalsman no jurisdiction to reduce lawful rents. The appellant was granted the costs of the appeal, of settling the appeal book as the result of applications by the respondents, and of preparing additional material for the appeal book which was not referred to on the appeal.

49. Pike v. B.C. Housing Management Commission (1982), 41 B.C.L.R. 332 (B.C.S.C.).

Decision: Application granted. Order for possession set aside; matter remitted to the Rentalsman for further consideration.

Facts: The tenant is an 84 year old man. A notice to vacate was posted upon his suite door; the tenant

failed to file any objection thereto prior to the expiry of the notice period, although he intended to do so. However, on the application by the landlord for an Order for Possession, the tenant and a witness appeared and sought to make a presentation.

Reasons: Technically, the Rentalsman is correct in stating that there is no right to give notice of objection when, by reason of the validly served notice of termination, the tenancy has been brought to an end, but, s. 13(3) of the *Act* provides that the exercise of discretion must be exercised in a judicial manner. There may be reasons why tenants fail to comply with the requirement to serve a notice of objection (e.g. in this case, age and infirmity; in others, lack of understanding of the English language, etc.). The Rentalsman must consider these factors, for "fairness dictates that such tenants should be given an opportunity to present the merits of their case...before any order for possession is granted...". This does not lead to an absurdity with respect to the relationship between landlord and tenant created by this decision. If the tenant is successful before the Rentalsman, a monthly tenancy is created; if he is not, the tenancy ends in accord with the notice of termination and an Order for possession may properly issue.

50. Blathras v. Mason (1982), 42 B.C.L.R. 387 (B.C.C.A.).

Decision: Appeal dismissed.

Facts: The tenant, becoming aware of the decision of the Rentalsman which had fixed rent for the subject premises, ascertained that an overcharge had been in effect for some months; as a consequence, the tenant withheld a sum equivalent to the total overcharge. The Rentalsman then found that the "lawfully chargeable rent" was the amount fixed by the Rentalsman at the earlier time and that the tenant was entitled to withhold payment as she had done, that the rent was collected in disregard of s. 64 of the *Act*, and was recoverable under s. 68(1) by set-off.

Reasons: The appellant landlord refers to the decision of Berger, J. in *R. v. Virvillis and Broadway Holdings Ltd.* (Vancouver Reg. 820571, September 13th, 1982). In that case the landlord had unlawfully increased residential rental; at issue (on the appeal from acquittal in Provincial Court) was the meaning of "rent" in s. 64(2). Berger, J. held that the Court was not permitted to insert in s. 64(2)(a) the word "lawful"; that it could not "amend the legislation" and agreed with the acquittal. The decision of the Rentalsman in the case at bar is made under s. 64(2) (a). It is the Court's opinion that "lawful" rent is that permitted to be charged under that provision, and that the refund (in fact) approved by the Rentalsman is correct. The Court then turns to the apparent conflict between this decision and that in the *Virvillis* case above. The question is, is the Court bound to follow *Virvillis* on the principle enunciated in *Re Hansard Spruce Mills Ltd.* (1954) 4 D.L.R. 590? It is noted that Berger, J. was directing his attention (in *Virvillis*) to the 'penal consequences" of s. 64, and no doubt had considered the principle to be applied (see *Maxwell on Interpretation of Statutes*, 12th Ed. at 239); additionally, Berger, J. provided the caveat in the closing words of his Reasons, noting that he did not wish to be thought to have affected the rights of the Rentalsman and of tenants to pursue remedies within the intent of the *Act*. The present decision "deals only with the rights of tenants to set off excess rent and is limited to that...". It does not, in light of the expressed scope of the decision in *Virvillis*, "unsettle the law": see *Re Hansard Spruce Mills*, supra at 592.

51. Campbell v. The Province of B.C. (1984), 7 D.L.R. (4th) 450 (S.C.) (B.C.S.C.).

Under s. 64 of the *Residential Tenancy Act*, R.S.B.C. 1979, c. 365, the Lieutenant Governor in Council is empowered to prescribe the rent control ceiling. Since it is empowered to prescribe it, it can reduce it or remove it by regulation. Accordingly, where the Lieutenant Governor in Council, by regulation, reduces

the ceiling from $300.00 to $1.00 in order to remove rent controls, the regulation is valid.

52. W.C Gibbon et al. v Chartwell House Apartments et al [1983] B.C.D. Civ 2361(B.C.C.A.).

The basis for judicial review of an order made by the Rentalsman lies within s. 55 above. When the Chambers Judge, having examined that decision together with all of the material presented by the applicant for review, finds that there was no jurisdictional error committed; when the same material is filed on an appeal of that decision; and when the disposition by the Chambers Judge is found to be in accord with the principles applicable to judicial review in that regard, an appeal will not be entertained. Decision: costs. Application for leave to appeal dismissed with

Facts: The Rentalsman made an order allowing an increase in rent for residential premises pursuant to the Act, s. 67(3). The applicants for leave to appeal here sought judicial review of that order, alleging an excess of jurisdiction on the part of the Rentalsman. The Chambers Judge hearing the review under s. 55 found "no jurisdictional error". That Order is sought to be appealed.

Reasons: The basis for judicial review in this case was the allegation that the Rentalsman, in allowing an increase in rent was carrying out "Government policy" and that such constituted an improper application of the jurisdiction conferred by the Act. The Chambers Judge found, on perusal of all relevant material, that such was not the basis for the decision and that such was made properly. The same material filed before him is filed on the appeal. The Chambers Judge referred, in his decision, to the applicable principle expressed in I.C.B.C. v. Dommasch [1978] B.C. Decisions - PRACTICE - October 4th, 1978 (S.C.B.C.) and to McDougall v. Nottingham Developments Ltd. [1982] B.C.D. Civ. 2363-27. He adopted the principle in Dommasch, but declined to adopt the "interesting" approach taken to a possible "novel avenue" in McDougall; in any event, he distinguished the McDougall case from the case at bar (on fact). The correct approach was taken by the Chambers Judge; there is no ground for appeal.

53. Grace Nicholson v Cowan [1986] B.C.D. Civ. 2377-03 (B.C.S.C.).

The Court upheld an arbitrator's decision which affirmed the landlord's right to issue a notice of termination under s. 27(1)(f) of the Residential Tenancy Act where the tenant displayed a sign "East Arp unfair to tenants" for some weeks in the window of her flat.

Decision: Petition dismissed.

Facts: An arbitrator decided that the petitioner/tenant's act in displaying for some weeks in a window of her flat a sign "East Arp unfair to tenants" gave the landlord the right to issue a notice of termination under s. 27(1)(f) of the Residential Tenancy Act. The petitioner applies to have the decision of the arbitrator set aside.

Reasons: "A landlord has a lawful right to conduct his business. An essential part of his business is attracting tenants. If a prospective tenant saw such a sign, he might well never cross the landlord's threshold. The longer such a sign is up the more the legal right is impaired. This sign was up long enough to constitute a serious impairment."

54. Aftias v. B.C. Housing Management Commission, [1983] B.CJ. No. 1301 (B.C.S.C.).

Decision: Application for judicial review of the Rentalsman's affirmation of validity of a notice to terminate a tenancy dismissed. Order of Rentalsman affirmed.

Facts: The applicants are residents of subsidized housing; originally, their "family unit" consisted of the husband, wife and son, and accordingly they were entitled to occupy a 2-bedroom suite. The son left to establish his own residence. The husband and wife were given 90 days to find alternative housing; they remained in possession of the subject premises. A notice to vacate was served; it was upheld by the Rentalsman. The applicants submit that the Rentalsman's decision was erroneous, mainly because he found that the provision (contained in the tenancy agreement) was a material covenant and that the nature of such covenants is codified in s. 10(2) and (3); that such a provision does not fall within the scope of a "reasonable covenant" as such is meant in that section.

Reasons: The tenants rely upon the decision in *Miller v. Zuchek* (1982) 132 D.L.R. (3rd) 142; [1982] B.C.D. Civ. 2363-03 (B.C.C.A.); the comments of Hutcheon, J.A. at 147-49 (D.L.R.) are emphasized. The tenants contend that as the phrase "family composition" has not been defined in the tenancy agreement, no material covenant can be found in relation thereto. The Court does not agree, finding that the meaning of the phrase is clear "from the tenancy agreement"; it is declared to consist of three members of the Aftias family..." and the premises were made available on that basis. The tenants then submit that the phrase "any change in the declared family composition" is so indefinite as to be unenforceable as a material covenant; they suggest that if one member of the family went on a short holiday, the covenant (if it did exist) could be invoked at the landlord's whim and to the tenant's detriment. That, in the Court's opinion, is "stretching the analogy of Hutcheon, J.A. beyond sensible limits". The covenant is clearly material. The Court then notes that "what is material has been held to be a matter of law. The determination of what is reasonable is essentially a matter of fact"; see the comments of Hutcheon, J.A. in the *Miller* case, supra, at 147 (D.L.R.); a similar conclusion was reached by Craig, J.A. in that case at 143 (D.L.R.). The Rentalsman is to be the trier of fact and clearly the determination of what is reasonable lies in his province. The definition of what is reasonable contained in s. 10(2) and (3) is not (as the tenants submit) exhaustive; those subsections must be read in the context of the whole of s. 10 and the covenant herein clearly falls within s. 10 (1). Finally, the tenants invoke s. 23 (2) of the *Act*, contending that the landlord did not, in his letter directed to them, rectify such. If the letter was the only basis for the error of law their position might be valid; but it was not the only factor; both landlord and tenant (and the Rentalsman) knew the surrounding circumstances, and the whole of the circumstances must be canvassed in determining the reasonableness of the notice to vacate. There was no error of law.

55. Haley v. Kloster, [1982] B.C.J. No. 149 (B.C.S.C.).

Decision: The notice given was not valid. The matter is remitted to the Rentalsman for reconsideration in accord with these Reasons.

Facts: It was alleged that the tenant had habitually been late in payment of rent, that she had been warned that she must pay her rent on time (first of the month), and failed to do so. The notice of termination (upheld by the Rentalsman) stated as the reason for termination the fact: "always late payment of rent". The tenant, on an application under s. 56(1) of the *Act*, seeks to set the decision and notice aside.

Reasons: The main objection is the contended invalidity of the notice by reason of its failure to comply with the statute. This was not argued before the Rentalsman, who thus had no opportunity to consider the point. The Court finds the notice sufficient in respect to the requirement that complete information regarding the reason for termination be given. There is, however, no statement in the notice to the effect that the tenant, having been warned (of the fact of late payment), failed to rectify that breach of a material

covenant. Nor is this omission granted a remedy by s. 14(3). Simply, "the form of termination notice is not as prescribed" and it is therefore void.

56. Cohen v. Dillon, [1979] 5 W.W.R. 609 (B.C.S.C.).

Decision: Application dismissed. Decision of the Commission affirmed.

Facts: As a result of a complaint by a tenant of a hidden rent increase, of an illegal increase, and diminishment of usual service and facilities, the Commission caused an inquiry into the complaint to be made. Confirmation of most complaints resulted and the Inquiry Officer made an Order; the landlord appealed and the Commission affirmed that Order. It is now contended that the Commission, in so doing, was acting judicially without power to so do, and that if the statute purports to grant such power it is ultra vires the Legislature in that it represents an infringement of the *B.N.A. Act*, s. 96.

Reasons: The Commission is alleged to have acted in a manner analogous to a s. 96 Court. The Order of the Commission arose pursuant to an investigation (s. 65 and s. 73), certain factual findings were made and the Order resulting was in conformity with s. 65 and s. 73, with a reference for tenants to their rights under s. 69 (recovery of overpayment); no explicit Order was made by the commission in respect to repayment (s. 71). The problem of possible conflict with s. 96 has been considered in a long line of cases. The most authoritative of such (and one of the most recent) is *Tomko v. L.R.B.* (N.S., et al. (1977) 1 SCR 112 at 120. The test adopted is usually a twofold test: (1) was the power exercised a judicial power? and (2) in the exercise of the power was the tribunal broadly conformable or analogous to a s. 96 Court? This form of test has been reiterated in *Corp. of the City of Mississauga v. Regional Mun. of Peel, et al.* (S.C.C.) (Unreported, March 6th, 1979). The former more stringent test set out in *Toronto v. York* (1938) AC 415 has been effectively displaced by *L.R.B. (Sask.) v. John East Iron Works Ltd.* (1949) AC 134 at 151 - one must not attempt to turn back the clock. Hence a Province may give to a tribunal certain judicial functions ancillary or incidental to its principal functions so long as it can be fairly said that in the overall scheme it remains in essence a regulatory or administrative tribunal of a kind within the power of the province to establish: see: *Tomko* (supra) at 679; *Shell Co. of Australia v. Fed. Commr. of Taxation* (1931) AC 275 at 298. It is not unconstitutional, per se, for a Provincial Legislature to take away from persons recourse to the Courts as the machinery for determination of rights, but it could become so if the Legislature attempts to substitute a new office or agency which purports to determine those rights and in so doing acts essentially as (or "broadly analogous to") a s. 96 Court. If however, a scheme has been instituted whereby rental situations (i.e. increases, etc.) are governed by legislation (as herein), the tribunal is simply "administering a Legislative scheme of rent control apart entirely from the contract between the parties...", in other words the tribunal is not adjudicating the rights of each vis-a-vis the other, and hence is not infringing upon the Court's function. That is the case herein, and a review of the genesis of the proceedings clearly indicates that fact; the proceeding was initiated by the Commission pursuant to its powers granted by s. 63 and s. 64, and carried through in accord with the provisions of the sections hereinbefore mentioned. It did not act in excess of its statutory jurisdiction, and that jurisdiction is properly conferred by the Legislature. Looking in obiter at another aspect of the matter the Court notes that, even if it is wrong in its exercise of power might be valid within the area of administration of Justice - s. 92 (14), for Provinces have the power to create Courts of summary or inferior jurisdiction (there is provision for appeal from a decision of the Commission); see: *Re Adoption Act* (1938) SCR 398.

57. Diane Harvey v. Cica Holdings, [1979] B.C.D. Civ. 2363-11 (B.C.S.C.).

Decision: Application dismissed without costs.

Facts: The applicants, seeking judicial review of an Order to vacate given each by the Rentalsman pursuant to s. 18 of the *Act*, were tenants of an old 8-suite apartment building. The municipality required certain renovations to be made in order to prevent the condemnation of the building. The landlord attempted to arrange with the tenants for them to vacate - they refused, offering to cooperate in allowing workmen to enter their suites for the purpose of renovations. The landlord applied for an Order under s. 18 and, after investigation and hearing, such was granted.

Reasons: The applicants contend that the Rentalsman erred in law and that, in this application made under s. 56 of the *Act*, his Order should be set aside. It is noted that the Rentalsman concluded that vacant possession was a necessity in this case if the required renovations were to be properly carried out. Observing a list of such, the Court agrees that they are extensive, amounting to more than $14,500.00 per suite - a total sum of $116,000.00. They could not possibly be carried out in occupied premises. The definition of the word "renovate" as found in the *Shorter Oxford Dictionary* is pertinent: it provides a "common and well understood meaning" properly embracing the situation herein. The contention to the effect that the Rentalsman was under a duty to consider less "drastic" action (i.e. by requiring the tenants to grant access to the apartment for working personnel) is not acceptable. Section 18 is "clear, straightforward and unambiguous" and the Court will decline to read into the provision "something which is not there". In any event, the Rentalsman possesses the exclusive jurisdiction to make the Order he made, and failing proof of illegality, the Court will not interfere with its terms.

58. Fay Walker v. Carlill and Carbolic Smoke Ball Corporation, [1979] (B.C.S.C.).

The landlord, a co-operative venture launched by residents of a trailer park for the purpose of transforming the park into a condominium style of operation, gave the tenants of a "pad" in the park notice to quit, claiming the right to terminate the tenancy pursuant to s. 18(1)(c) of the *Residential Tenancy Act*, which allows termination where a landlord "bona fide requires residential premises for the purposes of converting it into a unit in a co-operative corporation as defined in the *Real Estate Act*". A Rentalsman officer upheld the notice to quit, on the ground that the landlord bona fide intended to convert the premises into a unit of a co-operative corporation. After the tenants initiated review proceedings of the Rentalsman's decision, under s. 56 of the *Act*, the Rentalsman officer purported to render supplemental reasons for decision which held the landlord "required" possession of the premises.

Held: Application for review dismissed.

The *Act* provides that intent on the part of the landlord to convert the premises is sufficient to give the notice to quit validity and remove the tenant's security of tenure. The word "requires" in s. 18(1)(c), if it had relevance at all, could not in light of the words of s. 24(2)(f) be given any stronger meaning than "wish" or "desire" to obtain possession.

The Rentalsman could not be allowed to bolster his decision against review by the supplemental reasons of the Rentalsman officer. Accordingly, statements in the supplemental reasons, where they added to rather than explained the original reasons, were ignored.

59. Pierre Coutoure v. Rosenthal Holdings Ltd., [1978] B.C.D. Civ. January 11, 1978 (B.C.S.C.).

Decision: The "order, discussion, determination or direction" is set aside and the matter referred back to the Commission for further consideration.

Facts: The applicants attack an "order, decision or determination" of the Commission whereby it entered into an agreement with the respondent landlord pertinent to setting rentals payable by the applicants.

Reasons: The application is brought pursuant to the provisions of s. 54(1). The Court notes s. 27(2) which restricts the right of the landlord to increase rentals, and s. 29G (1) (c) which provides an exception to the restriction when an agreement exists with the Commission. The applicants contend that an error in law exists in that adequate approval from the Minister of Consumer and Corporate Affairs was not present in conformity with s. 24(6). The respondent contends that the decision, not being a decision, is not subject to judicial review, citing *B.C Packers Ltd. v. Canada Labour Relations Board* (1973) FC 1194 at 1196 but the Court notes that although the matter under review was not a ruling, it was, as stated by the Commission, a decision, and the contention is not accepted. The Certificate is filed and the difference in wording between such and the section is noted; counsel for the respondent promotes the principle "omnia praesumuntur rita esse acta" stating that it is incumbent upon the applicant to rebut the resultant presumption; had the word "persons" been used in the statute instead of the word "person" the Court would have entertained this proposition but cannot accept the fact that the agreement was entered into or, at the most, the paucity of, consideration flowing to the Commission in compensation for the agreement; the Court does not accept the argument, but notes the paucity of consideration and opines that the possibility is probably one reason for the requirement for Ministerial approval. A further contention by the applicants to the effect that the agreement is not concluded in that it purports to be for a term of 5 years, but does not set rentals (i.e. provide firm and complete terms) beyond the first year. The Court accepts this contention: vide: *May.* Butcher Ltd. v. R. (1929) 103 LJKB 556 at 559. The exemption provided by s. 29G (1) does not apply. The Court further comments to counsel the comments made by the Court in *Johnston, et al. v. Rosenthal* - LANDLORD AND TENANT ACT- RENT REVIEW COMMISSION - March 7, 1977 in respect to the compromising position of counsel for the Commission appearing on hearings of this nature which are purportedly issues between landlord and tenant; the participation by the Commission cannot help but mitigate against the impartial position which the Commission must at all times, adopt.

60. Legg & Verderr v. Rosenthal Holdings, [1979] B.C.D. Civ. Nov. 28, 1978 (B.C.S.C.).

Decision: Application dismissed. No Order for costs.

Facts: For a summary of the facts leading to this application see: *Johnson, et al. v. Rosenthal* and *Couture, et al. v. Rosenthal.*

Subsequent to those decisions, and the replacement of the statute by the *Residential Tenancy Act*, the Commission made an Order and the tenants responded with a Notice of Review of the Commission's Order in this respect alleging a reasonable apprehension of bias couched in the fact that one Patterson (a Commissioner) had conducted a number of hearings throughout, and that his decision could not but help be coloured by this fact.

Reasons: The application is brought pursuant to the *Residential Tenancy Act*, s. 56 (1). The presence of bias offends the rule laid down in *R. v. Sussex Justices* (1924) 1 KB 265 at 269. A reasonable apprehension of such is contended by reason of the fact that the same tribunal has conducted more than one hearing in respect to the same issue; the tenants submit that one McCullogh (the other Commissioner) should sit alone as provided by s. 59 (3) of the *Act.* Cases cited supporting this suggestion are: *Committee for Justice v. National Energy Board* (1976) 69 D.L.R. (3rd) 716; *Re Diamond Construction (1961) Ltd. v. Construction and General Laborers Local 1076* (1973) 39 D.L.R. (3d) 318. The Commission contends that bias may not be imputed by suspicion, citing: *R. v. Pickersgill* (1970) 14 D.L.R. (3d) 717; the landlord emphasizes the difficulties inherent in a referral back. Section 56 plainly contemplates

reconsideration of a matter previously decided by the Commission itself; the Court will only interfere if obvious error exists. None exists.

61. Johnson v. Rosenthal Holdings Ltd. (1977), 2 B.C.L.R. 212 (B.C.S.C.).

Landlord and tenant - replacing worn-out elevator - Not a renovation - Not qualifying under Reg. 14 (1) - the *Landlord and Tenant Act*, 1974 (B.C.), c. 45, ss. 1 (as amended by 1974, c. 109, s. 1; 1975, c. 4, s. 9(1)(a), 28 (as re-enacted by 1974, c. 109, s. 10) - Reg. 14(1)(b).

The replacement of a worn-out elevator did not fall within the definition of a renovation within Reg. 14(1) and therefore the landlord could not raise rents to cover the costs.

62. Chan Foo v. Lee Pang, (Unreported, July 4, 1975) (C.C.)

Decision: Tenant/appellant's motion for an order that Deputy Rentalsman McArthur present himself for examination for discovery or be held in contempt of Court is dismissed because there is no legislation or regulation specifically authorizing the procedure.

Facts: Relying on s. 54(2) of the *Act* which provides that, subject to the regulations (of which there are none), "the rules of Court apply...", the tenant/appellant has asked to examine the Deputy Rentalsman under M.R. 370C of the Supreme Court Rules. He contends that review under s. 54 of the *Act* is an "action" within the meaning of that word as defined in the *Supreme Court Act*, and that the Rentalsman is a "party" within that word's definition in the same *Act*.

Reasons: The proceedings under s. 54 are not an "action", and the Rentalsman is not a "party". The proceedings are by review and are to a "trial de novo" where evidence may be called. See: *Kai Foh Young v. Foo Bor and George Fu* (B.C. Unreported - see digest of this case under LANDLORD & TENANT, February 3, 1975). The issues in dispute are between the landlord and the tenant; the Rentalsman is not a party to that dispute. The fact that he is shown as a party in the style of cause and is served with a copy of the notice does not make him a party so as to render him and his deputies available for discovery.

63. Sundberg v. Jed Holdings (1985), 36 R.P.R. 103 (B.C.S.C.).

A tenant was unreasonably disturbed by the conduct of other tenants. The tenant applied for review of an order of the Rentalsman who found that the conduct of other tenants did not constitute a breach by the landlord of the covenant of quiet enjoyment.

Held: The order of the Rentalsman was set aside and the matter remitted to him for further consideration.

In order to constitute a breach of the covenant of quiet enjoyment, the conduct complained of did not have to consist of overt acts or originate with the landlord.

The tenant vacated because of persecution and intimidation which the landlord could have controlled but for his inaction. Persecution and intimidation by a landlord was a breach of quiet enjoyment. If such conduct was a breach when engaged in by the landlord directly, then it was equally a breach if, although preventable by the landlord, he stood idly by while others engage in such conduct.

64. 371266 B.C. Ltd. v. Jessie Frank, (Unreported, January, 1991) (B.C.S.C.).

A number of homeless people took over five vacant houses on Frances Street in Vancouver. The owner of the houses was awaiting final demolition clearance from city hall. The landlord brought an application for an injunction to evict the squatters.

Held: Mr. Justice Davies ruled that the injunction should be issued. However, considering the number of children and time of year, the Judge delayed the enforcement of the injunction for two weeks. This is one of the few cases that deals with squatters' rights.

65. Whattlekanium Housing Co-op v. Suttie (1998) S.C.B.C., No: A981971

The petitioner, which is a co-operative association incorporated under the *Cooperative Association Act,* seeks an order for vacant possession of the respondent's housing unit. The respondent is Ms. Suttie. The respondent is a single parent with two small children, including a special needs child. Her income consists of disability benefits.
The respondent presently pays $510 a month which is subsidized by CMHC. Her shelter allowance from Ministry of Human Resources is $610 including utilities. It is obvious that she would be unable to obtain comparable or suitable housing for that amount of money elsewhere.

Problems arose in April 1998 when the petitioner demanded arrears of $1,862 and the respondent failed to pay. The arrears initially arose in April 1997 and there has been an ongoing dispute as to the amount of those arrears. While there is no question that the respondent is in arrears, the amount of those arrears was reduced from $2,125 to $1,862 and then to $1,752.

On May 12, 1998 the board of directors of the petitioner approved a resolution terminating her membership and lease. The respondent was entitled under the *Cooperative Association Act* to appeal to the membership, and on June 17, 1998 the members of the co-op approved a resolution confirming the decision of the board of directors. The respondent has refused to give up vacant possession and remains in the unit.

The respondent is now in a position to offer a payment schedule for the arrears which is guaranteed by the Ministry of Human Resources. The payment would consist of one-third forthwith, (which Ministry of Human Resources was prepared to pay after the June 17th meeting), and the balance, which is to be approximately $100 a month, over 12 months.

The only issue is whether the respondent should be granted relief under x. 24 of the *Law and Equity Act.* That section states that:

The Court may relieve against all penalties and forfeitures and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court sees fit.

The petitioner relies upon the decision of *Gleneagle Manor Ltd. et al v. Finn's of Kerrisdale Ltd. et al.*, a decision of Mr. Justice Locke, (1980), 116 D.L.R. (3d) 617 (B.C.S.C.). That case, of course, involved a commercial situation and, as would be expected in the circumstances, relief from forfeiture was granted on terms which required that all rent, taxes, insurance and covenants be paid within approximately two weeks, that costs be taxed on a solicitor/client basis, and other strenuous terms. Generally, except in exceptional circumstances, relief from forfeiture will only be granted when all rents and costs are paid in a timely manner and the landlord is fully compensated, (and that will generally include compensation by costs as well as the outstanding rent.)However, exceptional circumstances exist in this case for the granting relief under c. 24 of the *Law and Equity Act* . It should be emphasized that relief from forfeiture is available only

in the most exceptional of cases unless the creditor can be wholly indemnified.

The distinguishing factors are these:

i.it is in the best interest of Ms. Suttie, a single mother with two children and extremely limited means;

ii.it is in the best interest of the petitioner co-op in the sense that they will be paid the outstanding arrears. While clearly Ms. Suttie is legally responsible for payment of those arrears, if she is evicted, any judgment would be likely to be a hollow judgment and the co-op would be out that money;

iii.the problem with the petitioner's accounting system appears to be a factor which precipitated the difficulties between the co-op and Ms. Suttie;

iv.the proposal put forth by the Ministry is virtually the same as the one the co-op put to Ms. Suttie which she rejected earlier on. By saying that, the court does not mean to say that simply because that proposal was made, the co-op should have accepted it. When they put the proposal to her and she rejected it, that was the end of it from a legal point of view. Still, the Ministry of Human Resource's proposal is to be considered under granting relief from forfeiture.

The proposal by the Ministry is reasonable. Unlike the situation that pertains in a commercial case, the respondent is simply not in a position to pay costs. Obviously an order for costs would impact on her ability to maintain her ongoing rent obligations.

So this is a borderline case, but, on the balance, the circumstances are such that the Court should exercise its broad discretion under s. 24 of the *Law and Equity Act*.

F. UNEMPLOYMENT INSURANCE

66. Cornish-Hardy v. UIC Board, [1980] 1 S.C.R. 1218 (S.C.C.)

Under the *Unemployment Insurance Act*, the U.I. Commission was given the power to write off overpayments of U.I. benefits, if it would cause undue hardship The Appellant attempted to appeal the refusal of the Commission to give such a write off to the Board of Referees. The S.C.C. held the Board of Referees had no jurisdiction to hear such appeals, because the decision was within the sole discretion of the Commission.

67. Canada (Attorney General) v. Whiffen (1994), 165 N.R. 146 (FCA)

The Unemployment Insurance Commission had an unwritten policy that a claimant who wilfully moved to an area with fewer employment opportunities would be required, after a reasonable period of time, to expand the area of job search or become disentitled to benefits - Whiffen received benefits after moving when her husband was transferred. In accordance with the policy, her benefits were subsequently stopped on the ground that she was unavailable for work. The Federal Court of Appeal held that, notwithstanding the validity of the policy, the policy would not apply to the case of a wife moving to accompany her husband.

68. Attorney General of Canada v. Frank Von Findenigg, [1983] F.C.A.D. 548-02 UIC (F.C.A.)

Decision: Application granted. Decision of the Umpire set aside; matter referred back to the Umpire with the direction that he refer back to the Commission the issue of waiver (s. 55(10)) and require the Commission to perform its statutory duty in that regard, then to dispose of the respondent's appeal on that basis.

Facts: A claim for benefits was refused by the Commission on the basis that the respondent had not filed his claim in timely fashion in accord with the *Act*; that it was his duty to show reasonable excuse for the delay, and such not having been shown, there was no entitlement. This matter was taken to a Board of Review; after that appeal had been launched, but before it had been dealt with, the Commission issued what purported to be a second refusal of the application, on this occasion correctly referring to the claim as a renewal (and not an initial claim) and again stating the failure to file in timely fashion was the reason for denial. Hence, s. 55 of the *Act* comes into force; s. 55(10) allows the Commission to waive strict compliance with the *Act*, and to allow the claim. The Board upheld the denial; the Umpire reversed the ruling of the Board and of the Commission, allowing the benefits to be paid.

Reasons: The Commission may amend or rescind its own previous decision where new facts bearing upon the issue are presented or if the decision was made on the basis of ignorance or mistake of a material fact (s. 102); the section does not put an express time limit upon this power (after a decision is made) but the Court is of the opinion that, once the appeal procedure is launched, the power is lost, otherwise one would have the Commission able to overrule the Board, the Umpire, and even this Court; this is not the legislative intent, expressed in the *Act*. In the present case it is obvious that the Commission never, at any time, gave consideration to possible relief under s. 55(10) or formulated any opinion upon whether or not the respondent was entitled to such relief. The duty of the Board then was to allow the appeal and to refer the matter back to the Commission for consideration of the applicability of s. 55(10) (the Board not being empowered to enforce that provision). The purpose and function of the Board is, as a "tribunal for the hearing of appeals from decision of the Commission", set out in ss. 91 and 94 of the *Act*. But it must have a decision in respect to which it may consider an appeal; such is lacking here, as is the power to substitute its decision for that of the Commission on this point. The Court then turns to the appeal to the Umpire; his Reasons are quoted in part. His powers are set out in s. 96 of the *Act*. The Umpire found that the decision of the Board was wrong in law and had to be set aside; the Court agrees with his disposition so far. But he declined to send the matter back, and although he gives "very persuasive reasons" for that decision, the Court is of the opinion that to leave the matter there does not grant to the respondent the entitlement which is his, i.e. to have the issue of waiver decided by the only authority empowered to make that decision, the Commission. A decision upon that point, in light of the facts regarding time of filing of the claim, is imperative before either the Board or the Umpire may deal properly with the issue.

69. Silvestre v. Umpire, [1985] F.C.A.D. 3544-01 (F.C.A.)

Decision: Application brought pursuant to the *Federal Court Act*, s. 28 dismissed.

Reasons: The Court notes that the Umpire hearing this matter dealt with the jurisdiction of a Board of Referees to decide whether a legislative provision before it is intra vires; it does not wish to be taken as approving that position regarding the jurisdiction of the Board. However, it is pointed out that the Court's position on that point needs not be decided in this case in that the Court has a firm opinion on the fundamental issue. Section 85(1)(b)(i) of the *Unemployment Insurance Act Regulations*, does not conflict with the *Canadian Charter of Rights and Freedoms*, s. 7 or with the *Canadian Bill of Rights*, s. 1(b).

70. Anderson v. Umpire, [1985] F.C.A.D. 3548-01 (F.C.A.)

Decision: Application brought pursuant to the *Federal Court Act*, s. 28 allowed. Decision of the Umpire set aside. Matter referred back to the Umpire for disposition on the basis that the Commission's appeal to the Umpire is not sustainable and should be dismissed.

Facts: Although 'the applicant had a number of jobs during his qualifying period" the job which is fundamental to the decision challenged is that of a ranch hand. In this position, he was paid (cash) $1,000.00 monthly. He also received personal accommodation which he valued at $250.00 monthly and board for his three horses which he valued at $115.00 monthly. Premiums administered by his employer were paid on the sum of $1,000.00 monthly only. The applicant applied for benefits. The Commission "requested a ruling from the Minister of National Revenue who reported..." that the applicant was in receipt of "insurable employment based on $1,000.00 per month...There is no value placed on free accommodation or board". The Commission followed the Minister's decision; a review board upheld the position of the worker; an Umpire allowed the appeal of the Commission.

Reasons: The Court notes that "the complexity of the *Act* and *Regulations*...has been the subject of considerable judicial comment:. The above-noted provisions of the *Act* and *Regulations*, being in Parts II, III and IV of the *Act* delineate the respective powers and duties of the Commission and the Minister (a detailed reference to the various provisions is made). It is concluded that "determination of a claimant's insurable earnings during his qualifying period is clearly a purpose related to the payment of benefit under Part II...(and)... responsibility for the administration of Parts II and III lies with the Commission while that for part IV lies with the Minister of National Revenue:. The Minister's decision is not directly attacked in this proceeding but "it is in issue. Exclusion of the value of free accommodation and horse board from the applicant's insurable earnings was clearly contrary to these provisions and had some value. It is not necessary to accept the value arbitrarily placed upon such amenities by the worker. The Minister may determine the quantum of an employee's insurable earnings when the *Act*, s. 75(1) applies and the operation of that provision cannot be triggered by the Commission; it can only be brought into play at the instance of the person concerned, i.e. the employee or employer liable to pay a premium, or at the instance of the Minister. In adopting the Minister's decision on the point the Commission made that decision its decision. It was then properly appealed to a board of referees pursuant to the *Act*, s. 94. The decision that the accommodation and horse board had no value at all was plainly perverse. The Commission erred in law..." and the Minister acted outside his jurisdiction. The respondent raises an argument purportedly based on "fairness", i.e. the applicant had only paid premiums based on an income of $1,000.00 monthly. The Umpire also found that fact eliminated any injustice. There was a "manifestly illegal understatement of his insurable earnings", but the plan was administered by the employer. "The Minister is responsible to collect the prescribed premium; a claimant is not to be penalized if he (i.e. the Minister) fails in that duty".

71. Attorney General of Canada v. Atwal, [1985] F.C.A.D. 3548-02 (F.C.A.)

Decision: Application brought pursuant to the *Federal Court Act*, s. 28 dismissed.

Facts: The respondent worker, a farmer labourer, asserted that he had to his credit when applying for benefit, 21 weeks of insurable employment . His employer's records were "in a mess" and the Commission was unable to verify the statement by reference to those records. It asked the Minister replied that the respondent had been in insurable employment for 17 weeks. The Commission who then notified the respondent that as he did not have the required 20 weeks of insurable employment, the he was not entitled to benefits. He was simultaneously advised that the Minister's decision could be "appealed" within 90 days and that the Commission had "made the same determination pursuant to s. 18 and 19 of the *Act* and that he could appeal its decision to a Board of Referees". The worker appealed to a Board which agreed with the worker; an Umpire affirmed that decision. The Commission now asserts that the worker was required to

"appeal" to the Minister and that the decision below is thus invalid.

Reasons: The Court refers to a case in which the basis of the dispute was similar to that herein, namely, the ascertainment of the jurisdictional mandate of the Commission and the Minister; see: *Anderson v. the Umpire* [1985] F.C.A. D. 3548-01, November 12, 1985. The conclusion which can be drawn from the Court's consideration of the *Act* and *Regulations* in the *Anderson* case is the "Part II (of the Act), administered by the Commission, is concerned with entitlement to and payment of benefits while Part IV, administered by the Minister, is concerned with liability to pay and the collection of premiums". In the present case, the Minister had no jurisdiction to determine more than the fact that the worker was in "insurable employment" during the relevant period. How long that employment lasted and how much in actual income was received by the worker in respect to such employment lies wholly within the jurisdictional mandate of the Commission. Hence, the worker was entitled to take the proper appellate route in accord with the *Act*, s. 94. There is no challenge otherwise to the decisions of the Board and/or of the Umpire, and the challenge advanced is without merit.

72. Stamberg v. Umpire, [1986] F.C.A.D. 3464-01 (F.C.A.)

Decision: Application brought pursuant to the *Federal Court Act*, s. 28 allowed. The decision below is set aside. The matter is remitted to the Umpire "for decision on the basis that the evidence before the Board of Referees did not disclose any valid reason for rejecting the applicant's sworn statement".

Reasons: A sworn declaration by an applicant for benefits which states that he was given incorrect information by an employee of the Commission, and thus failed to take proper steps to qualify for entitlement to benefits should not be rejected out of hand by a Board of Referees for it may be cogent evidence; to so reject it out of hand constitutes error of law.

73. Dhaliwal v. Umpire, [1986] F.C.A.D. 3544-01 (F.C.A.)

Decision: Application brought pursuant to the *Federal Court Act*, s. 28 granted. The decision of the Tax Court is set aside.

Facts: The applicant's application for benefits was denied by reason of the decision of the Minister to the effect that she had not been engaged in "insurable employment" during the requisite qualifying period. She appealed that decision to the Tax Court (s. 84 of the Act); the Tax Court denied her appeal.

Reasons: "The sole issue before the Tax Court was whether or not the applicant had worked at least 25 days as a farm labourer so as not to fall within the exceptions enacted by s. 16(1) of the *Regulations* as it read at the relevant time" (the text of the applicable Regulation is reproduced in the Reasons). The issue was one of credibility; there were only 3 witnesses "all of whom gave evidence tending to support the applicant's position". The Court canvasses the findings of fact made by the trial Judge and pertinent to that evidence, stating that "those findings are demonstrably wrong" (this is explained). These erroneous findings are the only basis for the decision; that decision cannot stand.

74. Meherally v. Minister of National Revenue, [1987] F.C.A.D. 3534-01 (F.C.A.)

Decision: Application brought pursuant to the *Federal Court Act*, s. 28, dismissed.

Facts: The applicants were employed by the Ministry of Education of B.C. during the early summer of 1984. According to the relevant B.C. statute, they were engaged as independent contractors and not employees; they executed a contract which so stated. They were denied benefits under the *Unemployment Insurance Act*. They seek judicial review of that decision.

Reasons: The application questions the "validity of the method of participation of the Province of British Columbia in the Federal unemployment insurance program". U.I. Regulations, s. 8(2) purports to incorporate in the program, Provincial legislation in the form of the *Public Service Acts* and/or *Civil Service Acts* of the Provinces. This constitutes, not a delegation of Federal powers to the Provinces, but rather, legislation by reference, a mode of law-making which has long been accepted: see: *H.M. The King v. Walton* [1906] 11 CCC 204; Dreidger, "*The Interaction of Federal and Provincial Law*" [1976] 54 CBR 695 at 708; *Re Brinklow* (1953) OWN 325 (S.C.C.). The preclusion of delegation of legislative powers by Canada to a Province was considered and stated in *Prince Edward Island Marketing Board v. Willis* (1952) SCR 392. However, "the next step in the progression" - ie. an extension of the doctrine of legislation by reference to cover the situation where the adoption of Provincial legislation occurred not by statute, but by Regulation - is found in *R. v. Glibbery* [1963] 1 CCC 101 (Ont. C.A.). There can also be "anticipatory incorporation by reference"; see: *Coughlin v. Ontario Highway Transport Board* (1967) SCR 596 at 575. In summary, it can then be said: (1) adoption by reference by Parliament of Provincial legislation to avoid its repetition in the exercise of a Federal power, is valid (*A.G. of Ontario v. Scott*, (1955) SCR 137). (2) Parliament can, in the proper exercise of its power, under the *Constitution Act*, 1867, s. 91, delegate to Provincial administrative bodies charged with the regulation of intra-provincial and export trade is concerned (see: P.E.I. Marketing Board, supra). (3) The Gov. in Council can, by Regulation, validly adopt by reference contemporaneous Provincial legislation enacted in respect of an endeavour in which the Provinces are constitutionally competent, which is exactly what has occurred in this instance (see: Glibbery, supra). (4) Parliament is entitled to adopt, in the exercise of its exclusive legislative power, the legislation of another jurisdictional legislative body, "as it may from time to time exist" (see Coughlin, supra). There is no distinction to be validly drawn between the supra. The status of the applicants vis-a-vis their employment was established by way of contract and in accord with the *Civil Service Act* of B.C. That latter *Act* has been incorporated as part of unemployment insurance law by the *U.I. Act*, Reg. 8(2). The incorporation is intra vires Parliament to effect.

75. O'Connor v. Umpire, [1988] F.C.A. Div. 3516-14 (F.C.A.)

Decision: Application brought pursuant to the *Federal Court Act*, s. 28 is allowed. Decision is set aside. Matter referred back to the Umpire for decision on the basis that the "retirement allowance" in question was a retirement pension within the meaning of para. 57(3)(a) of the *Regulations* as it read before January 5th, 1986.

Facts: The applicant "retired" and was in receipt (prior to January 5th, 1986) of the sum of $78.33 per month, such sum being characterized as a "retirement transitional allowance". An Umpire (ultimately) held that the sum as paid was not a "retirement pension".

Reasons: The word "pension" as such is used in the above provision is to be given the broad meaning accorded to it in the *Concise Oxford Dictionary* (1982), 7th ed. - i.e. "a periodic payment made... in consideration of past services or on retirement...". Any sum paid which accords with that definition must not be allocated as "earnings" as that word is intended to mean in the (former) Regulation.

76. McPherson v. Attorney General of Canada, [1973] 1 F.C.R. 511 (F.C.A.)

Applicant left her employment on August 13, 1971, because of illness due to pregnancy. Her expected date of confinement was February 3, 1972. She was paid unemployment insurance benefits for 15 weeks commencing August 15, 1971, but was denied benefits for the 10 weeks following, to which she claimed entitlement.

Held: Affirming the Umpire, under section 30(2) of the *Unemployment Insurance Act*, she was not entitled to benefits for those 10 weeks.

77. Randi Overall v. Umpire, (June 14, 1988) A-889-87 F.C.A. (F.C.A.)

Decision: Application by the employee (action No. A-809-87) brought pursuant to the *Federal Court Act*, s. 2 dismissed; that by the A.G. of Canada (action No. A-770-87) allowed. That matter will be referred back to the Umpire "for decision on the basis that there was evidence on which the Board of Referees could legally..." reach the decision reached.

Facts: In September, 1985 the employee received the sum of $6,500.00 "in settlement of a claim for retroactive wages" owing by his employer. On December 17th, 1985 he received a further sum of $4,000.00, apparently to the same account. The Board directed that both sums were "earnings" in accord with the *Regulations*. The Umpire concluded that the Board had erred and reversed the Board's decision as to the fact of "reinstatement" of the employee. Both parties seek reversal of the Umpire's decision as it affects such party.

Reasons: It is agreed that the law on this issue is correctly stated in *A.G. for Canada v. Bordeau* [1986] F.C.A. D. 3472-02. The only issue (also agreed upon) is the ascertainment of the fact of reinstatement. "There was clearly evidence supporting the conclusion of the Board...the Umpire could not substitute his judgment of the facts...anymore than, in similar circumstances, could this Court..." do so on a s. 28 application. Reversal of the Board on questions of fact is beyond the Umpire's jurisdiction, unless there was no evidence to support the Board's conclusion.

78. Davidson v. Board of Referees, (June 16, 1988) A-694-86 F.C.A. (F.C.A.)

The *Davidson* case concerns a provision in the *Unemployment Insurance Act*, which stated that the Commission could "as prescribed", extend a claimant's benefit period for not more than 6 weeks following completion of a course to which the claimant had been referred by the Commission. For years, the Commission had, by regulation, automatically extended each such benefit period by the full 6 weeks. In approximately 1984, the regulation was amended to reduce the extension to 3 weeks. The issue was whether "as prescribed" entitled the Commission to reduce the maximum extension which Parliament had determined to be 6 weeks to some lesser figure. CLAS argued that, in the context, the phrase referred to procedures for granting an extension, and guidelines to decide which periods would receive the maximum extension, and which ones would perhaps receive a lesser extension. CLAS argued that it is contrary to Parliament's intention to enact a regulation which in effect, amended the *Act* to provide for a 3 week extension period. Mahoney, J. agreed with CLAS argument, but the majority of the Court of Appeal felt that the *Act* simply gave the Commission the authority to extend benefit periods for as much as 6 weeks, if it wished, or for a lesser period, or not at all.

79. Jerome Irwin v. Umpire, (Dec. 2, 1988) A-249-87 F.A.C. (F.C.A.)

The issue in this case was a settlement which the claimant accepted for giving up his grievance against a dismissal by his employer. He belonged to a Union, and a Collective Agreement was in force which had been entered prior to a change in the regulations which made such settlements "earnings" for U.I. purposes. Under the applicable regulations, if the settlement was considered to be payment "pursuant to the Collective Agreement", it would then be exempt from earnings. It was argued, among other things, that a long line of cases (the best known of which is *McGavin Toastmaster*) had established the general principles that, where a Collective Agreement is in force, it constitutes the entire body of obligations between the employer and a member of the bargaining unit covered by the agreement. Thus, whatever rights the worker had to bargain with when he entered the settlement arose under the Collective Agreement, and it was paid pursuant to that agreement. Neither the Umpire nor the Court of Appeal accepted this approach, and it was decided that the exception for payments pursuant to a Collective Agreement should be construed narrowly to mean specific, ascertainable amounts such as holiday pay, severance pay pursuant to a specific formula, etc. It is clear from this case and the *Randi Overall* case that the Court of Appeal wished to restrict the effect of the "grandfather clause" exceptions as far as possible, in line with the Court's general belief that the *Act* should not allow "double-dipping" (receiving both U.I. benefits and some other income at the same time).

80. Ricci v. M.N.R.[1994] F.C.J. No. 163 (F.C.A.)

The applicant sought review of a trial decision holding that the applicant, a person over the age of 65, was liable to pay unemployment insurance premiums for 1990, and that this result did not run afoul of section 15 of the Canadian Charter of Rights and Freedoms. On October 23, 1990, Parliament passed an act to amend the Unemployment Insurance Act so that employment of persons aged 65 years and over would no longer be excepted from the scheme of the Act. The amending Act was to be deemed to have come into effect on September 23, 1988. The Unemployment Insurance Commission assessed the applicant for premiums for all of 1990. The applicant disputed the assessment of premiums for that part of 1990 before the date of assent of the amending Act, October 23rd. The trial judge disagreed with the applicant's view of the matter.

HELD: The application for review was dismissed The court was not persuaded that the trial judge had committed any reviewable error Indeed, the court was fully in accord with the trial judge's conclusion, noting that although employees over age 65 now had the right extending back to September 23, 1988, to receive benefits, back premiums were only sought for the 1990 year As for the impact of section 15 of the Charter, the court agreed with the trial judge that the applicant did not suffer discrimination, in that the combined effect of paying insurance premiums in return for eligibility for benefits could not be seen as a burden.

81. Curtis v. Canada (Minister of National Revenue - M.N.R.)[1989] T.C.J. No. 39 (Tax Court)

This was an appeal from the Minister's determination that the appellant worker was not engaged in insurable employment because he was a casual worker. The appellant was a planning technician and home renovator who worked for his mother in completing renovations and carrying out maintenance on rental properties that she owned. The appellant took the position that he was not a casual worker because his mother actually carried on the business of renting property.

HELD:Appeal dismissed. The Court did not directly address the question of whether the mother's property rental activities constituted the conduct of a business, but looked instead at the stability and continuity of the appellant's engagement. The Court concluded that the appellant was engaged in casual

employment, and, therefore, that he was not engaged in insurable employment, because the employment was not a stable one which could continue to exist or at least be renewed at regular intervals and upon which the worker could rely. Thus the Court dismissed the worker's appeal.

82. Roussy v. The Minister of National Revenue, (Oct. 8, 1992) A-123-91 F.A.C. (F.C.A.)

This case involved provisions of the *U.I. Act* which exclude "casual" employment which is not in the course of the employer's usual business. Mr. and Mrs. Roussy hired workers to assist in the construction of their new home. Following Revenue Canada's instructions, income tax, C.P.P. and U.I. premiums, etc. were deducted from the workers' pay and remitted to the government. When one of the workers later applied for U.I., a ruling from the Minister was requested which decided that the employment was not insurable because it fell within the "casual" exception. The Minister took the position that any employment was casual that was not for an indefinite term, even if it was to last several weeks or months. The Court of Appeal disagreed, finding instead that "casual" should be interpreted as employment which had no regularity or predictability. This decision means that many workers involved in construction activities and other such employment will now be entitled to U.I. coverage.

G. LEGAL RIGHTS OF PEOPLE WITH MENTAL ILLNESS

83. D.H. v. Attorney General of B.C. [1994] B.C.J. No. 2011 (B.C.C.A.).

Mr. H. was found not guilty by reason of insanity in 1985 of starting a fire. At the relevant time, he was a juvenile and was charged under the *Young Offender Act*. He is now an adult. A Review Board was held on November 22, 1993. We received the Reasons for Judgment on February 7, 1994. The Review Board held in part that Mr. H. should be conditionally discharged and that he not receive an absolute discharge. Mr. H. is not receiving any medication in regard to his mental health and it was held that he is not suffering from any mental illness.

There were four major legal issues to be determined in this case. The first issue concerned whether Mr. H. should continue to be held pursuant to the *Young Offender Act* and the *Criminal Code*. When the new amendments to the mental disorder section of the *Criminal Code* were brought into being approximately two years ago, the provisions dealing with capping were not proclaimed. The capping provisions are the provisions that say that you are not allowed to be kept under the mental disorder sections of the *Criminal Code* for any further period of time than the maximum amount you would have received if you had been convicted under the index offence. In the case of our client, that would have been three years. Our first major legal argument was that the proclamation section of the amendments to the *Criminal Code* are unconstitutional because they fail to proclaim the capping provisions. The allegation here would be that the proclamation section is a violation of s. 7 of the *Charter*.

The second argument was based on the unreasonable finding of facts that our client is not entitled to an absolute discharge.

The third legal issue that we raised is that onus should not be on Mr. H. to show that he is no longer a threat to public safety but should be on the hospital. We argued this issue in the Court of Appeal in the Davidson matter but Mr. Davidson decided that he did not want to appeal this matter to the Supreme Court of Canada.

The fourth legal issue was whether a person who does not have a mental illness can still be detained under the mental disorder sections of the *Criminal Code*.

This case was heard on July 21, 1994. In a unanimous decision, the B.C. Court of Appeal held that the decision of the Review Board should be overturned. The Court of Appeal granted Mr. H. an absolute discharge.

84. Robinson v. Hislop (1980), 24 B.C.L.R. 80 114 D.L.R. (3d) 620 (B.C.S.C.).

The petitioner brought a petition for discharge from a mental hospital. There was no argument that the petitioner was a mentally ill person, but he contended that he did not need constant care, supervision or control.

Held: Petition dismissed.

The petitioner, under s. 27 of the *Mental Health Act*, had to present a prima facie case for being released. It was not equivalent to a case of false imprisonment. The director had to "satisfy" the Court there was reason for continued incarceration. The burden of proof was not "beyond a reasonable doubt", but adjusted

to somewhere between balance of probabilities and the criminal onus depending on the seriousness of the issue at stake, and the gravity of the consequences. The reports of the doctors and social workers involved with the petitioner satisfied the Court that the petitioner's best interest would be protected by further confinement.

85. Hoskins v. Hislop (1981), 26 B.C.L.R. 165 121 D.L.R. (3d) 337 (B.C.S.C.).

The petitioner, an involuntary patient at a provincial mental health facility, applied for an order that she be discharged from the facility. She had a long history of schizophrenia for which she had been frequently hospitalized. She had a pattern of discontinuing her medication and relapsing when released from hospital. On this occasion her condition had improved considerably since her admission to hospital. The medical authorities had planned a long-term treatment program designed to give the petitioner sufficient insight into her condition to prompt her to continue taking her medication after her eventual release and thereby to prevent another relapse.

Held: Application dismissed.

Section 27 of the *Mental Health Act* provided a mechanism whereby involuntary mental patients and persons concerned with their detention could obtain a judicial review of the legality of an involuntary admission at any time during the detention, regardless of whether the admission was procedurally correct and lawful at the time it occurred. The other provision for review was s. 21(4) which contemplated a less formal hearing by three persons appointed under the Act. The right to judicial review conferred by s. 27 was unqualified and unlimited by s. 21 or any other provision. The onus of satisfying the Court that sufficient reason for detention existed lay on the respondent. The petitioner was not required to satisfy the Court that there was not sufficient reason for continued detention. The nature of the proof required was the same as that imposed in other civil action, i.e. by a preponderance of the evidence. The Court would require clear unequivocal evidence of mental disorder and the necessity of treatment before being satisfied that the evidence disclosed "sufficient" reason for continued detention. The state of the patient's mental health with which the Court was concerned was that state which prevailed at the time of application. Section 20 of the Act set out the specific criteria which had to be met before a person could be admitted and detained in a provincial mental health facility. Section 27(4) and (5) provided a mechanism for review involving different criteria. Under s. 27(6) the Court should, if satisfied that the patient was mentally disordered and required treatment in a provincial mental health facility, order the admission and detention in or continued detention in the facility. Read together with s. 1, s. 27 allowed the Court to order the continued detention of a patient who was still mentally ill and required continued hospitalization even though he might no longer require hospitalization for his own protection or that of others. The psychiatric report provided for by s. 27(5) was simply one factor to be considered and was not in itself conclusive. The Court was empowered to direct a discharge even in the absence of a psychiatric report.

In the instant case the petitioner's expressed intention to discontinue her medication if released would again result in the deterioration of her mental and physical health. There was sufficient evidence to warrant her continued detention.

86. Director of Riverview Hospital v. Andrzejewski (1983), 150 D.L.R. (3d) 355 (B.C.S.C.).

Section 11(1) of the *Mental Health Act*, R.S.B.C. 1979, c. 256, provides that "a guardian, committee or other person liable for payment for" an involuntary patient's care shall on demand make payment for the cost of that care to the director of the provincial health facility in which the patient is incarcerated. Section

11(2) of the Act provides that in default of payment the director may sue to recover the amount owing in a Court of competent jurisdiction. These provisions of the *Mental Health Act* do not make an involuntary patient liable to pay daily charges for her care to the director in a case where no guardian or committee has been appointed for her or her estate. If the Legislature had intended to charge an involuntary patient or her estate it would have been easy to do so by apt language.

87. Ketchum v. Hislop (1984), 54 B.C.L.R. 327 (B.C.S.C.).

The plaintiff was incarcerated against her will at Riverview Hospital and initially was forcibly injected with prescribed drugs during her 35-day confinement. On the evidence it was shown there were irregularities in her admission documents: contrary to the British Columbia *Mental Health Act*, the application for committal and one of the two required medical examinations were respectively 2 and 11 days out of time at the date of admission. However, it was found that the defendants had acted in good faith, and the plaintiff needed the care and treatment she received and had benefited from it. The plaintiff brought an action for damages for false imprisonment.

Held: Judgment for the Plaintiff.

The plaintiff's rights to liberty and security of person were seriously invaded. There was a substantial disregard for the statutory requirements and no explanation for the oversight. Damages were to be "nominal" but not "merely token" and were assessed at $500 plus costs.

88. Wood v. Public Trustee, (1984) 52 B.C.L.R. 396 (B.C.C.A.).

The defendant Public Trustee was appointed the committee of the plaintiff's small estate upon the plaintiff being declared incapable of managing his affairs due to mental infirmity resulting from brain damage sustained in a fall. Three years later, the plaintiff was declared capable of managing his affairs and the defendant ceased to have anything to do with his affairs although there was never a formal discharge. The plaintiff brought an action for damages for breach of trust, alleging that certain actions by the defendant had resulted in the unnecessary depletion of the estate. The trial Court dismissed the action as it related to the payment of hospital expenses and the disposal of certain property. However, it awarded damages of $7,500 representing payments made for the maintenance of the plaintiff's wife on the grounds that as a matter of law it was not open to the defendant to make payments in excess of the amount ordered by the Court which had refused maintenance for the benefit of the wife and awarded a monthly sum to her for the maintenance of the child of the marriage. The defendant had made the excess payments to the plaintiff's wife on the basis of her version of her needs and the possibility of a reconciliation. The defendant appealed.

Held: Appeal dismissed.

The trial Judge was correct in concluding that the Public Trustee can be liable for damages arising out of the administration of the estate. The standard of care required of the Public Trustee is to act as a person of ordinary prudence would act. Under the *Patients Property Act* the Public Trustee may exercise all the rights, powers and privileges that could be exercised by the patient were it not for his incapacity. Therefore, the trial Judge was mistaken in finding that as a matter of law it was not open to the defendant to make payments in excess of the Court order. However, as a matter of fact, the trial Judge was right in saying that it was not appropriate for the defendant to take over the function of the Court as it was not reasonable or prudent to do so under the circumstances. The estate was small, the defendant accepted

uncritically the wife's version of events and there was no basis in fact for the supposition of a reconciliation.

89. Rosandick v. Manning (1978), 5 B.C.L.R. 347 (B.C.S.C.).

A patient in a psychiatric institution brought an application in his own name for his release pursuant to s. 30 of the *Mental Health Act*. The respondent sought to set aside the proceedings on the ground that (1) there had been a failure to comply with Supreme Court Rule 6(2) which provides that a person under a legal disability shall commence a proceeding by his committee; (2) an action in this form is prohibited by s. 23(1) of the *Patients' Estates Act* which states: "No person other than the committee of the patient shall bring an action".

Held: The motion to set aside the proceedings was denied. The patient is entitled to commence the action in his own name. Although the *Patients' Estate Act* generally restricts the right of a patient to bring an action otherwise by his committee, this restriction is no longer applicable with respect to the right to bring an application for discharge. This right is conferred directly on a patient by s. 30(1) of the *Mental Health Act*, which, speaking as it does with respect to a particular right and having been enacted at a later in point in time, must be taken to have repealed or amended the earlier enactment. Statutes which limit the rights of freedom of choice, action and liberty must be interpreted strictly. Further, since the rules are not substantive law they are ineffective as far as they contradict the rights set out in the *Mental Health Act*. A general rule cannot be taken as intended to repeal the special provisions of the *Mental Health Act*.

90. W.J. Hilton v. John Peter Duffy [1980] B.C.D. Crim. Conv. 5752 - 01 (B.C.S.C.).

The patient is improperly detained in the Forensic Psychiatric Institute, since his detention has been made without any order having been made by the Lt. Gov. in Council which should have been made under s.25 of the Mental Health Act.

Decision: There will be an order in the nature of habeas corpus directing that the petitioner be discharged from the Forensic Psychiatric Institute and that he be returned to the Lower Mainland Regional Correctional Centre, to serve the balance of his sentence.

Facts: This is an application for relief in the nature of habeas corpus in the form of an order directing the respondent Director of the Forensic Psychiatric Institute at Port Coquitlam, B.C., to discharge the petitioner forthwith from the Forensic Psychiatric Institute, on the ground that the petitioner was transferred from the Lower Mainland Regional Correctional Centre to the Forensic Psychiatric Institute and has been detained there without any order having been made by the Lt. Gov. in Council in accordance with s.25 of the Mental Health Act and amendments, and that the said transfer and detention are therefore without lawful authority. At the time of the transfer, the petitioner was an inmate at the Lower Mainland Regional Correctional Centre at Oakalla, as a result of having been convicted of a criminal offence. If he was released from the Forensic Psychiatric Institute pursuant to this motion, he would still be required to return to a penal institution to complete his sentence. The respondent admitted that the petitioner was not conveyed to the mental institution, pursuant to s.25 of the Act. A temporary absence authorization permit was issued by the Director of the Lower Mainland Regional Correctional Centre so that the petitioner could obtain medical psychiatric treatment. The petitioner states that his reason for seeking this order is to avoid the need to take drugs which have been forced upon him without his consent during his stay at the Forensic Psychiatric Institute.

Reasons: S.25 of the Mental Health Act deals with the removal to a provincial mental health facility of prisoners and child care resource inmates. The Lt. Gov. in Council did not make an order under s.25 of the Act for the petitioner's removal to the Forensic Psychiatric Institute. The respondent relies on s.20 of the Act, under which the petitioner purported to be admitted, accompanied by an application for admission and two medical certificates as described in that section. It is submitted that the procedure set out in s.25 of the Act is not a form of admission, but merely a direction to the warden of the jail to release the mentally ill person to a mental institution. Here, the warden granted the petitioner temporary relief from the institution to go to the mental hospital, so it was not necessary to get the consent of the Lt. Gov. in Council. It is submitted that s.25 merely provides further admission procedure "if it is necessary" for one who is detained in a jail or lock-up, and he must be forcefully removed since he cannot go voluntarily. However, s.25 provides a complete procedure for inmates who may be prisoners or members of child care resources. The two medical certificates are sent to the Lt. Gov. in Council and not the Director of the mental health institute, as in s.20. The Lt. Gov. in Council may decide to order the warden to remove the prisoner to the mental health institute, but at the same time as the removal, an application for his admission is presumably sent with him, and the form of this application is prescribed by the Lt. Gov. in Council by regulation, and is not necessarily the same application form as used in s.20 admissions. Patients admitted under s.20 of the Mental Health Act may be detained for one year and then must be discharged unless the authority for the detention is renewed in accordance with the section. Inmates detained under s.25 are not subject to a time factor. The administration of the drugs which the petitioner objects to is permitted under s.8 of the Act to patients who have been admitted under s.20. The petitioner is not a person admitted under s.20 and this would be sufficient to prevent him from receiving professional service, care and treatment under s.8 of the Act. The patient is improperly detained in the Forensic Psychiatric Institute, since his detention has been made without any order having been made by the Lt. Gov. in Council as it should have been, under s.25 of the Mental Health Act.

91. John Scherba Mervyn W. Hislop et al 1981] B.C.D. Civ. 2668-02 (B.C.S.C.).

Although the onus of proof that a person may continue to be involuntarily confined in a mental institution lies upon the authorities, a finding to the effect that such person would, at the time of his application for release, be involuntarily confinable pursuant to s. 20 will negate his application for release made under s. 27.

Decision: Application dismissed No costs.

Facts: The petitioner is a "chronic schizophrenic paranoid type" who had, for a number of years, been intermittently involuntarily confined for treatment. From time to time he has been released as an out-patient, but each time, he neglects his necessary medication, fails to attend to personal hygiene, and becomes abrasive in his relations with others. There are also incidents of physical violence and other aberrant behaviour.

Reasons: It is generally contended by the applicant that a major factor in his attitude is the confinement per se, and that release would solve his problems vis-a-vis his capability to care for himself, and his relationship with others. Evidence presented by psychiatrists is directly opposed to this contention. The onus of proof rests throughout on the authorities, and the scope of that onus was considered in: Robinson v. Hislop [1980] B.C.D. Civ. 2668-01, July 7th, 1980, and in Hoskins v. Hislop [1981] B.C.D. Civ. 2668-01, February 16, 1981 (both S.C.B.C.). The evidence regarding delusions, habits, and actions of the applicant convinces the Court that an application to confine him under s. 20 of the Act would be successful. In that case, the burden of proof resting upon the authorities in respect to an application brought under s. 27 is met.

92. Lemay v. Kirby [1987] B.C.J No. 2561 (B.C.S.C.).

Decision: Application dismissed; each party to bear own costs.

Facts: The petitioner seeks an order that his status as an involuntary patient, on leave from a psychiatric institution, was unlawful. At the time of the hearing the petitioner was not detained.

Reasons: The petitioner claims that certain provisions of the *Mental Health Act*, namely ss. 1, 8(1)(a), 20, 21(4) and 27 and procedures adopted by officials charged with enforcement of the Act, contravene ss. 7 and 10 of the *Canadian Charter of Rights and Freedoms*. However, the petitioner is now at liberty and there have been major amendments to the *Mental Health Act* and *Regulations* since the petitioner's detention and his release such that, a person involuntarily committed is provided more frequent applications for review concomitant with shortened detention periods. See s. 7(2) of the Mental Health *Regulations* 14584 as amended and s. 21 of the *Mental Health Act* as amended. "It is well settled law that this Court has discretion as to whether it should hear and decide a moot case." In the circumstances, this is not a proper case to decide the constitutional issues raised as they are moot.

Comment: This case induced the provincial government to amend the Mental Health Legislation. First, six months prior to the hearing of the *LeMay* case and well after the case started, the regulations were amended so that patients were informed of their right to counsel. Secondly, about two months prior to the hearing of this matter, the *Act* was amended drastically reducing the detention periods of involuntary patients.

93. Patterson v. Superintendent of Child Services, (1988), 15 R.F.L. (3d) 216 (B.C.C.A.).

Decision: Appeal allowed. Order for permanent custody quashed.

Facts: This is an appeal from a County Court appeal upholding the Provincial Court Judge's decision to make a permanent order pursuant to s. 14 of the *Family and Child Service Act* in respect of a child born to the appellant. The mother of the child was in receipt of a pension as a result of her mental disability, the exact nature of which has not been determined. Because she was in receipt of this pension the Ministry became aware of her pregnancy and a decision was made to apprehend the child at birth. Following the apprehension of the child, there were a number of access visits arranged between the mother and the child with the supervision of homemakers. Ultimately the Superintendent sought an order of permanent custody pursuant to s. 14 of the *Act*. At the hearing in Provincial Court of this matter the Court heard a report from a clinical and consulting forensic psychologist. Essentially that report indicated that the mother was under a mental disability but the diagnosis and prognosis of such a disability was unclear. In coming to his conclusion the Provincial Court Judge indicated that he realized that the diagnosis of a mental disability was unclear but that an exact diagnosis was not necessary for the purpose of these proceedings.

Reasons: Approaching the matter in that way, the Provincial Court Judge erred in principle. He overlooked the requirements of s. 14(2)(b) of the *Family and Child Service Act*, particularly s. 14(2)(b(ii). The lower Court misconstrued the requirement of that section. The oversight of the trial Judge was in proceeding in the absence of evidence as to whether the condition with respect to the natural mother will soon be remedied. He did not know the cause of the condition, he had no prognosis before him as to whether her condition would improve in the future, he did not know whether treatment would assist in improving her condition. He was in error in failing to guide himself by the requirements of s. 14(2)(b)(ii).

94. D. O.v. Supt. of Family and Child Services, (1992) 69 BCLR (2d) 219 (B.C.C.A.).

Facts: In this case, CLAS intervened on behalf of the F.A.P.G. The case concerned the constitutionality of provisions of the *Family and Child Services Act* that make disability of the parent a ground for apprehension of a child. F.A.P.G. argued that the relevant provisions violate s. 15 of the *Charter*.

Held: The Appeal Court refused to deal with the *Charter* argument as the issue was not raised below.

95. Greggor v. Director of Riverview Hospital, [1992] B.C.J No. 694 (B.C.S.C.).

Facts: Dean Greggor is aged 30 and is a patient detained pursuant to the *Mental Health Act* in the Respondent Hospital. In 1982, when he was aged 20 years, he suffered irreversible brain damage in a motor vehicle accident. His history of treatment, the fact of the incurable nature of his defect, the basis for his first committal and subsequent re-committals (irrational behaviour, sometimes of a violent nature) are canvassed. There is no doubt that the plaintiff has improved with treatment, he asserts that he is sufficiently improved that he can cope in society; his doctors are of the opposite opinion.

Held: Dean Greggor should be detained.

In considering an application for an order pursuant to the *Mental Health Act*, s. 27 requiring that an involuntarily-committed patient be released from detention, "The Court is not necessarily obliged to inquire into the conditions existing at the time the patient was admitted...(although the provision could be so interpreted)...but may where appropriate limit itself to the task of deciding whether there now exist sufficient reason and authority for...(the patient's)...admission and detention".

Reasons: "The formulation of the statutory conditions that must be met, and at what point in time they must be met, is...difficult" to ascertain. The Court conducts an in-depth examination of the various sub-sections of the *Mental Health Act*, s. 27, noting that there is a possible interpretation which would lead to a "double-barrelled" test; however, the Court selects the interpretation set out above. "The respondent conceded at the outset that a prima facie case had been made out in the material filed...(by the petitioner)...thus satisfying the initial onus...Thus the onus shifts to the respondent to satisfy the Court with 'clear, unequivocal evidence' that there is...sufficient reason for...the continued detention of the petitioner..." Cases which are on point are: *Robinson v. Hislop*, [1980] B.C.D. Civ. 2668-01; 24 B.C.L.R. 80 at 85 (S.C.B.C.): *Robinson v. Kirby*, [1984] B.C.D. Civ. 2668-02 (S.C.B.C.) and *Hoskins v. Hislop*, [1981] B.C.D. Civ. 2668-01: 26 B.C.L.R. 165 (S.C.B.C.). The interpretations accorded to the statutory provision in those cases is noted; it is clear that the question was left open, as it was - as well - in *Scherba v. Hislop, et al.*, [1981] B.C.D. Civ. 2668-01 (S.C.B.C.). "Whilst the resulting uncertainty as to the applicable criteria in cases of detention is a fine one, it may well be important in some cases. Were is necessary for me to decide it, I would...adopt the reasoning...In *Hoskins*...(supra)...On the view I take of this case...it is not necessary for me to decide the point as I am satisfied that the respondent has proven its case with clear and unequivocal evidence on all three criteria...admission and re-certification...(as well as)...present condition". It is clear that the petitioner continues to be a person "requiring treatment in a Provincial facility" and his continued detention for that purpose is justified.

96. Orlowski v. British Columbia (A.G.) (1992), 10 C.R.R. (2d) 301 (B.C.C.A.).

The appellants had been found not guilty by reason of insanity before the coming into force of the

amendments to the *Criminal Code* consequent upon the decision of the Supreme Court of Canada in *R. v. Swain*, and had been ordered detained at the pleasure of the Lieutenant Governor. After the coming into force of the amendments, a periodic review by an independent board as required for every patient. The dispositions were available under s. 672.54 of the *Code* to a review board on an annual review: an absolute discharge, a conditional discharge, and a detention order. Section 672.54 directs the review board to make the disposition that is the least onerous and least restrictive to the accused after taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused. An absolute discharge is to be granted when in the opinion of the review board "the accused is not a significant threat to the safety of the public".

The board granted level two conditional discharges to the appellants O and H and a level one conditional discharge to the appellant A. No specific findings were made as to whether the appellants constituted a significant threat to public safety. The appellants appealed.

Held: Appeals allowed.

Parliament has left the board with no alternative other than absolute discharge if it has the opinion that the accused is not a significant threat. The language of s. 672.54 of the *Code*, however, does not require the board to reach a conclusion as to whether the accused is not a significant threat. Section 672.54(a) is phrased in such a way that the requirement for an absolute discharge only arises when the board *does* have the opinion that the accused is *not* a significant threat. The board need not order an absolute discharge when it has doubts as to whether the accused is a significant threat or not.

In cases under s. 672.54 of the *Code*, the board should make an express finding as to whether it is of the opinion that the accused is not a significant threat. Section 672.54 requires the board to make one of the three possible dispositions "that is the least onerous and least restrictive to the accused". An absolute discharge will always be the least onerous disposition, and it is not possible for the board to decide upon a different disposition without first deciding whether it has the opinion that the accused is not a significant threat which would entitle the accused to an absolute discharge. As such a decision is fundamental to any more onerous disposition, fairness requires that reasons be given. In the absence of such reasons, the reviewing Court would be entitled in most cases to remit the disposition to the board.

In these cases, the boards did not come to grips with the question of whether the appellants posed a significant threat. The matters should be remitted to the boards for further consideration on the question of whether or not the boards have an opinion on whether any of the appellants is a significant threat to the safety of the public, and if so, what that opinion is.

97. Fenton v. B.C. (Forensic Psychiatric Services Commission) (1991), 82 D.L.R. (4th) 27 (B.C.C.A.).

The respondent, a patient in a provincial Forensic Psychiatric Institute operated by the appellant commission, was a participant in a voluntary work program established by the institute which entailed approximately four hours of work a day. The work done by patients in the various work groups established under the program included maintaining the grounds of the institute and working on a government farm. Patients participating in the work program were paid a small weekly gratuity which was less than the minimum wage prescribed by the *Employment Standards Act*. The respondent brought an action seeking entitlement to the statutorily prescribed minimum wage for work done in the work program. The trial Judge held that any tasks performed by patients as part of a structured program that provides economic benefit to the institute must be considered to be employment under the *Employment Standards Act* if the

thrust of the program is either to provide an economic benefit or to keep the patients busy, with he rehabilitative benefit being incidental. The trial Judge went on to conclude that the respondent was entitled to minimum wage in respect of work done in several of the work groups which were part of the program.

On appeal, held, the appeal should be allowed.

Patients in the institute's work program do not fall within the definition of "employee" in the *Employment Standards Act* and thus the minimum wage provisions of the *Act* are not applicable. The proper test for determining whether an employment relationship exists is not whether there is some incidental benefit to the institute, but rather whether there is real economic benefit flowing to the institute from the work program. On the facts of this case, the substance of the relationship between the institute and the patient is really one of rehabilitation. The objectives of the work program are to provide patients with learning opportunities and work experience to enhance their likelihood of employment upon discharge. Furthermore, there is no real economic benefit to the institute as the costs of operating the program vastly exceed any production associated with them.

98. Davidson v. B. C. (Attorney General) [1992] B.C.J. No. 914 (B.C.S.C.).

The plaintiff was a mental patient who allegedly had been subjected to certain forms of treatment without her consent. The defendants applied under Rule 28(1) for an order entitling them to examine the plaintiff's solicitor of record. The defendants sought to examine the solicitor regarding a consent for treatment signed and subsequently revoked by the solicitor on behalf of the plaintiff. The defendants conceded that there was a solicitor-client relationship when the consent and revocation were executed and that the relationship had continued.

HELD: Application dismissed. There was no basis for granting an order to examine the plaintiff' solicitor regarding the plaintiff's state of mind. The plaintiff had been in the professional custody of the defendant and it could not be said that examining the solicitor was the only way the defendants could test the plaintiff's competence. Moreover, in deciding whether to exercise the discretion under Rule 28(1) to overcome privilege which prima facie would exclude the examination, the potential for oppression of the party was a factor to be considered. In the present case the particular difficulties which could be created for a lawyer acting for a mental patient and, in particular, the danger of creating mistrust on the part of the client, were significant.

99. Blackman v. B.C. (Attorney General), (1995) 95 CCC (3d) 212 (B.C.C.A.).

The appellant inmate was in custody pursuant to Part XX.1 of the *Criminal Code*, which deals with persons acquitted on the ground of insanity. He applied under s. 672.5(6) for an order excluding the public during his annual review before the British Columbia Board of Review. The board refused the exclusion order and stated further that any evidence given during the course of an exclusion order application could not itself be the subject of an exclusion order. The appellant sought to appeal this disposition under s. 672.72(1).

Held: Appeal quashed. Section 672.72(1) provides that any party may appeal against a "disposition or placement decision" made by a court or the board. The ruling was clearly not a "placement decision" made by a court or the board. The ruling was clearly not a "placement decision." In Part XX.1 a "disposition" is an order made by the board under s. 672.54 or by the court under s. 672.58. The latter did not apply in this case, and the former was concerned with discharge and detention orders. A non-exclusion order was

neither of these and hence was not a "disposition." Nor was the definition of the term expanded by the provision in s. 672.72(1) that the appeal might be made on any ground that raised a question of law or fact alone or of mixed law or fact. The board's order was an interlocutory order made as part of a criminal proceeding, and the appeal was governed by the provisions of Part XX.1. Accordingly, the court had no jurisdiction to hear the appeal.

100. Winder v. B. C. Review Panel under Mental Health Act (1993), 82 B.C.L.R. (2d) 261 (B.C.C.A.).

The petitioner was a patient in a psychiatric hospital, having been involuntarily admitted in the Fall of 1992 upon the purported completion of medical certificates under the *Mental Health Act*. From time to time, renewals of the certificates were completed recommending the petitioner's continued detention for medical reasons. In June of 1993, a review panel was convened, at the petitioner's request, to consider whether he should continue to be detained. At the commencement of the hearing, the panel decided that the medical certification on which the petitioner was detained was invalid because it failed to comply with the procedural requirement of the *Act*. The panel refused to continue with the hearing, saying that it only had jurisdiction where a person was validly detained because its jurisdiction was restricted to a review of the medical justification for the detention. The petitioner sought a declaration that the review panel had the jurisdiction to decide the validity of the medical certification.

Held: Petition dismissed. A review panel does not have the jurisdiction to determine the validity of the medical certification or of the renewals of the certification. Section 27 of the *Act* specifies that the court has the power to review the documentation pertaining to the admission and continued detention of a person. Such powers are not granted to the review panel under s. 21. The function of the panel is restricted to a determination of the medical justification for the continued detention of the person, after the issuance of appropriate documentation.

101. McCorkell v. Riverview Hospital, [1993] 8 W.W.R. 169 (B.C.S.C.).

The provisions of the *Mental Health Act*, dealing with involuntary committal and detention of mentally ill persons, is constitutionally valid legislation. The purpose of the *Act* is manifestly plain: the treatment of the mentally disordered who need protection and care in a provincial psychiatric hospital. Although involuntary detention under the *Act* is a deprivation of liberty within the meaning of s. 7 of the *Charter*, the detention occurs "in accordance with the principles of fundamental justice." The courts have not determined that "dangerousness" is the only permissible criterion for involuntary committal, and the criteria under the *Act* are not invalid on the doctrine of vagueness. The standards for committal strike a reasonable balance between the rights of the individual to be free from restraint by the state and society's obligation to help and protect the mentally ill. The *Act* contains adequate procedural safeguards.

Although the plaintiff in this case was no longer committed and the case was technically moot, it was appropriate for the court to rule on the validity of the legislation. The plaintiff and others continued to be at risk of coming under the impugned provisions of the *Act*. Given the short term nature of involuntary detention, unless the court dealt with a test case, the constitutionality of the *Act* might never be examined.

102. Davidson v. British Columbia (Attorney-General), (1993) 87 C.C.C. (3d) 269 (B.C.C.A.).

On May 20, 1993, the appellant was found not criminally responsible by reason of mental disorder. The trial judge ordered the appellant to be detained in custody at the Forensic Psychiatric Institute, where he was to await a hearing before the British Columbia Review Board to determine the appropriate placement order. The Review Board first head his case on June 29, 1992. The Board ordered that he be conditionally discharged subject to review not later than August 24, 1992. The review took place on August 31, 1992. At the hearing on August 31, 1992, the appellant asked for an absolute discharge. Section 672.54 of the *Criminal Code* provides that the Review Board shall order that the accused be discharged absolutely where "in the opinion of the...Review Board, the accused is not a significate threat to the safety of the public." The majority of a five member panel concluded that it had doubts about where in the future Mr. Davidson

could become a significant threat to the public. The minority would have granted him an absolute discharge. The appellant appealed the majority decision on the grounds that the Review Board had failed to interpret the section as requiring the Crown and the Hospital to prove beyond a reasonable doubt that the patient is a significant threat to public safety. Further, the appellant argued that s. 7 of the *Charter of Rights and Freedoms* mandated that s. 672.54 be interpreted to place the onus on the Crown and the Hospital to prove beyond a reasonable doubt that the patient is a significant threat. The appellant argued that an appropriate burden and standard of proof are part of the "principles of fundamental fairness" required by s. 7.

Held: Appeal dismissed. The Court of Appeal ruled that the presumption of innocence and the consequential burden of proof on the Crown to prove disputed facts beyond a reasonable doubt had no application to the Review Board process since the process did not involve a determination of guilt. Further, the Court of Appeal rejected the assumption that the proceedings before the Board are adversarial, but left open the possibility that the hearings could be party and party in character.

On the constitutional issue, the Court of Appeal rules that not all aspects of criminal justice require proof beyond a reasonable doubt. The court rules that the language of s. 672.54 and the absence of a clear burden and standard of proof on the Crown is proportional to the legislative objective. The court adopted the reasons of Madam Justice McLachlin in *R. v. M (S.H.M.)* (1989), 50 C.C.C. (3d) (S.C.C.) at pp. 546-547 that in these circumstances the concepts of civil or criminal standards of proof are not helpful.

103. Chambers v British Columbia (Attorney General), (1997) 116 CCC (3d) 1406 (B.C.C.A.).

This was an appeal from a custody order for a patient held due to mental disorder The appellant, Chambers, was arrested for assault and fraudulently obtaining food. She was found to be not criminally responsible for her actions because she suffered from a mental disorder. She was hospitalized for the protection of herself and society. Upon her release from the hospital, Chambers abused alcohol and drugs. She engaged in prostitution. She was returned to custody because of these breaches of her release order conditions. Chambers was permitted to leave the hospital on conditions. She left without permission and remained in detention. A review board continued the custody order against her. The board found that Chambers needed ongoing residential care. It found that Chambers' sexual habits, HIV and substance abuse posed a threat to the community. Chambers argued on appeal that the review board's decision was unreasonable and was not supported by the evidence.

HELD: The appeal was granted. The review board's decision to continue the custody order was based on Chambers' HIV. Her continued detention was warranted only with evidence of a significant threat of criminal conduct .It was not a crime for Chambers to engage in prostitution or to have HIV. Her mental condition had stabilized. There was no evidence that she posed a significant threat within the context of criminal behaviour. The decision of the review board was unreasonable.

104. Hutchinson v British Columbia (Attorney General) (1998) 130 CCC (3d) 367 (B.C.C.A.).

This was an appeal from a decision of a Review Board. The appellant was a dual status offender in that he was found not guilty by reason of a mental disorder of an offence in April 1993, and on the same date was sentenced to five and a half years of imprisonment on other offences. In June, 1993, a Review Board ordered that the appellant should be detained in custody at the institution now known as the Matsqui Regional Health Centre. Various reviews of this disposition were held up to and including July, 1996.. On November 28, 1996, a Review Board decided that the appellant should remain at the Matsqui Regional

Health Centre pending a placement hearing to be held in January, 1997. On January 23, 1997, a Review Board decided that effective January 29, 1997, the appellant ought to be transferred to serve his sentences on the crimes for which he stood convicted at an appropriate institution. The Review Board concluded that he should continue to have a custodial status which would be in abeyance while he was in prison serving his sentence. On January 28, 1998, after another hearing, the Review Board ordered his continued detention. The appellant argued that the Review Board lost jurisdiction over him because of its alleged failure to comply with section 672.81(1) of the Criminal Code, requiring it to hold a review hearing every 12 months.

HELD: The appeal was dismissed. From after his sentencing in April,1993 until January, 1997, the appellant was under the control and direction of the Review Board, and it was obliged during that time to hold yearly reviews to decide on an appropriate disposition. But, as a result of the placement decision made in January, 1997, the appellant passed from the immediate direction and custody of the Review Board to the custody of the authorities at the relevant federal prison. Although the Review Board continued to have access to the appellant, and was entitled to be notified of any proposed change in his custodial status, the Review Board had no particular active role to play in the appellant's ongoing custody. It would have been only an academic exercise for the Review Board to continue to hold annual disposition hearings concerning this appellant. When a dual status offender came to be incarcerated for the offences on which he had been found guilty, the Review Board ceased to have prime responsibility for his custody. The Review Board's disposition functions were, at that time, held in abeyance. There was no error committed by the Review Board and it could not be successfully argued that there had been any loss of jurisdiction over the appellant by the Review Board.

105. Jones v British Columbia (Attorney General) [1997] 99 B.C.A.C. 310 (B.C.C.A.).

This was an appeal from a custodial disposition of the British Columbia Board of Review. The 22-year-old appellant was detained at a forensic psychiatric institution since December, 1994 when he was admitted for an assessment as to his trial fitness and mental disorder. The psychiatrist who admitted the appellant found that he was not criminally responsible because of his mental disorder and the appellant continued in detention. The matter was deferred to the Review Board which granted a conditional discharge on the condition that the appellant reside at the institution. The Review Board directed that the disposition be reviewed in six months or by August 4, 1995 A review conducted on August 18, 1995 found that the appellant suffered from a substance abuse disorder and allowed the appellant to reside in a psychiatric boarding home but no transfer occurred. A third review found that he suffered from no major mental disorder and no psychosis. The custodial disposition included access to the community with delegated authority to the director A fourth review granted a conditional discharge provided he resided where placed by the Director and reported to an outpatient clinic. When he was released into the community he was arrested and convicted of theft. A deportation order was not carried out. A fifth review resulted in a custodial order with delegated authority to the Director to increase access to the community. The Review Board relied on a medical report which diagnosed the appellant with psychoactive substance abuse disorder, antisocial personality disorder and borderline intellectual functioning and found that he was at high risk of re-offending if left unsupervised. At issue was whether the Review Board lost jurisdiction over the appellant when it failed to review the original disposition order within the time period prescribed in that order of August 4 and whether the Board erred in law by finding that the appellant should not be discharged as he posed a significant threat to public safety given his antisocial behaviour and substance abuse rather than his mental condition.

HELD: The appeal was dismissed. The Review Board's failure to comply with its own procedural requirements did not result in a loss of jurisdiction It was not shown that the Review Board had failed to

comply with the mandatory legal requirement to hold a hearing within a year so to result in a loss of jurisdiction. The original order remained in force until the Review Board held the hearing on August 18, 1995. The Review Board had not erred in declining to declare that the appellant was not a significant threat to the safety of the public taking into consideration his mental condition. An absolute discharge as sought by the appellant was not justified in the circumstances. The term "mental condition under section 672.54 was a broad phrase and pertained to the overall mental state of the accused.

106. Bese v British Columbia (Attorney General) [1999] 2 S.C.R. 722

This was an appeal by Bese from a finding by the Court of Appeal that Part XX.1 of the Criminal Code did not violate the Canadian Charter of Rights and Freedoms. Bese had a psychiatric history. He was charged with breaking and entering with intent to commit an indictable offence but was found not criminally responsible. Under section 672.54 of the Criminal Code, a court or Review Board could discharge such accused absolutely, discharge them subject to conditions, or detain them in custody in a hospital. The court granted Bese a conditional discharge. He sought an absolute discharge on review but the Review Board denied his request. He appealed to the Court of Appeal and argued before a different panel of the Court of Appeal that the section violated the Charter. In the Supreme Court of Canada, he submitted that section 672.54 violated his liberty rights under section 7 of the Charter and his equality rights under section 15(1).

HELD: Appeal dismissed. For the reasons given in a case released on the same date, section 672.54 did not violate s. 7 or 15(1) of the Charter. The section was carefully crafted to protect the liberty of accused persons found to be not criminally responsible to the maximum extent compatible with the person's current situation and the need to protect public safety.

107. Winko v British Columbia (Attorney General) [1999] 2 S.C.R 625

This was an appeal by Winko from a decision by the Court of Appeal that section 672.54 of the Criminal Code did not violate sections 7 and 15(1) of the Canadian Charter of Rights and Freedoms. Winko had a long history of mental illness. In 1983, he attacked stabbed a person with a knife. He was charged and taken to the Forensic Psychiatric Institute. In 1995, the Review Board considered Winko's status. It granted him a conditional discharge. He appealed and then sought to challenge the validity of section 672.54 of the Criminal Code. The section was in Part XX.1 of the Code, which was enacted to deal with persons found not criminally responsible. Pursuant to section 672.54, a court or Review Board was to, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, either order that the accused be kept in a secure institution, be released on conditions, or be unconditionally discharged, whichever was the least onerous and restrictive to the accused.

HELD: Appeal dismissed. In drafting Part XX.1 of the Code, Parliament intended to set up an assessment-treatment system that would identify not criminally responsible accused who posed a significant threat to public safety and treat those accused appropriately while impinging their liberty as minimally as possible. The scheme fulfilled these goals in a manner that did not infringe Winko's rights under the Charter. Section 672.54 did not violate section 7. The phrase significant threat to the safety of the public was not unconstitutionally vague as it did not so lack precision that it did not give sufficient guidance for legal debate. As well, the section did not improperly shift the burden to the accused to prove that he or she would not pose a significant threat to public safety and did not create the presumption that those found not criminally responsible posed a significant threat to public safety. The scheme of the legislation was not overbroad. It ensured that the accused's liberty would be trammelled no more than was necessary to protect public safety. The section did not infringe section 15(1) of the Charter If the scheme

led to differential treatment on the basis of mental illness, it could not be found that the differential treatment was discriminatory as the differential treatment did not reflect the application of presumed group or personal characteristics or perpetuate or promote the view that individuals falling under the provisions of Part XX.1 of the Code were less capable or less worthy of respect and recognition. Section 672.54 served to ensure that each accused was treated appropriately, having regard to his or her particular situation and in a way that was minimally onerous and restrictive.

108. Patients Property Act Ronald Levy,(February 1, 2000) S.C.B.C.,.

Ronald Levy applies to set aside an ex parte order. The question is one of the affect to be givento medical evidence that has been subsequently obtained and is now adduced. Mr. Levi is a 62-year-old man who is suffering from diabetes and osteomyelitis of this left foot. He is a patient at St. Paul's Hospital. His treating physician, Dr. Alastair Younger, an orthodaedic surgeon, says that the osteomyelitis cannot now be treated with antibiotics and that Mr. Levi will eventually die unless his foot is amputated. Dr. Younger says that, to the effect of the operation to remove the foot, must be performed now. Time is of the essence. Mr. Levi will not consent to the surgery and he has no known family or close friends to support him. He suffers psychiatric abnormalities which have not been diagnosed. Dr. Younger is of the opinion that Mr. Levi does not understand that he will die unless his foot is removed. He referred him to a psychiatrist, Dr. Robert Kitchen, who is of the opinion that Mr. Levi does not appreciate the severity of this condition and that his mental disorder renders him incapable of managing his personal affairs and, in particular, giving an informed consent to the treatment. On the strength of this evidence, the hospital made application and the order was made. It was, however, a term of the order that counsel appearing as amicua curiae, who has experience in these matters, be permitted to consult with Mr. Levi and that he had leave to apply to have the order set aside. Since then two more physicians have examined him. They differ in their opinions as to his capacity to give or withhold informed consent. Mr. Levi applies to set the order aside and both the hospital and the public trustee now take no position.

Held: The question is not whether the amputation should be performed, but rather whether the evidence establishes that Mr. Levi is not capable of making the decision for himself such that the public trustee should make it for him. Where four days ago the position appeared clear, we are now faced with differing medical opinions and no sound justification for preferring one over the other. It is not simply a matter of the number of opinions on one side or the other, or of the experience on which the opinions are offered. The evidence establishes only that there is a difference of medical opinion held by independent practitioners as to whether Mr. Levi is capable of making the decision with which he is confronted. If he clearly does not understand the realities of his situation the public trustee must make the decision for him. But if he understands, but simply will not accept the advice that has been given to him, the decision belongs to him. He must not be deprived of his right to make a choice he is capable of making, however foolish or wrong his choice may appear. The choice of whether to undergo the surgery is his unless it is clear it is a choice he is not capable of making. The difficulty is that the evidence that has been adduced is now in conflict and the conflict is not one that can be summarily resolved. The order should be set aside.

H. WORKERS' COMPENSATION

109. Napoli v. WCB (1982), 126 D.L.R. (3d) 179 (B.C.C.A.).

The rules of natural justice apply to hearings before boards of review and the commissioners of the Workers' Compensation Board sitting on appeal from a decision of a board of review. The rules require full disclosure of the contents of the claimant's file, rather than summaries of its contents, in order that the claimant can effectively answer the case against him. This case was one of the most important in the development of workers' compensation law in British Columbia. Prior to the Court's decision, claimants appealing decisions, and their representatives, often did so "blind" without knowing the evidence that would be considered by the Board. Since that time, the entire claim file has been available to a worker whenever there is a decision which could be or has been appealed.

110. Evans v. WCB (1982), 138 D.L.R. (3d) 346 (B.C.C.A.).

Section 6(3) of the *Workers' Compensation Act*, R.S.B.C. 1979, c. 437, provides that if a worker, at or immediately before disablement from an industrial disease, was employed in a process or industry mentioned in Sch. B and the disease contracted is set out opposite the description of the process in the Schedule, the disease shall be deemed to have been due to the nature of the employment, unless the contrary is proved. In applying that section, the commissioners of the Workers' Compensation Board err in requiring at least a reasonable period of continuous and fairly full exposure. The extent of the exposure is to be weighed only after the tests in s. 6(3) have been applied and then with the strong presumption that the disease is due to the nature of the employment unless the contrary is proved.

When the board errs in such a manner, it is proper for a Court on judicial review to intervene and set aside the decision despite the privative clause in s. 96(1) of the Act, which provides that the board has exclusive jurisdiction to determine "all matters and questions of fact and law arising under this Part". The error is not one at the heart of the board's specialized jurisdiction and no expertise in the field would influence the decision, nor can the decision be rationally supported on a construction which the legislation may reasonably be considered to bear. An interpretation that cannot be rationally supported and that destroys the purpose of a provision is such a serious error that intervention may be warranted.

111. Hanney v. WCB, [1984] B.C.D. Civ. 4252-02 (B.C.C.A.).

Decision: Appeal dismissed.

Facts: This case concerned a decision of the Commissioners denying a worker's appeal concerning her back condition. In the Supreme Court, it was argued that the Commissioners' decision was based upon an error of law and should therefore be set aside, because the Commissioners had dealt with the wrong question. Instead of merely determining whether the worker suffered a disability arising out of and in the course of her employment, the Commissioners examined the medical evidence to find the exact cause of her back pain. When they concluded that they could not answer that question, they then concluded that the claim had not been established. Both the Supreme Court and the Court of Appeal rejected this interpretation of the Commissioners' decision, finding instead that they simply were not satisfied that there was enough evidence to prove that the worker's disability arose out of her work.

112. Uszkalo v. WCB, (Unreported, May 6, 1984) (B.C.S.C.).

This was an application for an interim order under the *Judicial Review Procedure Act* that a Medical Review Panel be restrained from giving a medical examination to the Petitioner. The grounds were that the Medical Review Panel lacked jurisdiction. The application was refused.

113. Stewart v. WCB, [1983] B.C.J. No. 472 (B.C.S.C.).

Decision: Petition dismissed.

Facts: This case concerned whether an employee on a "dairy farm" was covered by Workers' Compensation, which does include "dairy" undertakings. The worker argued that "dairy" should be interpreted broadly to include a dairy farm. The Court did not agree that this was a reasonable interpretation of "dairy", and moreover, found that the Board's decision was protected by the privative clause, s. 96. Since the decision was not patently unreasonable, the Court could not set it aside, and the worker's judicial review was removed.

114. Michaud v. WCB, [1987] B.C.J. No. 2213 (B.C.S.C.).

Reasons: In the circumstances the Board did not exceed its jurisdiction in extending the time to appeal under s. 91(1) of the *Act*. "The section gives the Board the express power to do what it did. It will be reviewable if the evidence demonstrated that there was some classic ground, such as fraud or bias or total unreasonableness, or other such matters. There is no such evidence here. The mere fact that an extension of time is given under section with this wording does not of itself show lack of jurisdiction."Under s. 91(1) of the *Workers' Compensation Act* the Board has been given an express discretionary power to enlarge the time for appeal. In addition, the process of determining compensation is a continuous and ongoing process: "assessments on employers may be raised or lowered, entitlement to compensation once decided can be varied or reviewed for any proper reason, and the Board is expressly empowered to reconsider any matter under the *Act* in s. 96(2)."

Decision: Appeal dismissed.

Facts: Twenty months after the Workers' Compensation Board of Review allowed an appeal by the Petitioner and increased his disability award, the Commissioners granted the respondent employer's application for an extension of time to appeal. Petitioner sought judicial review to prevent the appeal from proceeding.

I. HUMAN RIGHTS

115. Cook *v.* B.C. Human Rights Council (1988), 26 B.C.L.R. (2d) 52 (B.C.S.C.).

The petitioner was hired by the respondent E. Co. in 1968 and had been a commissioned salesperson since 1973. In 1984 she was transferred to E. Co.'s appliance department, where she was the only female salesperson. From 1985 her right to sell big ticket items was restricted or rescinded by her superiors, depriving her of the chance to earn the larger commissions that were paid on such sales. She was the only salesperson so restricted. She also applied for a vacant sales position, which was eventually given to a man who had four months' experience with the company. She launched a complaint of sex discrimination against E. Co. in May 1986. The respondent contended it had treated the petitioner differently because of her declining sales performance and because she had trouble getting along with other employees. Its denial of having restricted the scope of her activity was directly contradicted by a memorandum of June 1985 which purported to impose such a restriction. In October 1986 the respondent council ordered, pursuant to s. 14 of the *Human Rights Act*, that the proceedings be discontinued. In a letter to the petitioner the council stated that there was no evidence that sex was a factor in her having been passed over for the vacant position. It also stated there was "insufficient evidence to establish" that the way she had been treated was related to sex, as opposed to business criteria. She applied for judicial review.

Held: Application allowed.

It is not necessary for the council to state explicitly that it has considered all the options available under s. 14 before deciding to discontinue the proceedings. In so deciding, however, it must adhere to an appropriate standard, which, in view of the scheme and objects of the Act, is whether there was any evidence upon which a board of inquiry under s. 16 or a designated council member under s. 14(1)(d) could reasonably have found the complaint to be proved on a balance of probabilities. In this case the council had not applied that test but had weighed the evidence. Furthermore there clearly was evidence upon which a proper tribunal, acting reasonably, could find the complaint established on a balance of probabilities.

Comment: This case had profound importance across Canada. Many provinces have similar legislation. From now on, Human Rights complaints cannot be pre-screened, but instead must go to a full hearing.

116. McIntyre v. B.C. Council, (Unreported, 1985) (B.C.S.C.).

Decision: Application for Judicial Review granted.

Facts: The Petitioner filed a complaint under the *Human Rights Act*. The Human Rights Council refused to send it to an inquiry and summarily dismissed the complaint.

Reasons: The Council did not give the complainant an opportunity to rebut the case against him and did not arbitrarily investigate the case.

117. Berg v. UBC School of Family and Nutritional Sciences, [1993] 2 S.C.R. 353 (S.C.C.)

In 1979, Janice Berg was accepted in the Master's program of the University of British Columbia School of Family and Nutritional Sciences. As a student, she consistently performed above average. Although she

experienced a recurrence of depression in 1981, she continued to attend classes and was capable of responding to the same demands and expectations as other students. During that period, on a particularly stressful day, Ms. Berg wrote "I am dead" on the mirror in the School's washroom and, later the same day, when frightened upon seeing R.C.M.P. and security personnel in the hall, she attempted to jump through a plate glass window. When the School moved to new premises in 1982, Ms. Berg was denied a key to the building although other graduate students were provided with one. The School's Director was later assured by a physician that there was no risk and issued Ms. Berg a key. In 1983, a faculty member refused to complete Ms. Berg's rating sheet required for an application for a hospital internship on the basis of her observation of Ms. Berg's behaviour and problems. The faculty member later testified that she was not obliged to fill out the sheet and that she had refused to do so on a number of occasions every year. This testimony was contradicted by that of the Director of the School. Following a complaint by Ms. Berg, the member-designate of the British Columbia Council of Human Rights found that the School had contravened s. 3 of the *Human Rights Act* by denying Ms. Berg the key and rating sheet because of her mental disability. The British Columbia Supreme Court set aside the decision, holding that the provision of a key or a rating sheet did not constitute services "customarily available to the public" within the meaning of the *Human Rights Act*, and that the member-designate therefore had no authority to determine the complaint. The Court of Appeal affirmed the judgment. In the Supreme Court of Canada, the School conceded that the key and rating sheet were "services" within the meaning of the *Act*. The real issue in these appeals is whether such services are, on the correct interpretation of s. 3 and the evidence, "customarily available to the public".

The Supreme Court of Canada held in an 8 to 1 decision in favour of Ms. Berg that the word "public" in s. 3 of the *Act* cannot be required to include every member of a community. The distinction found in previous Court decisions between discrimination at the threshold of admission to a facility and discrimination once admission to the facility has been obtained is artificial and unacceptable. Such a distinction would allow institutions to frustrate the purpose of the legislation by admitting people without discrimination, and then denying them access to the accommodations, services and facilities they require to make their admission meaningful. This distinction leads to results the legislature cannot have intended. A liberal and purposive interpretation of s. 3 would define "public" in relational terms, not in terms of quantity. Every service has its own public, and once that "public" has been defined through the use of eligibility criteria, the *Act* prohibits discrimination within that public. Eligibility criteria, as long as they are non-discriminatory, are a necessary part of most services, in that they ensure that the service reaches only its intended beneficiaries. All of the activities of an accommodation, service or facility provider, however, are not necessarily subject to scrutiny under the *Act*. In determining which activities of an institution are covered by the *Act*, one must take a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility. Some services or facilities will create public relationships between the institution and the users, while others may establish only private relationships. Under the relational approach, the "public" may turn out to contain a very large or very small number of people.

In the circumstances of this case, the member-designate was correct in assuming jurisdiction and examining the reasons for the denial of the rating sheet and key. Ms. Berg, by virtue of having passed through a selective admissions process, did not cease to be a member of the "public" to which the School provided its educational services and facilities. The key and rating sheet were incidents of this public relationship between the School and its students. They were also, as a matter of law and fact, "customarily available" to the School's public. The member-designate clearly found that keys and rating sheets were customarily provided to other graduate students in Ms. Berg's situation. Neither the existence of a discretion, when it is habitually exercised in a certain way, nor the element of personal evaluation attached to these services, necessarily excludes the *Act*, both on principle, and because of the member-designate's factual finding.

Comment: This case is one of the most significant human rights cases in the last 10 years. It opens up a whole host of services to the scrutiny of the *Human Rights Act*.

118. Bendrodt, et al. v. B.C. Transit (B.C. Council of Human Rights), [1992] B.C.C.H.R.D. No. 19

Members Designate: Douglas Wilson, Barbara Humphreys
Hearing: 11 days; Vancouver and Victoria; June-September 1990
Decision: August 13, 1992

Three-wheeled, motorized scooters are the mobility aid of choice for some persons with disabilities because of the scooter's manoeuvrability, compactness, and portability. Scooters require a minimum of strength and stamina to operate, and have many features that enable the user to transfer out of it independently. Furthermore, as testified by the Complainants and substantiated by an expert medical witness, the lack of stigma associated with the scooter has a very positive effect on rehabilitation. Without the scooter, one Complainant testified, "I can't call this living".

B.C. Transit discriminated against certain "HandyDART" users by requiring them to transfer from their motorized scooters to wheelchairs or bench seats while in transit and to sign waivers disclaiming any liability on the part of the Respondent.

Eighteen Complainants charged that both policies were discriminatory against scooter users because of their physical disabilities. Many of them do not possess the strength or stamina to transfer from the scooter to the bench seats in the van without assistance, which can be embarrassing and humiliating for them (the two Complainants who testified both have fallen during transfer). The alternatives were either to use standard wheelchairs or not to use the HandyDART van - which, for many, means to stay at home. They were willing to accept the risk to their safety.
The Respondent argued that its policy prohibiting passengers from remaining seated on their scooters while in transit was based not on the physical disabilities of the Complainants but on the mobility aid itself and, therefore, was not within the jurisdiction of the Council.

Humphreys determined that the Respondent's policy, which caused the Complainants to reduce their use of the HandyDART service, imposed conditions and obligations not imposed on other members of the public served by the Respondent. The interim policy requiring a waiver of liability was also discriminatory because it, too, adversely affected the Complainants.

According to well-established human rights law, this placed the onus on the Respondent to demonstrate that it attempted to accommodate the physical disabilities of the Complainants up to the point of undue hardship.

Humphreys applauded the Respondent for its conscientious involvement in developing standards for mobility aids, but dismissed the basis for its arguments as being either unsubstantiated opinion, hearsay, or insufficient evidence that the risk to persons other than the users themselves is any greater due to the use of scooters rather than any other mobility aid. Humphreys stated that she believed the Respondent was unaware of the medical and psychological benefits the scooter provided its users when it implemented its policy. Its position that the Complainants should be using wheelchairs if they were too disabled to transfer amounted to "an affront to their dignity," she stated. Use of the scooters enable the Complainants to achieve the greatest degree of both physical and psychological independence of which they are capable.

The evidence presented by the Respondent clearly indicated that current scientific data on all mobility aids

was insufficient to ensure that all users of the public transportation system are enjoying the same level of safety. Meanwhile, scooter users are willing to assume the risk. This risk has to be balanced against the burden caused to them by not allowing them to take the risk, she ruled. Without the Respondent's service, the complainants had no means of public transpiration. Without transportation, they had no way of participating in the life of their community. This lack of participation was found to be a loss not only to the Complainants but also to the larger community which was denied the benefit of their contribution.

119. Onischak v. BC (Council of Human Rights)(1989), 10 C.H.R.R. D/6290 (B.C.S.C.).

This is an application to set aside an order of the B.C. Human Rights Council discontinuing proceedings on Gerry Onischak's complaint that he was discriminated against by the Ministry of the Attorney General with respect to employment because of a physical disability.

Mr. Onischak complained previously under the B.C. *Human Rights Act* that he was refused consideration for a job as a probation officer because he is visually impaired and does not have a driver's licence. The hearing on this complaint has not yet been held. However, the requirement for a driver's licence for the position was removed in July 1986 and in August 1986 Mr. Onischak was invited to apply for the next available position.

Mr. Onischak applied for the position but was rejected. He filed another complaint. After preliminary investigation, the Council decided to discontinue the investigation. Mr. Onischak argues that the Court should set aside this decision of the Council on the grounds that the rejection of his application was due to his visual impairment and there was evidence on which a board of inquiry or a designated member of the Council could base a finding of discrimination on a balance of probabilities.

The Court rejects Mr. Onischak's arguments. If finds that the Council made a reasonable decision that there was no issue of discrimination involved in Mr. Onischak's rejection. It is not the Court's role to intervene in decisions made by the Council unless they are patently unreasonable. In this case the Court finds that the evidence uncovered by the investigation was insufficient to raise the inference of discrimination based on disability. In these circumstances, it was reasonable to discontinue the investigation of the complaint.

The application is dismissed.

120. Onischak v. British Columbia, (October, 1991) 13 C.H.R.R. D/87

The B.C. Human Rights Council rules that the Province of British Columbia discriminated against Gerry Onischak because he is visually impaired.

Mr. Onischak is legally blind. He has a Bachelor of Social Work degree and he applied for a Probation Officer/Court Counsellor position in a competition run by the B.C. Ministry of the Attorney General.

Mr. Onischak's application was screened out of the competition at the outset because he does not have a valid driver's licence.

The Ministry of the Attorney General conceded that the requirement had a discriminatory impact on blind people and that a driver's licence was not a bona fide occupational qualification for all the positions being filled through the competition. However, the Ministry of the Attorney General argued that no

compensation should be awarded in this case because Mr. Onischak had some bad references and would never have been hired in any case.

The Council rejects this argument in part and accepts it in part. It orders the Ministry of the Attorney General to pay Mr. Onischak $2,000 as some compensation for the hurt and humiliation he experienced because of being screened out solely because of his blindness. However, it declines to make an order compensating Mr. Onischak for lost wages because it finds that he would not have been hired in any case.

121. Kelly v. British Columbia, (1990) 12 C.H.R.R. D/216

The B.C. Council of Human Rights finds that Joanne Kelly was discriminated against by the B.C. Motor Vehicle Branch because of her physical disability.

Ms. Kelly uses a wheelchair because of a disability which affects her legs. In 1984, she obtained an Alberta Driver's license. In 1988, she moved to British Columbia and went to the Point Grey office of the Motor Vehicle Branch to replace her Alberta license with a B.C. license.

Because of her apparent physical disability, Ms. Kelly was required to take a road test and have a medical examination before she could obtain a B.C. license. Had she been a non-disabled person presenting a valid Alberta driver's license, she would have been required only to pass a written test and an eye test before a B.C. license would be issued.

The Council finds that the automatic requirement that Ms. Kelly pass additional tests in order to obtain her B.C. license constitutes discrimination because of her disability.

The Council orders the Motor Vehicle Branch to pay Ms. Kelly $40 in compensation for expenses she incurred because of the additional tests, as well as $1,500 as some compensation for the humiliation she suffered. The Council also orders the Motor Vehicle Branch to refrain from committing the same or a similar contravention.

122. Zutter v. British Columbia (Council of Human Rights) (1993), 82 B.C.L.R. (2d) 240 (B.C.C.A.).

The petitioner filed a complaint against his employer with the respondent Council of Human Rights. The respondent sent a summary of its investigation to the petitioner and his lawyer for review and comment by a certain date. The lawyer sent a letter setting out the petitioner's disagreement with some of the facts contained in the summary, but the letter was not received by the respondent. After the time for comment expired, the respondent reviewed the matter and decided that the complaint should be discontinued. When informed, the petitioner asked the respondent to reconsider and to receive further information. The respondent took the position that it was functus officio and had no power to reconsider. The petitioner applied for judicial review.

Held: Application allowed. The Supreme Court of Canada has pointed out that the doctrine of functus officio in the context of administrative tribunals must be "more flexible and less formalistic" than in the courts. Although no specific section of the *Human Rights Act* grants such jurisdiction, the beneficial nature of the legislation as a whole, the absence of a right of appeal, and the respondent's broad investigative powers together imply a power to reinvestigate and reconsider a decision previously made where evidence not previously known to the respondent exists. Here, the respondent failed to exercise its discretionary power to reconsider because it misapprehended its own enabling legislation, thus committing a

jurisdictional error. The appropriate remedy would be to remit the matter to the respondent to reconsider its decision in light of the court's direction that the respondent has an equitable jurisdiction to reconsider matters on learning of new evidence.

123. Tharp v. Lornex Mining Corporation Ltd. (Unreported, September 25, 1975) (*Human Rights Code*)

This proceeding arose out of a complaint filed by Jean Tharp alleging that Lornex Mining Corporation Ltd. discriminated against her by providing camp housing accommodation for men but not for women. The Council ordered that Jean Tharp be compensated for expenses incurred in obtaining housing for herself other than in the camp in the amount of $263.50. The Council further ordered that the general sum of $250 for damages be awarded and that Lornex Mining Corporation Ltd. refrain from committing the same or a similar contravention.

124. Justice Institute of B.C. v. Furland [1999] B.C.J. No. 1571 (B.C.S.C.).

Application by Justice Institute for judicial review of the Police Commission's decision to set aside the Police Academy's decision to remove Furlan from a training program. The Police Academy, a division of Justice Institute, contracted with the Province to provide classroom segments of police training for municipal police departments. In November 1996, Furlan was hired as a municipal police officer. He failed three assessments and was suspended in January 1997 by the Academy and referred back to his department. He resigned his employment on January 9, 1997. He applied to the Police Commission for a review of the Academy's decision to suspend his academic training. The Police Commission found that he suffered from a learning disability that affected his ability to meet the standards of the Police Academy. It noted that he had not identified himself to instructors as having a learning disability nor had he requested that he be accommodated. Furlan was not specifically aware of his learning disability until after he had been suspended and sought accommodation through his appeal. The Police Commission concluded that Furlan had a learning disability, and it directed the Police Academy to determine how to accommodate him. Justice Institute argued that the Police Commission was without jurisdiction to make its decision, and that it erred in applying principles of human rights law.

HELD: Application dismissed. The Police Commission did not exceed its jurisdiction. The right of appeal was not restricted by a trainee's employment status The Police Commission was performing its appeal function, and it did not misapply the law under the Human Rights Code. It had the right to determine the appeal on its merits and to consider further evidence. Its decision to overturn the Police Academy's decision was not patently unreasonable. The Police Academy received reasonable notice of the issue of disability and the possible duty to accommodate. The proceedings were fair and impartial.

Miele v. British Columbia (Council of Human Rights) [1996] B.C.J. No. 1810 (B.C.S.C.).

This was an application for judicial review of a dismissal of a human rights complaint. The applicant, Miele, was confined to a wheelchair. He sought admission to a theatre. The wheelchair accessible entrance to the theatre was locked. In order to gain admission, he had to purchase a ticket at one location and return to the locked entrance for admission. He alleged that the theatre discriminated against him on the basis of physical disability. The theatre apologized for Miele's inconvenience and took measures to avoid further problems. The Human Rights Council dismissed Miele's complaint on the basis that the theatre took sufficient remedial steps to rectify the discrimination. The council did not conduct a hearing to determine whether the remedial measures were sufficient.

HELD: The application was allowed. The dismissal of Miele's complaint was quashed and the matter was referred back to the council for redetermination. The council made a final determination of a justified complaint. It was obligated to appoint a panel to receive representations on the sufficiency of the remedial measures adopted by the theatre.

125. Gail Neufeld v. Ministry of Social Services, [1999] C.H.R.R. D/48 (Tri).

This is a complaint that the $100 limit on the "maintenance exemption" in British Columbia's income assistance scheme discriminates on the basis of sex and family status. The Tribunal finds that the complainant, Gail Neufeld, did not establish a prima facie case of discrimination and the complaint is dismissed.

Section 14(1) of Schedule B of the GAIN Regulations, commonly described as the "maintenance exemption", provides that up to $100 per month of monthly maintenance received from a former spouse will be considered exempt income for recipients of income assistance. If the income assistance recipient does not have dependents, the maximum is $50. If the recipient has one or more dependents the maximum limit is still $100. If the former spouse does not actually pay maintenance in a month, regardless of whether or not he or she is legally obliged to, the exemption is not available.

On behalf of the complainant it was argued that the maintenance exemption discriminates: (1) on the basis of sex because most of the recipients of maintenance are women, and the maintenance exemption has not been increased since its introduction in 1976, whereas other exemptions, such as the earnings exemption have been increased over the period; and (2) on basis of family status because the amount of the exemption does not vary with family size, with the result that the value of benefit is diluted for large families.

Counsel for the complainant presented evidence regarding the legislative scheme and statistics regarding the composition of the group in receipt of income assistance, which was not disputed. It was accepted by all that income assistance benefits constitute a service that is customarily available to the public.

However, the Tribunal finds that the complainant failed to establish a prima facie case of sex discrimination. Although the evidence established that the vast majority of single parent families are headed by women, and supported an argument that the amount of income assistance is generally inadequate, the complainant failed to show that the failure to increase the amount of the maintenance exemption has an adverse impact on the complainant that is related to her sex. No evidence was presented to establish a distinction based on sex between the group claiming the maintenance exemption and the group claiming the earnings exemption. Counsel for the complainant argued that adverse effect discrimination is not a comparative issue. This is rejected by the Tribunal as a fundamental misconstruction of the meaning of adverse effect discrimination.

The claim of discrimination based on family status also fails. For the complainant it was argued that because the maintenance exemption is "child sensitive", that is, related to the children's needs, the exemption must take account of the number of children. The Tribunal finds that neither in purpose nor effect is the maintenance exemption "child sensitive". The Tribunal finds that the proper characterization of the present effect of the maintenance exemption is to entitle a single parent to an additional amount if maintenance payments are actually made. Any such amount would most likely be used for the benefit of the whole family. This does not make it "child sensitive" so as to require the exemption amount to vary with family size.

126. Cook v. T. Eaton Co. [1989] 10 C.H.R.R. D/6337

The B.C. Human Rights Council finds that Elaine Cook was discriminated against by the T. Eaton Company because of her sex. Ms. Cook alleged that she was discriminated against when she was denied the position of commissioned salesperson in the appliance and furniture departments of Eaton's Nootka store in March 1986. She also alleged that there is a systemic barrier to women being commissioned salespersons with the T. Eaton Company.

The Council finds that while Ms. Cook was employed in sales in the furniture department she was verbally harassed by salesmen and this affected her sales adversely. The Council also finds that, in general, women have not been employed in the furniture and appliance departments as commissioned salespersons and Ms. Cook's 1986 application for a commissioned sales position was not given full consideration.

Ms. Cook makes no claim for lost wages. The Council orders that Ms. Cook be awarded the first vacant position for a commissioned salesperson in the appliance department and that Eaton's pay her $2,000 in compensation for her loss of dignity and injury to self-esteem.

127. **Williams v. Elty Publications Ltd. [1992] 10 C.H.H.R. D/6337**

The B.C. Council of Human Rights finds that Heather Williams was not discriminated against because of a physical and mental disability when her employment as a typesetter was terminated by Elty Publications Ltd. in 1988.

Ms. Williams is a recovered alcoholic. She began working for Elty Publications as a typesetter in 1985. She was under stress because her partner was very ill and the relationship dissolved. She was in a doctor's care because of the emotional stress, depression and the risk that she would return to drinking. She informed her employer that she required some time off but after approximately three weeks of absence, her employment was terminated.

The B.C. Council of Human Rights finds that as recovered alcoholic Mr. Williams has a physical and mental disability within the meaning of the B.C. Human Rights Act. It accepts Ms. William's physician's report which indicates that chemical dependency is a disease and if a proper course of care is not followed there can be a relapse.

However, the Council also finds that Ms. Williams did not properly inform her employer of her disability, and therefore could not expect her employer to accommodate her disability-related requirement for time off in order to deal with the situational stress that she was experiencing. Ms. William's supervisor was aware that she was a recovered alcoholic. However, it was not made clear to her supervisor or her employer at the appropriate time that absence from work was required in order to ensure that Ms. Williams would not have a relapse.

The Council finds that it is not useful to formulate a general rule regarding the responsibility of an employee to bring details of their disability to an employer's attention, because every situation is different. In this circumstance, however, the Council finds that the complainant failed to inform her employer adequately and therefore could not expect accommodation.

128. **B.C. (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights) [1999] S.C.J. No. 73**

Appeal by the Grismer Estate from the Court of Appeal's decision allowing the appeal by the British Columbia Superintendent of Motor Vehicles from a decision dismissing an appeal from a decision by a Member of the British Columbia Human Rights Council allowing Grismer's discrimination complaint.

Grismer suffered from the condition homonymous hemianopia, which eliminated almost all of his left-side peripheral vision in both eyes. The Superintendent's standards required a minimum of a 120 degree field of vision. People with Grismer's condition always had less than a 120- degree field of vision. Thus Grismer's licence was cancelled. His subsequent attempts to pass the standard visual driving tests were successful, but he was denied a licence on the ground that he could not meet the standard. The Council of Human Rights Member ordered that the Superintendent assess Grismer and consider the possibility of restrictions on his licence if necessary. He awarded Grismer $500.

HELD: Appeal allowed and Member's decision restored. The distinction between direct and indirect discrimination had been eliminated. The new approach required the plaintiff to establish that the standard used was prima facie discriminatory. The onus then shifted to the defendant to prove that the standard bona fide and had a reasonable justification. Grismer established a prima facie case of discrimination under the Human Rights Act. The Superintendent failed to prove that the discriminatory standard had a bona fide and reasonable justification. While the goal of providing reasonable highway safety was legitimate, rationally connected to the function of issuing licences, and the standard was adopted in good faith, the standard was not reasonably necessary to accomplish the goal. The Superintendent did not show that persons with Grismer's condition could not achieve highway safety. He also failed to show that the risks or costs associated with individually assessing those with the condition constituted undue hardship. Thus, he was obliged to give Grismer an individual assessment of his driving ability.

129. McLoughlin v. Ministry of Environment (1999) 36 CHRR D/306

The BC Human Rights Tribunal rules that the Ministry of Environment, Lands and Parks failed to adequately accommodate a disabled hunter.

Richard McLoughlin hunts moose. He prefers to hunt in the Muskwa-Kechika, one of the most beautiful wilderness areas in British Columbia. Because he has a disability, Mr. McLoughlin hunts from an all-terrain vehicle (ATV). In general, his position is that he should be able to shoot from his vehicle, go hunting unaccompanied, and drive his ATV in areas where ATVs are generally prohibited.

McLoughlin was only partially successful in obtaining a waiver of restrictions. He was granted permission to shoot from his ATV, to hunt unaccompanied, and to drive his ATV in areas otherwise closed to ATVs if the reason for the closure was to reduce the number of hunters. However, if an area was closed to ATV traffic in order to conserve sensitive terrain or wildlife, Mr. McLoughlin was required to abide by the restriction. McLoughlin was not satisfied with this, and alleged that he was not accommodated to the point of undue hardship.

Held: The Tribunal finds that the Muskwa-Kechika Management Area (MKMA) is environmentally sensitive terrain. There are designated routes in the MKMA which are open year round as access routes. Driving ATVs off these designated routes can cause temporary as well as permanent damage.

There are four primary users of ATVs and similar vehicles in this area. Amoco Canada holds a permit authorizing it to operate motor vehicles off the designated routes for the purpose of constructing and operating an access road and a well site. There are many restrictions on Amoco's permit, and Amoco is required to carry out a full area reclamation when the well is no longer in use.

Trappers are occasionally granted permits to use ATVs off the designated routes in order to bring in supplies or repair traplines. These permits are very specific as to duration, time of year and precise location in which the ATV may be used.

Hunters may lawfully use ATVs on the designated routes. Conservation officers and other Ministry

officials may use ATVs to carry out enforcement and other work-related activities.

In summary, the regulatory scheme for the MKMA was set up to protect an environmentally sensitive area and to ensure that exempted uses have as little lasting effect on the terrain as possible, either through planned reclamation, or through ensuring that permits are very specific about the time and place of the ATV use. The practical effect has been to reduce the area available to ATV Drivers by some 5 - 10 percent. There are reasonable opportunities to hunt moose on the designated routes or outside the areas closed to ATVs..

130. **Blencoe v. British Columbia (Human Rights Commission) [2000] S.C.J. No. 43**

Appeal by the British Columbia Human Rights Commission from a decision of the Court of Appeal staying Commission proceedings involving human rights complaints against Blencoe. In March 1995 Blencoe was accused of sexual harassment by an assistant while serving as a minister in the B.C. Government. He was removed from Cabinet and dismissed from the NDP caucus. In July and August 1995 similar complaints were made to the Commission by two other women. Hearings were scheduled for March 1998. Blencoe commenced judicial review proceedings to stay the complaints based on loss of jurisdiction due to unreasonable delay causing serious prejudice. The B.C. Supreme Court dismissed the application but Blencoe's appeal was allowed by the Court of Appeal, the majority finding he had been deprived of his section 7 right under the Canadian Charter of Rights and Freedoms to security of person.

HELD: Appeal allowed. The Commission exercised statutory authority and was bound by the Charter. The harm to Blencoe resulted from the publicity of the allegations and the ensuing political fallout. This occurred prior to the commencement of the human rights proceedings. The proceedings did not cause or seriously exacerbate Blencoe's prejudice. Dignity, reputation and freedom from stigma were not free-standing constitutional rights protected by section 7. There was no constitutional right to be tried within a reasonable time outside a criminal context. Delay itself did not justify a stay. Blencoe failed to prove prejudice impacting on hearing fairness or amounting to abuse of process. The delay was not inordinate and did not offend the community's sense of decency and fairness.

J. MISCELLANEOUS

131. **McLellan v. I.C.B.C. (1981), 130 D.L.R. (3d) 349 (B.C.C.A.).**

The plaintiff started a class action as a result of a dispute with the defendant over payment of insurance premiums. The defendant successfully applied under R. 5(11) of the Supreme Court Rules to have the class action discontinued, although the chambers Judge allowed the plaintiff to continue the action personally. The plaintiff appealed the decision.

Held: Appeal dismissed.

The plaintiff had to show that there were numerous persons having the same interest, i.e. a common interest, or a common grievance arising from the same origin, and common entitlement to the relief claimed. Unless there was a wrong interpretation and improper enforcement of the section of the *Insurance Act* involved, there could be no class action claim. There was no allegation that the plaintiff's dispute had arisen in other cases, nor was there a claim against a fund which might prove a base for

common interest. The plaintiff failed to bring his case within the meaning of R. 5(11), and so could not support a class action.

132. Hague v. UBC (1988), 21 B.C.L.R. (2d) 145 (B.C.S.C.).

When the petitioner, a second year law student at the respondent university, was informed he had failed his year, he commenced two appeals, one to the senate appeals committee on academic standing, with regard to his procedural complaints, and the other seeking a review of assigned standing in two courses. Neither appeal was successful. He then applied to the senate to hear his substantive appeal, and the president of the university denied this request. The petitioner applied for a declaration that the respondents had erred in law in refusing to review his examination results.

Held: Application dismissed.

The senate, composed of approximately 100 people, could not itself remark the examinations. That task had to be delegated, which had in fact been done under the review of assigned standing, and the senate had accordingly exhausted its authority to delegate under s. 36(d) of the *University Act*. The senate did not fetter its discretion by limiting an appeal to two examination papers. That was a matter the senate had a right to determine through regulations.

133. Olsen v. Town of Smithers (1985), 60 B.C.L.R. 377 (B.C.C.A.).

Olsen obtained approval of her plan to build a porch with a setback of 20 % less than allowed by the zoning by-laws as a "minor variance" under s. 727 of the *Municipal Act* from the Board of Variance for the town in which she lived. The town obtained an order from a local Judge setting aside the decision of the Board on a petition under the *Judicial Review Procedure Act* and Olsen appealed that Order.

Held: Appeal allowed.

The County Courts have only that jurisdiction expressly given by statute. The *Judicial Review Procedure Act* does not contemplate proceedings in any Court other than in the Supreme Court and therefore the jurisdiction which the County Court may have in these circumstances is to be found in the *Supreme Court Act*, the basic source of jurisdiction of local Judges. The principle section conferring jurisdiction provides that a local Judge has jurisdiction "under all enactments except this *Act*" (s. 11(2)(c)). The exception of the *Supreme Court Act*, the only *Act* under which the judicial review power could be said to be exercised as being historically part of the inherent supervisory jurisdiction of the Supreme Court, indicates that a local Judge does not have the inherent jurisdiction of the Supreme Court respecting judicial review. Section 22(4), which lists the *Acts* over which a local Judge may exercise judicial review powers, emphasizes that a local Judge has no jurisdiction over the subject matter of judicial review proceedings. Respecting the merits of the appeal, it could not be said, having regard to all of the circumstances, that the variance requested by Olsen was not a minor variance.

134. Bell and Parkhill v. Consumers' Food Wholesale & Volken, [1987)] B.C.J. No. 2387 (B.C.S.C.).

Facts: CLAS represented the plaintiffs who entered into franchise agreements with the defendant food company after being given oral assurances by an employee of that company, the defendant Macey, and a principal of that company, the defendant Volken, that it was one of North America's largest companies and

that they could expect to make substantial earnings by simply using the approved and recommended sales techniques. The plaintiffs' franchises failed and the claim against the defendants was on the basis that they were fraudulently induced into entering into the franchise agreements; alternatively, that the defendants' statements were negligent misrepresentations which induced the plaintiffs into entering into the agreements. A disclaimer in the franchise agreements provided that the projections of sales volume and profits where mere estimates.

Held: Decision for the plaintiffs.

Reasons: In the circumstances it was obviously intended by the parties that the oral statements which were made by the defendants were intended to be part of the contractual relationship. Further, the parol evidence with respect to those representations and statements ought to be admitted and considered in determining the issues. See *Gallen v. Butterly* (1984), 53 B.C.L.R. 38. The statements made by the defendant Volken were fraudulent in that he was the operating mind behind the corporate defendant. He formulated the policy and the programs and he wrote the material which the plaintiffs relied on which included statements that were patently false. In addition, while the statements made by the defendant Macey were made at the instance of the corporate defendant and the defendant Volken, they were nevertheless negligently and recklessly made.

135. Walters v. Canada [1996] F.C.J. No. 176 (FCA)

The employee applied for judicial review of a decision of the Appeal Board. The employee became disabled in February 1992. It was determined that the last 10 years of her contributory period were from 1983 to 1992 inclusive and that she made valid contributions to the Plan during those 10 years in 1983, 1984, 1985 and 1986 only.

HELD: The application was dismissed. There was no error in the conclusion reached by the Board. The statutory prerequisites to eligibility for a pension under the CPP Plan were not met by the employee. She did not make sufficient contributions to the Plan during five of the last 10 years of her contributory period.

136. Rodriguez v. British Columbia (Attorney General),[1993] 3 S.C.R. 519

The petitioner, 42, was suffering from amyotrophic lateral sclerosis, an incurable, progressive disease affecting the nervous system, leading to extensive muscle wasting. Victims of the disease generally die within two to three years of first diagnosis, due to wasting of the muscles used in breathing. Prior to that time, victims experience difficultly with speech, chewing and swallowing. Feeding eventually must be done by stomach tube and the victim requires total care as most bodily functions are lost. Death generally results from starvation or choking. The petitioner wished to avoid the future stress and loss of dignity caused by the prospect of such a death an she proposed to have a physician install an intravenous line containing some effective agent which, at the appropriate time, the petitioner would be able to transfer into her body by activating a switch, ending her life. She applied for an order declaring invalid s. 241 of the *Criminal Code*, which makes aiding or abetting a suicide a criminal offence. She relied on ss. 7, 12 and 15(1) of the *Charter*. Her application was dismissed, as was her appeal. She appealed to the Supreme Court of Canada.

Held: Appeal dismissed.

Per Sopinka J. (La Forest, Gonthier, Iacobucci and Major JJ. concurring): There is no question that person

autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these. The prohibition in s. 241(b) of the *Code*, which is a sufficient interaction with the justice system to engage the provisions of s. 7 of the *Charter*, deprived the petitioner of autonomy over her person and caused her physical pain and psychological stress in a manner impinging on the security of her person. Any resulting deprivation, however, is not contrary to the principles of fundamental justice.

The expression "principles of fundamental justice" in s. 7 of the *Charter* implies that there is some consensus that these principles are vital or fundamental to our societal notion of justice. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also be legal principles. To discern the principles of fundamental justice governing a particular case, it is helpful to review the common law and the legislative history of the offence in question, and in particular, the rationale behind the offence itself and the principles which underlie it. It is also appropriate to consider the state interest. Fundamental justice requires that a fair balance be truck between the interests of the state and those of the individual. The respect for human dignity, while one of the underlying principles upon which our society is based, is not a principle of fundamental justice within the meaning of s. 7.

The long-standing blanket prohibition in s. 241(b) fulfils the government's objective of preserving life and protecting the vulnerable. The state policy it reflects is part of our fundamental conception of the sanctity of life. A blanket prohibition on assisted suicide similar to that in s. 241(b) also seems to be the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. Given the concerns about abuse and the great difficulty in creating appropriate safeguards, the blanket prohibition on assisted suicide is not arbitrary or unfair. Section 241(b) therefore does not infringe s. 7 of the *Charter*. As well, s. 241(b) of the *Code* does not infringe s. 12 of the *Charter*. The petitioner was not subjected by the state to any form of cruel and unusual treatment or punishment.

Assuming that the prohibition on assisted suicide in s. 241(b) of the *Code* infringes s. 15 of the *Charter*, any infringement is clearly justified under s. 1 of the *Charter*. Section 241(b) has a pressing and substantial legislative objective and meets the proportionality test. A prohibition on giving assistance to commit suicide is rationally connected to the purpose of s. 241(b), which is to protect and maintain respect for human life. To introduce and exception to the blanket protection for certain groups would create an inequality. Finally, the balance between the restriction and the government objective is also met.

Per *McLachlin J. (dissenting)(L'Heureux-Dubé* J. concurring): Section 241(b) of the *Code* infringes the right to security of the person included in s. 7 of the *Charter*. This right has an element of personal autonomy, which protects the dignity and privacy of individuals with respect to decisions concerning their own bodies. A legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under s. 7 if the limit is arbitrary. Here, Parliament has put into force a legislative scheme which makes suicide lawful but assisted suicide unlawful. The effect of this distinction is to deny to some people the choice of ending their lives solely because they are physically unable to do so, preventing them from exercising the autonomy over their bodies available to other people. The denial of the ability to end their lives is arbitrary and hence amounts to a limit on the right to security of the person which does not comport with the principles of fundamental justice.

Section 241(b) of the *Code* is not justified under s. 1 of the *Charter*. The practical objective of s. 241(b) is to eliminate the fear of assisted suicide being abused and resulting in the killing of persons who do not truly and willingly consent to death. But neither the fear that assisted suicide will be used for murder

unless it is prohibited, nor the fear that consent to death may not in fact be given voluntarily, was sufficient to override the petitioner's entitlement under s. 7 to end her life in the manner and at the time of her choosing.

Per Lamer C.J.C. (dissenting): Section 241(b) of the *Code* infringes the right to equality contained in s. 15(1) of the *Charter*. While at first sight s. 241(b) is apparently neutral in its application, it effect creates an inequality since it prevents persons physically unable to end their lives unassisted from choosing suicide when that option is in principle available to other members of the public without contravening the law.

Section 241(b) of the *Code* is not justifiable under s. 1 of the *Charter*. While the objective of protecting vulnerable persons from being pressured or coerced into committing suicide is sufficiently important to warrant overriding a constitutional right, s. 241(b) fails to meet the proportionality test. The prohibition of assisted suicide is rationally connected to the legislative objective but the means to carry out the objective did not impair the petitioner's equality rights as little as reasonably possible. The vulnerable are not effectively protected under s. 241(b) but the section is over-inclusive. Those who are not vulnerable or do not wish the state's protection are also brought within the operation of s. 241(b) solely as a result of physical disability.

Per Cory J. (dissenting): Section 7 of the *Charter* emphasizes the innate dignity of human existence. Dying in an integral part of living and, as a part of life, is entitled to the protection of s. 7. It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity.

137. Wiebe v. Woodward Stores Ltd. [1993] B.C.J. No. 1015 (B.C.C.A.).

This was an appeal arising out of what appeared to be a unilateral change by an employer in the quantum of benefits payable under a disability plan which had been incorporated into a collective agreement.

HELD: The appeal was dismissed. The plaintiff's right to long-term benefits and the quantum thereof arose out of the plan which was part of the collective agreement. The question was properly one to be resolved under the grievance procedure of the collective agreement.

138. LeRoss, et al. v. MacMillan Bloedel Limited, et al., [1991] 1 WWR 527 (B.C.C.A.).

The respondent Calnan was a sub-tenant to LeRoss; the latter was lessee of the lands from MacMillan, Bloedel, the lessor. LeRoss became in default; the lessor obtained and caused to be served an eviction order. LeRoss complied and vacated the land. However, Calnan, who operated a sawmill on the lands and who had a backlog of work, negotiated with the lessor's representative for an extension of possession for 90 days. This was agreed upon, although the lessor, post-agreement, sought to impose impossible and additional terms of occupancy. Calnan declined to accept those terms, and also declined to vacate until the end of the 90 day period, taking the not unreasonable position that he had a right to so remain. The lessor instructed the Sheriff to use the original eviction order as a ground to evict Calnan. The Sheriff attempted to do so and in the course of the ensuring altercation, Calnan was assaulted, arrested and - for a brief period - incarcerated in the local jail (he was later released without being charged with any offence). The trial Judge found that, on the evidence, the Sheriff had committed assault upon Calnan, had falsely arrested him, and falsely imprisoned him. He awarded $15,000.00 in damages against all defendants, jointly and severally. The defendants appeal.

Reasons: Two grounds supporting the Judgement at trial are advanced by Calnan. (1) That there was no authority to evict Calnan under the original eviction order obtained against LeRoss; that that order had, with LeRoss's vacating the lands and with Calnan's subsequent agreement with the lessor, lapsed. This argument was accepted at trial, and on this appeal. (2) "That an arrangement of license of some form, perhaps personal license, had been made between Calnan and MacMillan, Bloedel...". This ground was not considered by the trial Judge in light of his reasoning and conclusion on the first ground advanced. However, this Court would, against in light of the proven facts, agree with that proposition as well. Finally, the Crown's argument to the effect that the Sheriff was acting in good faith and should be held liable for that reason is not viable in light of the facts of this case. This would be so even if the *Criminal Code*, s. 25 was available as a defence although the Court declines to decide whether that defence could be raised here.