followed the decision in *R v. Sparrow*) by fishing on a day designated for Aboriginals only. He ruled that Aboriginal-only commercial salmon fisheries are a form of racial discrimination and therefore a violation of the *Canadian Charter of Rights and Freedoms*. In this ruling he cast doubt on the fishing provisions of the Nisga'a Treaty, other proposed West Coast treaties, and Aboriginal fishing provisions for the East Coast.

Fyi In August 2003, the federal government announced that it planned to appeal Justice Kitchen's judgment.

CHECK YOUR UNDERSTANDING

1. Identify some ways in which historical circumstances shaped conditions for Aboriginal peoples in Canada.
2. Distinguish between specific land claims and comprehensive land claims.
3. In what ways are Aboriginal rights the same as those of all Canadians? In what ways are Aboriginal rights different from those of other Canadians?
4. Explain how land claims agreements help to establish Aboriginal rights for the peoples involved.

Affirmative Action

Throughout Canada's history, many groups have been the subject of racial discrimination, either through official, government-supported means, or in a more informal manner through social conditions and traditions. Discrimination against Aboriginal peoples has existed since European contact; slavery was legal in Canada until it was abolished by Britain in 1833; racial groups such as blacks, Japanese, and Chinese have been systematically repressed; and cultural groups such as the Irish have been declared unwanted. In addition, discrimination has occurred because of gender, religion, age, sexual orientation, and physical abilities. The *Canadian Charter of Rights and Freedoms* seeks to guarantee that all people will be treated equally. It also recognizes that discrimination did occur in the past, and that corrective measures are now necessary to ensure equality of opportunity. Such corrective measures are referred to as **affirmative action**, which is another way of dealing with people who have been treated unequally.

affirmative action: a policy designed to increase the representation of groups that have suffered discrimination

Affirmative action programs cannot violate the equality provisions of s. 15(1) of the Charter. Generally, this means that an affirmative action program cannot discriminate on the basis of a prohibited ground. Discrimination is permitted, however, if the program benefits a group that was previously discriminated against. How should governments achieve the equality goals of the Charter? Some suggest that governments should set policies or create laws that treat some individuals and groups more favourably than others. For example, building codes could require facilities such as access ramps and washrooms for wheelchair users, or hiring quotas based on race or gender could be required for public sector agencies.

The Law

From the *Canadian Charter of Rights and Freedoms*:

Equality Rights

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Questions

1. Specific types of discrimination are listed in s. 15(1). Are there other types of discrimination that you would like to see included in the list? Are there types of discrimination that you think should be deleted from the list? Explain your point of view.
2. What wording in s. 15(2) might lead to problems in interpretation and application? Explain your answer.

Section 15(2) has generated some questions of interpretation. What does equality mean? To some, equality implies a numerical sameness. That is, if a particular group represents 50 percent of the population, then it should represent 50 percent of any particular sector of the government, economy, and so on. Others have rejected this formal equality and have argued that s. 15(2) implies the equality of opportunity: people should have equal access. However, many variables may affect the representation of a particular group in any sector.

Another question raised under s. 15(2) is the meaning of the term "disadvantaged." Most would agree that groups who have been historically under-represented in positions of power and prestige in society have been disadvantaged. The courts have to use historical and sociological studies of Canadian society to determine the degree to which groups have been disadvantaged, and the impact of this discrimination. In many situations the studies are incomplete or inconclusive, or there are significant differences in the interpretation of findings.

Learn more about the ODA Committee at www.emp.ca/dimensionsoflaw

Personal Viewpoint

David Lepofsky: Fighting for Rights of Ontarians with Disabilities

David Lepofsky is a blind lawyer and Chair of the Ontarians with Disabilities Act Committee, Toronto.

When I studied law in high school, I knew I wanted to be a lawyer and that I had poor vision. I didn't know I'd become totally blind, and that I'd volunteer much of the time outside my day job fighting for the rights of people with disabilities.

As my eyesight worsened, I discovered many unfair barriers that block people with disabilities from fully participating in life. New buses are too often made with steps, creating physical barriers, when accessible buses can be bought. Most Web sites lack simple features that would make them accessible to special computers for blind or dyslexic people. Different kinds of barriers impede people with other physical or mental disabilities.

Removing these barriers would help everyone. Ontario has 1.9 million people with disabilities. Everyone has a disability or gets one later in life. We all should be able to ride public transit, shop in stores, get an education, use our health-care system, and get a job based on [our] abilities, without facing barriers.

In 1980, while finishing lawyer training, I volunteered with disability groups fighting to amend the *Canadian Charter of Rights and Freedoms* and the Ontario *Human Rights Code* to make it illegal to discriminate against people with disabilities. We were excited when grassroots teamwork won us those new legal rights.

Yet by the 1990s, we realized that those important new rights were not enough to achieve a barrier-free society where all people with disabilities can fully participate. A person in a wheelchair who is prevented from entering a store to shop, due to a single step at the doorway, must file a lawsuit, perhaps hire a lawyer, and fight for years. People with disabilities have to fight such barriers one at a time.

I and others decided we needed a new law to achieve a barrier-free society. We named it the *Ontarians with Disabilities Act* (ODA). We launched a grassroots coalition, the ODA Committee, to fight for it. Our Web site shows what we want and how to get involved. We knew that all barriers can't be removed overnight. We wanted the ODA to let everyone know what they must do to become barrier-free and to give organizations reasonable time to act.

In 2001 the Ontario government passed an ODA. It was a first step, but it didn't go far enough. The government left out most ingredients we needed. It lets government organizations like city hall and schools decide what barriers to remove and when, if ever, to remove them. It doesn't make the private sector (stores, restaurants, and other companies) do anything.

Our effort continues. We want the government to fully implement its ODA, and we want the ODA strengthened.

I learned important lessons from this rewarding activity. Everyone can have a huge impact, by volunteering for a cause to improve society.

Questions

1. Using the Internet, locate information on the *Ontarians with Disabilities Act, 2001*. What is its purpose, and to whom does it apply?
2. Why was the ODA Committee disappointed with the Ontario government's legislation passed in 2001?
3. What barriers impede persons with disabilities in your school and community?
4. How would society benefit from removing and preventing these barriers?
5. How could the *Ontarians with Disabilities Act, 2001* be rewritten to be strong and effective?

The Charge of Reverse Discrimination

Affirmative action programs have been controversial. For many people, the treating of some groups more favourably than others in order to rectify historical inequities runs contrary to the principles of free enterprise and democracy. They believe that ability and hard work should be the relevant criteria for determining social and economic rewards in Canadian society. Affirmative action programs and laws are seen as reverse discrimination—the practice of advancing one group's interests by treating everyone else "unfairly."

Another concern about affirmative action programs is that those who receive preferential treatment are not usually those who were originally discriminated against, and those who are at a disadvantage because of affirmative action are not generally those who were responsible for past discrimination. Critics argue that today's middle-class, heterosexual, white males are paying the price in the workforce for attitudes and behaviours of their ancestors toward the poor, homosexuals, non-white races, and women.

Case PRISONERS' RIGHTS

Conway v. The Queen, [1993] 2 SCR 872

Facts

Phillip Conway was an inmate at Collins Bay Penitentiary in Kingston, Ontario, in 1986. He objected to frisk searches (the hand search of a clothed inmate from head to foot) and cell patrols that were conducted by women guards. Conway argued that the cross-gender touching during searches "feels wrong" and that there was opportunity for women guards to see him undressed. He began a court action alleging that the performance of these duties by women violated his rights to security of the person, privacy, and equality. The Federal Court Trial Division held that the frisk searches did not violate the Charter, but that cell patrols were an invasion of male inmates' privacy and therefore violated s. 8 of the Charter. The Federal Court of Appeal ruled that neither practice was unconstitutional. Conway appealed to the Supreme Court.

The case had implications for women because affirmative action programs were in place to increase the number of women working as correctional officers. Simply removing women from male prisons and reassigning them would discriminate against them. The outcome of the case could have had repercussions for other affirmative action programs based on s. 15(2) of the Charter.

Decision

The Supreme Court dismissed Conway's appeal, ruling that frisk searches and cell patrols are practices necessary in a prison for the security of

the institution and the safety of inmates. Training of correctional officers ensures that these duties are carried out in a professional manner with regard for the dignity of the inmate. In addition, prisoners should expect a substantially reduced level of privacy while incarcerated.

The Supreme Court went on to comment that its decision in this case did not mean that female prisoners should also be subject to cross-gender searches and surveillance. They argued that the requirement for equality in s. 15(1) of the Charter does not mean identical treatment. Historical, sociological, and biological differences between men and women mean that cross-gender touching is different and more threatening for women than men. The decision states:

> Biologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men.

Questions

1. Summarize the issues and arguments in this case.
2. Why did the Supreme Court dismiss Conway's appeal of earlier decisions?
3. This case is also known as *Weatherall v. The Queen*. The Women's Legal Education and Action Fund (LEAF) intervened in this case because of the implicit equality issues for women. Conduct research to find out the arguments presented by LEAF in this case.

Learn about LEAF at www.emp.ca/dimensionsoflaw

CHECK YOUR UNDERSTANDING

1. In your own words, explain the rationale for affirmative action programs.
2. What are some of the concerns or criticisms of affirmative action programs?
3. In your view, are affirmative action programs justifiable? Explain your point of view.
4. Suppose you reject the view that affirmative action is justifiable. What are some other strategies or approaches that could be used to rectify the problems of historic discrimination against some groups in society?

METHODS OF *Legal Inquiry*

Dissecting a Statute: The *Ontarians with Disabilities Act, 2001*

Read the *Ontarians with Disabilities Act* at www.emp.ca/dimensionsoflaw

Once a bill is given Royal Assent by the governor general (for federal bills) or the lieutenant governor (for provincial bills), it becomes enacted and is referred to as a statute or act. A statute such as the *Ontarians with Disabilities Act, 2001* ("the Act") is made up of a number of parts, some of which are official and a part of all statutes, and some of which are unofficial. Each part is described briefly below.

Chapter Number

A statute is commonly identified and located by its chapter number. Federal and provincial statutes are given consecutive chapter numbers in the year in which they are enacted. Every 10 to 20 years in most jurisdictions, statutes are consolidated into one publication (called the Revised or Consolidated Statutes), organized alphabetically, and assigned a new chapter number. The Act was passed in 2001 and assigned chapter number 32. Statutes are described as chapters because, historically, all acts of a session of Parliament were considered to be one statute, and chapters were used to distinguish one particular act from another. Today, not only is an act a separate chapter, it is also a separate statute.

Long Title

The long title of a statute usually appears after the chapter number. Because these titles were often too long for purposes of citation, a shorter form was introduced in the 19th century. The long title may be used as an aid to understanding or interpreting a statute where a provision is ambiguous. The long title of the Act is: *An Act to improve the identification, removal and prevention of barriers faced by persons with disabilities and to make related amendments to other Acts.*

Date of Royal Assent

The date of Royal Assent is usually stated after the long title of the statute. The date is important because, unless the statute states otherwise, this is the date on which the statute "comes into force" or becomes effective as a statute. A statute may also come into force on a particular date or on a date to be named by proclamation. Section 33(1) of the Act provides that the Act "comes into force on a day to be named by proclamation of the Lieutenant Governor." The Act received Royal Assent on December 14, 2001, but the government has still not proclaimed into force all of the Act.

Words of Enactment

Words of enactment usually appear after the date of Royal Assent and serve to indicate that Parliament is exercising its royal authority.

Short Title

Both federal and provincial statutes have sections that confer a short title on the statute. Section 34 enacts the short title of the Act as the *Ontarians with Disabilities Act, 2001*.

Definitions

Most statutes contain a definition section at the beginning of the act. Definitions are important, especially where "everyday" words have a different or specific legal meaning in a statute. Section 2(1) of the Act defines such key words as "barrier" and "disability." "Barrier," for example, is defined to include physical and architectural barriers as well as attitudinal and policy barriers.

Parts, Sections, Subsections, and Paragraphs

Every statute is divided into principal units called sections, which are numbered consecutively. Sections may be further divided into subsections, paragraphs, and subparagraphs. (The federal *Income Tax Act* goes beyond subparagraphs to clauses, subclauses, and even sub-subclauses.) Canadian statutes usually indicate subsections by numbers in parentheses, paragraphs by lowercase letters in parentheses, and subparagraphs by roman numerals in parentheses. For example, the requirement of the Act that municipalities consult with persons with disabilities in preparing an accessibility plan as found in s. 11, subsection (1), paragraph (6), subparagraph (ii). A statute may also have larger divisions than sections, called parts. The Act is divided into five parts: three parts deal with the duties of the government of Ontario, municipalities, and "other organizations, agencies and persons," and the other two parts deal with interpretation and general matters.

Marginal Notes

Marginal notes appear alongside the sections of a statute and are designed to provide a summary of each section. Marginal notes are not formal parts of an act and, therefore, may not be used to assist in interpreting it. While these notes are meant to be useful, they can also be misleading. For example, the summary may be inaccurate, or it may summarize only a part of the section, or it may fail to reflect the fact that the section has been changed.

Amendments

Statutes may be amended by subsequent statutes, which follow the same pattern as the main statute. The Act was amended in 2002 by the *Municipal Statute Law Amendment Act, 2002*, c. 17, Schedule c, s. 18. The amended provisions of the principal statute are noted at the end of the section or subsection that has been amended.

Applying the Skill

Dissect a statute from this chapter. Go to www.emp.ca/dimensionsoflaw to locate the respective sites for searching federal and Ontario statutes.