

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

APPELLANT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

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FACTUM OF THE INTERVENERS

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS	1
A. OVERVIEW	1
B. STATEMENT OF FACTS	1
PART II – COALITION’S POSITION ON THE ISSUES	2
PART III – STATEMENT OF ARGUMENT	2
A. THE PRINCIPLES APPLICABLE TO THE INTERPRETATION OF HUMAN RIGHTS LEGISLATION	2
B. THE PROVISION OF BENEFITS BY LEGISLATION CONSTITUTES PROVISION OF SERVICES: APPLYING A PURPOSIVE APPROACH TO THE INTERPRETATION OF THE <i>ACT</i>	3
(i) The purpose of preventing discriminatory practices and effects	4
(ii) The purpose of achieving substantive equality: Government benefit programs are essential for the well-being of low-income and vulnerable people who require accessible human rights protection.....	6
(iii) The purpose of ensuring the full recognition and effect of human rights: government is bound by the Act.....	8
(iv) The purpose of providing an effective remedy for discrimination: access to justice...	8
PART IV – SUBMISSIONS ON COSTS	10
PART V – ORDER SOUGHT	10
PART VI – TABLE OF AUTHORITIES	11

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal is about securing human rights protection for vulnerable groups against government discrimination. The Coalition of legal clinic interveners represents the perspective and interests of low-income and vulnerable groups that rely on government income supports for their very survival. When such supports are denied for discriminatory reasons, the consequences for such groups can be extremely grave. For them, access to an accessible and effective remedy is crucial.

2. The findings below that the provision of government benefits by legislation does not constitute provision of services under the *Canadian Human Rights Act* (“*Act*”) denies low-income and other vulnerable people the protections and remedies afforded by the *Act*. By effectively cutting off access to a scheme that, in comparison with the courts, is less costly and formal, and offers more support to complainants and broader remedial powers, the Respondent’s interpretation of the *Act* effectively immunizes government from human rights claims by people who can ill-afford to use the courts to assert their equal rights to access government programs. A two-tier system of human rights protection is created in which discrimination complaints against privately delivered benefit programs have access to the *Act*’s protection, while those involving government benefits programs do not.

3. A broad and purposive approach to the interpretation of “provision of services” under the *Act* avoids these ills and advances its purposes to give full recognition and effect to human rights, prevent and eliminate discrimination, and to achieve substantive equality.

B. Statement of Facts

4. The coalition of legal clinic Interveners (“Coalition”)¹ is a group of not-for-profit organizations that provide free legal services to low-income and/or marginalized people in

¹ The following legal clinics constitute the Coalition: the Income Security Advocacy Centre, Sudbury Community Legal Clinic, Chinese and Southeast Asian Legal Clinic, Community Legal Assistance Society, and the HIV & AIDS Legal Clinic of Ontario.

Ontario and British Columbia (including accessing federal benefit programs) and that engage in frontline representation, systemic test case litigation, and law reform.

5. The Coalition adopts the facts as set out in the Factum of the Appellant the Canadian Human Rights Commission

PART II – COALITION’S POSITION ON THE ISSUES

6. “Provision of services” must be interpreted generously to advance the *Act’s* purposes of giving full recognition and effect to human rights, preventing and eliminating discrimination, achieving substantive equality, providing relief and preserving access to justice for victims of discrimination. Human rights protections apply when government benefits are denied for discriminatory reasons, whether those benefits are provided by legislation or otherwise.

PART III – STATEMENT OF ARGUMENT

A. The principles applicable to the interpretation of human rights legislation

7. Human rights legislation is fundamental quasi-constitutional law that is intended to ensure that individual rights of vital importance are capable of enforcement.² As the “law of the people,” human rights law is entitled not only to an expansive interpretation, but also an accessible application.³

8. This Court has repeatedly affirmed that because of its fundamental importance, human rights legislation is to be interpreted liberally and generously to advance its purpose to give full recognition and protection to human rights and to prevent and eliminate discrimination.⁴ Statutory interpretation should not seek to “minimize” human rights and “enfeeble their proper

² *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (“*Action Travail*”), at p. 1134.

³ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14 (“*Tranchemontagne*”), at para. 33, p. 531.

⁴ *Tranchemontagne*, *supra*, at para. 33, p. 531; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90; *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd* (“*O’Malley*”), [1985] 2 S.C.R. 536, at pp. 546-7.

impact,” or be restrictive such as to defeat their purpose of eliminating discrimination.⁵

9. Because human rights legislation serves these purposes, the focus of the discrimination analysis is the result or effect of the action complained of.⁶ Specifically with respect to the *Act*, this Court has held that the emphasis upon “discriminatory effects” is central to the *Act*’s purpose to prevent all “discriminatory practices.”⁷

10. At its core, the purpose of anti-discrimination law is the achievement of substantive equality.⁸ As described by this Court, substantive equality recognizes that systemic and historical disadvantages faced by members of certain groups in Canada have limited their opportunities in Canadian society, and seeks to prevent conduct that perpetuates those disadvantages.⁹ In the contextual substantive equality inquiry, the “main consideration”¹⁰ must be the impact of the impugned law on the individual or group concerned taking into full account the social, political, economic and historical factors concerning the group.¹¹ In this way, the purpose of anti-discrimination law is to eliminate the exclusionary barriers faced by individuals belonging to protected groups in gaining meaningful access to what is generally available.¹²

B. The provision of benefits by legislation constitutes provision of services: applying a purposive approach to the interpretation of the *Act*

11. A broad and purposive interpretation of section 5 of the *Act* supports the conclusion that

⁵ *Action Travail*, *supra*, at pp.1134, 1136, 1138.

⁶ *O’Malley*, *supra*, at p.547; *Action Travail*, *supra*, at p.1137.

⁷ *Action Travail*, *supra*, at p.1137.

⁸ *R v. Kapp*, 2008 SCC 41, [2008] S.C.R. 483, at paras. 15, 16, pp.501-502.

⁹ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 17, 18, p.556; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 332, p. 219.

¹⁰ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 165, where McIntyre J.

relied on the human rights decisions of this Court in *O’Malley* and *Action Travail*. This Court has continued to rely on the approach in *Andrews* to affirm its commitment to substantive equality. See *Quebec v. A*, *supra*, at para. 319, p. 214; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 29, pp. 408-410; *R v. Kapp*, *supra*, at paras. 14, 24, pp. 501, 506.

¹¹ *Quebec (Attorney General) v. A*, *supra*, at paras. 319, 324, pp. 214, 215; *Withler v. Canada (Attorney General)*, *supra*, at paras. 37, 39, pp. 412, 413.

¹² *Quebec (Attorney General) v. A*, *supra*, at para. 319, p. 214.

the provision of benefits established by legislation constitutes the provision of services customarily available to the public.

(i) The purpose of preventing discriminatory practices and effects

12. The complaints were rejected as a challenge to the “adoption of legislation”: the complainants were held to be directly challenging the *Indian Act* because they were challenging their entitlements under the legislation as opposed to the manner in which the government processed their applications.¹³ However, denial of access to a benefit through discriminatory legislation has the same discriminatory impact as denial of a benefit through discriminatory action in the processing or delivery of a benefit.

13. A focus on discriminatory effects is central to the *Act*’s purpose to prevent “discriminatory practices.”¹⁴ Whether the benefits (which are undisputedly services¹⁵) are established by legislation or by policy, the discrimination analysis should focus on the impact on the person seeking to access the benefit. The fact that the benefits were established by legislation ought not to change the discrimination analysis.

14. Ontario’s human rights jurisprudence is helpful in this respect, particularly given this Court’s recognition of the similarities in the aims and purposes of the Ontario *Human Rights Code* and the *Act*, and the equally applicable interpretive principles in assessing discrimination claims under the *Act*.¹⁶ Ontario’s *Code* provides for the “right to equal treatment with respect to services [...] without discrimination,”¹⁷ not dissimilar to the prohibition against “discriminatory practice in the provision of [...] services” in the *Act*.¹⁸

15. “Service” in the Ontario *Code* has been found to “mean something which is of benefit

¹³ *Canadian Human Rights Commission v. Attorney General of Canada*, 2016 FCA 200 (“FCA Decision”), at para. 32 (Appellant’s Record, Vol. 1, Tab 4, at p. 162).

¹⁴ *Action Travail*, *supra*, at p. 1137.

¹⁵ FCA Decision, at para. 54 (Applicant’s Record, Vol. 1, Tab 4, p.22).

¹⁶ *Bhinder and Canadian Human Rights Commission v Canadian National Railway Co.*, [1985] 2 SCR 561, at p. 586; *Action Travail*, [1987] 1 SCR 1114, at pp. 1136-7; *Robichaud v. Canada (Treasury Board)*, at pp. 89-91.

¹⁷ *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1.

¹⁸ *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 5.

that is provided by one person to another or to the public.”¹⁹ It is uncontroversial that “services” include the provision of government benefits and programs by legislation. Services under the *Code* include legislated benefits provided by the Ontario Disability Support Program²⁰ and social assistance provided by Ontario Works.²¹ Discrimination claims have been granted where legislated eligibility provisions have disqualified or excluded persons with specific disabilities from receiving disability income support benefits²² or special diet allowances,²³ or reduced a sole female parent’s social assistance because of her family status.²⁴

16. Of particular note is the outcome of this Court’s jurisdictional decision in *Tranchemontagne* remitting the case to the Social Benefits Tribunal to rule on the underlying discrimination complaint.²⁵ The Court of Appeal for Ontario ultimately confirmed that disqualifying the complainants from Ontario Disability Support Program benefits through

¹⁹ *Braithwaite v. Ontario (Attorney General)*, [2005 HRTO 31 \(CanLII\)](#), per Hon. Peter Cory at para. 22, where a coroner’s inquest was found to be a service (upheld on judicial review in *Ontario (Attorney General) v. Ontario Human Rights Commission*, [2007 CanLII 56481](#) (ON SCDC), at para. 39).

²⁰ *Ontario (Disability Support Program) v. Tranchemontagne*, [2010 ONCA 593 \(CanLII\)](#), at paras. 1-5, 183; *Ontario (Community and Social Services) v WB*, [2011 ONSC 288 \(CanLII\)](#), at paras. 1, 51; *Ball v. Ontario (Community and Social Services)*, [2010 HRTO 360 \(CanLII\)](#), at paras. 1, 4, 5; *Abbey v. Ontario (Community and Social Services)*, [2016 HRTO 787 \(CanLII\)](#), at para. 74: subcontracting rules would have reduced or eliminated the complainant’s disability benefits.

²¹ *Hendershott v. Ontario (Community and Social Services)*, [2011 HRTO 482 \(CanLII\)](#), at paras. 1, 3, 10, 69.

²² *Ontario (Disability Support Program) v. Tranchemontagne*, *supra*, at paras. 1-5, 183

²³ *Ball v. Ontario (Community and Social Services)*, *supra*, at paras. 1, 4, 5, 144, 150, 156;

Ontario (Community and Social Services) v WB, *supra*: complaints of discrimination were made against the exclusion of certain medical conditions from the special diet program (Ontario Disability Support Program and Ontario Works) and the inadequacy of the amounts provided for certain medical conditions under the program.

²⁴ *Hendershott v. Ontario (Community and Social Services)*, *supra*, at paras. 1, 3, 10, 69: Ontario Works Regulations reduced the complainant’s social assistance because she was living with and dependent on her parents.

²⁵ *Tranchemontagne*, *supra*, at para. 53, p. 539.

legislation because of their alcohol dependence was discrimination in services, and that the impugned provision was inapplicable.²⁶

(ii) The purpose of achieving substantive equality: Government benefit programs are essential for the well-being of low-income and vulnerable people who require accessible human rights protection

17. Excluding government benefits as a “provision of service” under the *Act* because legislation is being directly challenged is contrary to substantive equality, a key purpose of anti-discrimination law. Shielding legislated government benefit programs from discrimination claims under the *Act* significantly diminishes human rights protections for vulnerable groups, such as low-income people, who depend on government programs to meet their needs.

18. Low-income people often rely on government income support benefit programs to support themselves and their families. Indeed many aspects of their lives are regulated by legislated programs. Federal programs include the Canada Pension Plan, Employment Insurance, and Old Age Security, and tax delivered benefits such as the Canada Child Benefit. These benefits are provided by way of legislated eligibility criteria, with the scope of the benefits written into statute or regulation.²⁷

19. Low-income people disproportionately come from disadvantaged groups that are vulnerable to discrimination.²⁸ People with disabilities (including those with stigmatized conditions), women (particularly single mothers), Indigenous peoples, racialized persons, older persons and migrants are overrepresented among people living in poverty,²⁹ a situation which

²⁶ *Ontario (Disability Support Program) v. Tranchemontagne*, *supra*, at paras. 1-5, 183.

²⁷ *Canada Pension Plan* (R.S.C., 1985, c. C-8), ss. [42](#), [44](#); *Employment Insurance Act* (S.C. 1996, c. 23), ss. [2\(1\)](#), [6](#), [7](#), [8](#), [21](#), [22](#), [23](#), [23.1](#), [23.2](#), [25](#), [27](#), [29](#), [30](#); *Old Age Security Act* (R.S.C., 1985, c. O-9), ss. [2](#), [3](#), [4](#), [11](#), [19](#); *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)), s. [122.6](#).

²⁸ This was highlighted as a concern by the United Nations Committee on Economic, Social and Cultural Rights: [Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, 23 March 2016](#), (E/C.12/CAN/CO/6), at para. 37, p.7; and [Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, 22 May 2006](#), (E/C.12/CAN/CO/4; E/C.12/CAN/CO/5), at para. 15, pp. 3-4.

²⁹ Government of Canada (2016), [A Backgrounder on Poverty in Canada](#), at p.9.

has received repeated recognition by this and other Canadian courts.³⁰ For example, one third of people with disabilities have incomes below 60% of the median disposable income.³¹ These groups are also more likely to live in deep poverty and remain poor over longer periods.³²

20. Poverty has a serious detrimental impact on every aspect of life. It leads to poor health, food insecurity, housing instability or homelessness, lower educational attainment, and limited or lower paid work opportunities.³³ For those living in poverty, income support benefit programs provide critical support for their wellbeing and survival.

21. When vulnerable people are denied benefits because of discriminatory criteria, the consequences can be extremely detrimental. It is critical that they have an accessible and effective remedy. Excluding discriminatory government benefit programs from the *Act* takes away crucial protections for low-income people, creates additional barriers to their access to human rights protection, and perpetuates their disadvantage in Canadian society, all of which diminish substantive equality.³⁴

³⁰ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 113, pp. 99-100; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 56, p. 668; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 60-61, 67, pp. 469-470, 473; *R. v. Kapp*, *supra*, at para. 59, p. 519; *Withler v. Canada (Attorney General)*, *supra*, at para. 58, p. 419-420; *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 CanLII 3176 (NS CA) at paras. 31-34; *Falkiner v. Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ON CA) at paras. 86-88. For example in *Falkiner*, the Court of Appeal for Ontario recognized receipt of social assistance as a prohibited ground of discrimination under section 15 of the *Charter*, and that economic disadvantage often co-exists with other forms of disadvantage: see paras. 84, 88-90, 93.

³¹ Organization for Economic Co-operation and Development (2010), *Sickness, Disability and Work: Breaking the Barriers: Canada. Opportunities for Collaboration*, at p. 18.

³² Statistics Canada (2012), *Low Income in Canada*, at pp. 7-8, 29-42; Canadian Labour Market and Skills Researcher Network (2012), *Macroeconomic impacts of Canadian immigration*, at p. 2; Shillington, R. (2016). *An Analysis of the Economic Circumstances of Canadian Seniors*. Broadbent Institute, at pp. 4-6.

³³ *A Backgrounder on Poverty in Canada*, *supra*, at pp.10-27.

³⁴ *Quebec (Attorney General) v. A*, at para. 319, p. 214.

(iii) The purpose of ensuring the full recognition and effect of human rights: government is bound by the Act

22. Private actors such as employers and unions delivering benefit programs (such as long-term disability insurance) remain subject to the *Act*. The outcome of the decision below is the creation of a two-tier system of human rights protection: complainants alleging discrimination with respect to private benefits programs will be able to access protection under the *Act*, while those alleging discrimination with respect to public benefits programs will not.

23. Government should not be able to avoid human rights scrutiny under the *Act* simply because the rules for a government program are established in legislation. Characterizing complaints against legislated eligibility criteria as challenges to the “adoption of legislation” defeats the purpose of the *Act* by taking legislation outside its purview. It greatly reduces human rights protection and accountability for discriminatory government action. Government “will be, or seen to be, above the law.”³⁵ This is not the intention of the legislature. Rather, Parliament has explicitly bound the Crown to its human rights obligations under the *Act*.³⁶

(iv) The purpose of providing an effective remedy for discrimination: access to justice

24. Access to justice is essential to the rule of law and requires that litigants be able to challenge government action in an accessible non-cost prohibitive forum.³⁷ Accessibility is particularly necessary for the “law of the people”.³⁸ The availability of an informal and inexpensive forum for adjudicating human rights claims encourages compliance with and furthers the purpose of human rights legislation to protect and provide relief for victims of discrimination.³⁹ Human rights remedies must be accessible in order to be effective.⁴⁰

³⁵ *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40, p. 52.

³⁶ *Canadian Human Rights Act*, s. 66(1): “This Act is binding on Her Majesty in right of Canada”

³⁷ *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, *supra*, at paras. 38, 45, 46, pp. 51, 53; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at pp.229-230.

³⁸ *Tranchemontagne*, *supra*, at para. 33, p. 532.

³⁹ *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para.52, p. 187.

25. Access to justice is facilitated by the human rights scheme under the *Act*. It is less costly and complex than the courts; offers the resources of the Canadian Human Rights Commission (such as investigations, conciliation, representation) ; involves the less formal forum of the Canadian Human Rights Tribunal (which has no power to make costs awards); and provides a broad range of remedies for discrimination, both individual (including compensation for pain and suffering, special compensation for wilful and reckless discrimination) and systemic.⁴¹

26. In contrast, access to justice is effectively denied by the prohibitive costs of bringing a *Charter* challenge in court, particularly for low-income complainants. As observed by Ontario Court of Appeal Justice Sharpe, the Canadian legal system “faces an access to justice crisis” as it operates “at a cost that shuts the courtroom door to all but the well-to-do.”⁴² The cost of a *Charter* challenge is reported to range between below \$50,000 and \$1,000,000.⁴³ The risk of adverse costs awards are a significant impediment for low-income complaints and costs have been ordered in the government’s favour against unsuccessful *Charter* applicants. Advanced costs orders, while available, are only awarded in rare and exceptional circumstances.⁴⁴ For low-income people, a court *Charter* challenge is effectively out of reach.

27. In addition, when challenging the constitutionality of legislation in a *Charter* application, complainants are limited to the remedy of a declaration of invalidity under section 52(1) of the

⁴⁰ [Tranchemontagne](#), *supra*, at para. 49, p. 538. The guarantee of an effective remedy for human rights violations is also contained in primary international human rights documents, for example, [International Convention For The Elimination of All Forms of Racial Discrimination](#), 21 December 1965, 660 U.N.T.S. 195, Article 6; [International Covenant on Civil and Political Rights](#), 16 December 1966, G.A. Res.2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Article 2(3).

⁴¹ *Canadian Human Rights Act*, ss. [43](#), [44](#), [47](#), [50](#), [51](#), [53\(2\)](#), [53\(3\)](#), [53\(4\)](#).

⁴² Sharpe, Robert J. ["Access to Charter Justice."](#) *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 63. (2013).at p. 1.

⁴³ Department of Justice Canada, Research and Statistics Division (May 3, 2016), [The Costs of Charter Litigation](#), pp.3-4.

⁴⁴ [The Costs of Charter Litigation](#), *supra*, at p.9; [Access to Charter Justice](#), *supra*, at pp. 6, 8, 9; *Federal Courts Rules*, SOR/98-106, Rule [400\(1\)](#).

*Constitution Act.*⁴⁵ Individual and systemic remedies are not available.

28. When an accessible forum to challenge discriminatory government action is foreclosed, victims of discrimination are denied effective remedies. Interpreting the *Act* to exclude government legislation from its purview places an “insurmountable barrier” to human rights protection against government discrimination by legislation, and renders this “final refuge of the disadvantaged” meaningless.⁴⁶ An interpretation of “provision of services” that includes benefits conferred by legislation must be adopted.


PART IV – SUBMISSIONS ON COSTS

29. The Coalition does not seek costs and asks that no costs be awarded against its members.

PART V – ORDER SOUGHT

30. The Coalition has been granted permission by this Honourable Court to present oral argument and therefore does not seek an order from this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2017.



Marie Chen and Jackie Esmonde
Counsel for the Interveners

⁴⁵ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK), 1982, c 11, s.52(1)*; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at paras. 313-316; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 58-61, pp. 123, 124.

⁴⁶ *O'Malley*, *supra*, p. 549; *Tranchemontagne*, *supra*, para 49, p. 538.

PART VI – TABLE OF AUTHORITIES

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2. <i>Andrews v. Law Society of British Columbia</i> , [1989] 1 S.C.R. 143	10
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6. <i>Braithwaite v. Ontario (Attorney General)</i> , 2005 HRTO 31 (CanLII)	15
7. <i>Canadian National Railway Co. v Canada (Canadian Human Rights Commission)</i> , [1987] 1 SCR 1114	7
8. <i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624	56
9. <i>Falkiner v. Ontario (Minister of Community and Social Services)</i> , 2002 CanLII 44902 (ON CA)	19
10. <i>Hendershott v. Ontario (Community and Social Services)</i> , 2011 HRTO 482 (CanLII)	15
11. <i>Kahkewistahaw First Nation v. Taypotat</i> , 2015 SCC 30, [2015] 2 S.C.R. 548	10
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14. <i>Ontario (Community and Social Services) v WB</i> , 2011 ONSC 288 (CanLII)	15
15. <i>Ontario (Disability Support Program) v. Tranchemontagne</i> , 2010 ONCA	15, 16

593 (CanLII)	
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18. <i>Quebec (Attorney General) v. A</i> , 2013 SCC 5, [2013] 1 S.C.R. 61	10, 21
19. <i>R v. Kapp</i> , 2008 SCC 41, [2008] S.C.R. 483	10
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22. <i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	27
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25. <i>Tranchemontagne v. Ontario (Director, Disability Support Program)</i> , [2006] 1 S.C.R. 513 , 2006 SCC 14	7
26. <i>Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)</i> , 2014 SCC 59, [2014] 3 S.C.R. 31	23, 24
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33. Shillington, R. (2016). <i>An Analysis of the Economic Circumstances of Canadian Seniors.</i> Broadbent Institute	19
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36. <i>International Covenant on Civil and Political Rights</i> , 16 December 1966, G.A. Res.2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171	24
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Legislation	Provisions Cited
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Legislation	Provisions Cited
40. <i>Canadian Human Rights Act</i> , R.S.C., 1985, c. H-6	5 , 43 , 44 , 47 , 50 , 51 , 53(2) , 53(3) , 53(4) , 66(1)
41. <i>Employment Insurance Act</i> (S.C. 1996, c. 23)	2(1) , 6 , 7 , 8 , 21 , 22 , 23 , 23.1 , 23.2 , 25 , 27 , 29 , 30
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45. <i>Old Age Security Act</i> (R.S.C., 1985, c. O-9)	2 , 3 , 4 , 11 , 19
46. <i>The Constitution Act, 1982</i> , Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11	52(1)