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Indexed as:

J.C. v. Forensic Psychiatric Service Commissioner

Between
J.C., Plaintiff, and
Forensic Psychiatric Service Commissioner, Attorney General of British Columbia and Attorney General of Canada, Defendants

[1992] B.C.J. No. 430
Vancouver Registry No. A873287

Also reported at:
8 C.R.R. (2d) 260
65 B.C.L.R. (2d) 386

British Columbia Supreme Court
Vancouver, British Columbia
McKinnon J.

Heard: September 23 - 26, 1991
Judgment: February 28, 1992
(25 pp.)

Constitutional law — Canadian Charter of Rights and Freedoms, section 15 — Equality rights — Plaintiff institutionalized on a lieutenant governor's warrant — Because of her gender, plaintiff was denied access to certain accommodation for psychiatric patients — Accommodation had not been integrated as to do so would increase costs — Whether there was a breach of a law, giving the court jurisdiction to consider section 15 issues — Whether there was a violation of equality — Proportionality test — Rationality test — Minimal impairment test — Effect test.

The plaintiff sought a declaration that the defendants were in breach of section 15 of the Canadian Charter of Rights and Freedoms in the distribution of services they provided at the Forensic Psychiatric Institute in Coquitlam, B.C. The plaintiff was committed to the Forensic Psychiatric Institute under a lieutenant governor's warrant following a finding that she was not guilty by reason of insanity of the attempted murder of a child. The plaintiff argued that the policy of the institute in refusing to permit female patients to reside in premises known as the "Cottages" was discriminatory and offended section

15 of the Charter. The Forensic Psychiatric Institute was made up of three major buildings: the Main institute, the Dr. Halliday Unit, and the Cottages. The Cottages were considered the ultimate goal for patients.

HELD: The plaintiff had established a breach of section 15, not justified by section 1 of the Charter. Although she was entitled to relief consequent upon this decision, the court decided to leave that issue along with the issue of costs, to be addressed at a future date. A two-tier test is involved in a section 15 case. One must first determine whether the distinction results in a violation of equality, and then one must ascertain whether the distinction is discriminatory in its purpose or effect. The court was satisfied that there had been a violation of equality. The plaintiff needed the benefit of the Cottage programme to make the transition into the community. She was denied that programme because of her gender, and for no other reason. The court found that that was both a denial of equality and discriminatory under section 15 of the Charter.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 15.
Constitution Act, 1867, ss. 58, 59, 60, 61, 62.
Criminal Code, R.S.C. 1985, c. C-46, ss. 614(2), 617(1).
Forensic Psychiatry Act, R.S.B.C. 1979, c. 139, s. 4(b), 4(c).
Human Rights Act, S.B.C. 1984, c. 22.
Interpretation Act, R.S.C. 1985, c. I-21, s. 28.

Counsel for the Plaintiffs: David W. Mossop and Diane Nielsen.
Counsel for Forensic Psychiatric Service Commission and Attorney General for B.C.: Paul J. Pearlman.
Counsel for Attorney General of Canada: Mary Humphries.

McKINNON J.:— The Plaintiff J.C. is a patient residing in facilities located in Coquitlam B.C. known as the Forensic Psychiatric Institute. She has resided there since 1980 when found not guilty by reason of insanity for the attempted murder of a child.

She seeks a declaration that the defendants are in breach of s. 15 of the Charter of Rights and Freedoms in the distribution of services they are mandated to provide. In particular she claims that the policy of the Institute in refusing to permit female patients to reside in premises known as the "cottages" is discriminatory and offends s. 15.

The Plaintiff's present "incarceration" arose from the provisions of the Criminal Code which provide inter alia for her "strict custody...until the pleasure of the lieutenant governor is known" see s. 614(2). That "pleasure" authorizes custodial categories which include strict custody through to

discharges, ranging from conditional to absolute, see s. 617(1). It is argued that the various roles discharged by the Lieutenant Governor in the incarceration and treatment of the Plaintiff encompass both federal and provincial jurisdiction, hence the reason for joining both Attorneys General.

The Forensic Psychiatric Institute is operated by the Forensic Psychiatric Services Commission which in turn is authorized by the Forensic Psychiatric Act R.S.B.C. 1979, C. 139. The purpose of the Act is inter alia to provide custody and treatment (my emphasis) for persons held in custody at the direction of the Lieutenant Governor pursuant to the provisions of the Criminal Code. There are five patient custodial categories: strict custody, safe custody, first level conditional discharge, second level conditional discharge and absolute discharge. The Lieutenant Governor's warrant or the Order in Council stipulates the condition each patient is subjected to and these change from time to time, depending upon the progress of the patient. A review board appointed by the Province meets regularly and makes recommendations to cabinet who in turn issue the appropriate custodial category.

The Constitution Act, 1867 ss. 58-62 provides for the appointment and payment of the Lieutenant Governor by the federal government. On appointment he or she discharges roles as both lieutenant governor and lieutenant governor in council. The Interpretation Act at s. 28 defines the former role as "carrying out the government of the province", while the latter is defined as, "administering the government of the province in conjunction with the provincial government". Particularly in matters where federal and provincial powers are complementary the Lieutenant Governor may often be delegated the role of "agent" for the federal government, see in Re Kleinys, [1965] 3 C.C.C. 102 (B.C.S. C.) and R. v. T.W.; R. v. S., [1981] 1 W.W.R. 181 (B.C.C.A.)

The Federal Attorney General argues that she has no role to play in the treatment of the plaintiff, rather the federal role is strictly one of custody and release. She submits that the issue is not one about the status of J.C., rather it is all about treatment and facilities which are solely within the scope of the province, see R. v. Swain, [1991] 1 S.C.R. 933, 125 N.R. 1 (S.C.C.), in Re Kleinys (supra), The Constitution Act 1982, s. 92(7) and Schneider v. The Queen, [1982] 2 S.C.R. 112. It is contended that access to facilities that are within the scope of the province is an aspect of treatment and rehabilitation, not an aspect of custodial status. There is no federal funding of any programs except shared medical services and there is no federal administration or functional control over the institute. Finally it is contended that the manner of confinement of a person in J.C.'s position is within the sole competence of the provincial government, see R. v. Coleman (1927), 47 C.C.C. 148. I agree with this submission, and find that the Federal Attorney General is not a proper party to this action.

The Provincial Attorney General contends first that there is no "law" which results in denial of equal benefits. He then expresses as an alternate ground, that while he exercises control over J.C. there is no discrimination, rather the Institute is simply allocating finite resources in an efficient and appropriate manner, given all the demands placed upon it. Section 15 he says has four components: 1. the right to equality before the law, 2. the right to equality under the law, 3. the right to the protection of the law, and 4. the right to equal benefit of the law. It is this last right which he says is in issue here. In rejecting any breach of s. 15 the province claims that there must be regard to the danger of trivializing

the Charter in an attempt to redress all perceived social or economic inequalities created by the legislature, see Symes v. Canada, [1991] F.C.J. No. 537; Ronald Douglas Edwards et al. v. H.M. the Queen et al. (F.C.T.D.) May 17, 1991; The Queen v. Sheldon S., [1990] 2 S.C.R. 254.

On November 19, 1981, J.C. was committed to strict custody and on November 25, 1981 to safe custody. In December of 1986 she was granted a conditional discharge but one condition was that she remain a resident of her ward at the Institute. On attaining conditional discharge J.C. was permitted to leave the Institute during the day and in fact obtained employment which was terminated after she committed several acts of theft. Now 44 years of age she has experienced many years of institutionalization. She left home at age 15 and between 16 and 20 spent several years in a mental hospital in Ontario. In 1967 she was found not guilty by reason of insanity of the murder of a five year old child. Released in 1972 she came to British Columbia, was in and out of several institutions, had a relationship that produced twins one of which died, and committed several offences involving weapons and property. She then was involved with the attempted murder that led to her committal to the Institute. The Review Committee has authorized her to spend five days and nights each week in the community and two at the Institute. She is described as being "on the verge of leaving the Institute". Notwithstanding this characterization, the authorities are having great difficulty finding a facility in the community, such as a half way home or boarding arrangement that will accept her. She continues to reside in a room in a facility known as the Dr. Halliday unit on the grounds of the Institute.

The Forensic Psychiatric Institute is located in a pastoral setting near the Fraser river in a location formerly known as "Colony Farm". There are three major buildings; the Main Institute, the Dr. Halliday Unit, and the Cottages. The Main Institute consists of a three story building constructed in 1955 which houses the majority of patients. The west wing of the top floor houses males requiring strict security with no programs. These are generally persons on 30 day remands. The east wing of the same floor contains some who have been declared unfit to stand trial or declared not guilty by reason of insanity and they receive modest therapy and some programs. The second floor contains two wards, as well for males who have access to a full range of programs and full grounds privileges. The first floor is reserved for females. It has only one ward, and houses all categories of female patients. The Dr. Halliday Unit (DHU) is a collection of mobile units placed on the grounds near the main Institute in July of 1990. It has 30 beds of which 5 have been reserved for females. The plaintiff has resided there in a private room since July of 1991. The Cottages are located several kilometres away on the grounds of the Riverview Institute. They appear to be former staff homes and although old, offer home-like accommodations for 18 males. There are presently 133 males and 17 females housed in the various facilities.

On conclusion of the evidence, and at the request of Plaintiff's counsel, I conducted a view of these facilities. The main Institute is a rather depressing facility with open wards and little privacy. The staff do their very best to create an atmosphere of relaxed, pleasant surroundings but they are severely limited by the physical plant. The ward in which J.C. has resided for most of the past ten years contains approximately 15 beds, fairly close to one another with no curtains or other aspects of privacy. The washrooms are communal as is the dining room. Meals are not prepared at the Institute but are trucked

in and no doubt suffer from the transportation. Programs are undertaken in satellite buildings, one of which was apparently constructed in 1900. There are however, extremely dedicated staff who in addition to health care, provide a wide range of activities including woodworking, small appliance repair and a patient-produced newspaper, all of which appear to generate considerable enthusiasm.

Dr. Karl Enright, called by the plaintiff, commented that whatever the physical restrictions of the Institute, the entire staff are highly dedicated professionals who provide patient care second to none. He stated however, that facilities are an integral part of any patient's rehabilitation and only DHU and the Cottages offer a significant indication of progress to the patients.

The Dr. Halliday Unit (DHU) was initially designed to alleviate overcrowding in the main Institute but it quickly became a valuable asset in the rehabilitation program. It was described by Dr. Enright as, "centuries ahead of the dormitories". It offers private rooms with areas for light snack preparation, lounges for reading, smoking and/or watching television and generally conveys an atmosphere of privacy. The nursing station is centrally located. Patients come and go freely to various jobs or training, either at the Institute or in the community. Meals must still be taken in the Institute's communal dining room. J.C. was moved to this unit in July of 1991 when five of the thirty available beds were allocated to female patients.

The Cottages are considered the ultimate goal for patients. Dr. Enright considers them a critical stepping stone in the rehabilitation of forensic patients in their progression into the community. There are three old homes located high on a hill on the grounds of Riverview Hospital which collectively house up to 18 males. These have a "home-like" atmosphere where patients are given considerable freedom. They are allotted a budget from which food and necessities are purchased. They plan and prepare all their own meals with minimum assistance. At least one staff member is available 24 hours per day, but apart from that there is almost no supervision. Many of the occupants work each day in the community, returning at night to either a private bedroom or shared with one other male. A staff report prepared for the Institute to assess its 1986/87 needs described the cottages as follows:

> "There are three Cottages located on the Riverview Complex capable of accommodating 18 patients who have progressed to the point where they can be considered for discharge. These Cottages are used to prepare the patients for their return to the community and they learn to adapt to normal life style, adopt regular living habits and accept the work ethic as a normal course of life. These Cottages are run as a normal home and patients do the vast majority of chores including cooking, washing, cleaning and tending to the yard".

Dr. Enright, who has extensive experience, particularly in the area of institutional facilities, expressed several opinions respecting the rehabilitation of forensic patients. There is, he said, a general tendency to integrate and treat according to illness not gender. A homogenous population (patients at the same level of skills and illness) is desirable to avoid descending to a low common denominator. Institutionalized persons forget basic skills such as budgeting, and many of the ordinary skills we take

for granted. These have to be re-learned. They also need to see viable signs of progress and in this regard a move to the Cottages would, he says, be considered a significant badge of progress. As a general proposition he believed that patients who went from wards to half way houses in the community often failed because the step was too great. The DHU unit he considered an excellent resource but different from and not a replacement for the Cottages.

The professional assessments of J.C. indicate that she is ready to "move up". Dr. Enright concluded, after an interview and a review of her file, that she had made real progress to date and agreed with her own assessment that she could benefit from a move to the Cottages. Notwithstanding efforts by the Institute to place her in the community, given the recommendation of the Review Committee, no appropriate facility can be found. She remains a resident at DHU. On the evidence presented there is no question whatever that but for her gender, she would be a resident of the Cottages.

Various committees of the Institute have over the years discussed integrating the Cottages. In a meeting on May 9th, 1985 the nursing committee briefly discussed a request by Dr. Adilman that a female be placed in the Cottages. Several reasons were given for refusing same, including security, but it was agreed that a policy was required. In an executive committee report in March of 1986 the importance of the Cottages to the rehabilitative program was stressed but there was no discussion of female participation. The executive committee was then composed of several prominent psychiatrists. In March, 1987 a report entitled "A Functional Program For New Facilities At Forensic Psychiatric Institute" was presented. It recommended the construction of units similar to the cottages to address the needs of residents who have, "recovered sufficiently to be considered for discharge". Various community patient services, such as the Vancouver and Victoria Clinics, have commented upon the value of the Cottages to the rehabilitation of patients. In a joint letter dated May 23, 1990 they praised the Cottage program.

It is apparent from the documents filed and the evidence presented that, but for budget restrictions, provision could be made for the accommodation of female patients in the Cottages. The Nursing Executive Committee discussed integration in a November 1987 report but concluded that staff costs precluded any change. This theme appears throughout, and indeed Mr. J.A. Richardson, the Director of the Institute, gave very detailed and compelling evidence about the competing demands upon his limited budget. He particularly rejected any suggestion that integration could occur without further staffing and attendant increase in costs. He accepted that a Court order requiring integration would be "viewed as something that must be addressed", but left me with the impression that in that event other areas would suffer.

Notwithstanding many references in minutes of meetings about integration of the Cottages, Mr. Richardson stated that no specific meeting was ever held to consider any alternative form of compensation, such as half-way homes, to female patients for exclusion from the cottages. Until recently there does not appear to have been much pressure to address the issue, given the ratio of males to females. This ratio is changing, with more female admissions, which in turn has caused some changes in hiring practices and daily routines. Mr. Richardson believed that approximately 7 women would be eligible for either the Cottages or DHU. Three females have recently applied to reside in the

Cottages. The impression which I gained from his evidence was that all staff considered integration an ultimate goal and that increased female committals in the past six months has caused this goal to become a priority.

Mr. Mossop contends that there is no evidence of funding problems, only the usual budget considerations applicable to every organization. Even accepting funding limitations, he says that the evidence indicates historic discrimination against women which offends the Charter and fiscal restraints cannot excuse a Charter violation.

I do not accept the Provincial Attorney General's argument that there is no "law" which results in a s. 15 denial of equal benefits. The "law" is the Criminal Code which provides for J.C.'s custody at the Institute and the Forensic Psychiatric Act (supra) which provides for her treatment. Her custodial status is regulated by the Province through the lieutenant governor who determines the appropriate classification. Depending upon the classification she is then directed to the appropriate facility. This process is all pursuant to a "law".

Furthermore, in Andrews v. The Law Society of B.C., [1989] 2 W.W.R. 289, it was held that while groups can be treated differently,the purpose of s. 15 is to ensure equality in the formulation and application of the law. McIntyre J. at page 300 stated:

> "In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law - and in human affairs an approach is all that can be expected - the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."

On page 305 in discussing the purpose of s. 15 he states that it is to ensure equality in the formulation and application (my emphasis) of the law. He quotes with approval a view expressed by the Ontario Court of Appeal that s. 15 read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law, see in Ref. re An Act to amend the Education Act (1986), 53 O.R.(2d) 513. In addressing the issue of discrimination as the term is used in s. 15, McIntyre J. at page 308 considered various Human Rights Acts but concluded that while discrimination in s. 15 was not applicable to private activities it was not otherwise limited in its application. Although it was limited to discrimination caused by the application or operation of law, the enumerated grounds in s. 15(1) were not exclusive. At page 308 he stated:

> "Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a 'continuing framework for the legitimate exercise of governmental power', and, at the same time, for 'the unremitting protection' of equality rights': see Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 155...."

In my view this interpretation of the application of s. 15 disposes of the defendant's claim that s. 15 is not applicable here in that there exists no "law" which may be offended by refusing J.C. access to the cottages.

There is clearly a "law" in issue here. In particular J.C. is subjected to a provincial statute which regulates her confinement, see Forensic Psychiatry Act (supra). In Jones v. The Queen, [1986] 2 S.C.R. 284 the Court spoke of standards by which the term "efficient education" was to be construed. It rejected the notion that a court was qualified to define what may or may not be efficient education but at p. 307 LaForest J. commented:

> "I have already stated that if it can be established that the school authorities action is exercised in an unfair or arbitrary manner, then the courts can intervene".

While there is no specific "law" prohibiting J.C.'s move to the Cottages, the administration of the provincial statute operates to exclude her. It is this action of the authorities that brings her within the jurisdiction of the Court and a review of s. 15. On page 307 of Jones (supra) LaForest commented further:

> "If a person feels aggrieved, he may apply to a court of competent jurisdiction, in that case a superior court under s. 96 of the Constitution Act, 1867, which could accord him such remedy as it considered appropriate".

In examining the issue it is apparent that a two tier test is involved. One must first determine whether the distinction results in a violation of equality and then move to ascertain whether the distinction is discriminatory in its purpose or effect, see R. v. Turpin, [1989] S.C.R. 1296 at 1334. This determination cannot be affected by any legislative justification which might be argued under s. 1. The equality rights must be given their "full content" divorced from s. 1 considerations, see p. 1328 of Turpin (supra). I am satisfied that there has been a violation of equality and move to the second consideration.

The issue of discrimination was reviewed by LaForest J. in McKinney v. University of Guelph (1990), 76 D.L.R. (4th) 545 at 646 where he stated:

> "Assuming the policies of the universities are law, it seems difficult to argue in light of Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1, [1989] 1 S.C.R. 143, 25 C.C.E.L. 225, that they are not discriminatory within the meaning of s. 15(1) of the Charter since the distinction is based on the enumerated personal characteristic of age".

That case dealt with mandatory retirement at age 65, and while it held that the Charter did not apply to universities, it had no difficulty concluding that the age restriction was discrimination. I have no difficulty concluding that a policy restricting participation in a rehabilitative program based entirely upon gender is discriminatory.

Gender discrimination was reviewed by the Federal Court of Appeal in the case of Gayle Kathleen Horii v. The Queen et al., (5 September 1991), Ottawa document A-841-91 [unreported]. Ms. Horii sought an injunction prohibiting her transfer from Matsqui Prison to the Burnaby Correctional Centre for women, a provincial prison. This move was contemplated by authorities because no federal facilities for women existed in British Columbia. Ms. Horii objected to the transfer as several programs and privileges she currently enjoyed at Matsqui Prison were not available at the provincial facility. On page 4 of the reasons, Hugessen J.A. in reviewing the trial judge's reasons stated:

> "As I read the Associate Chief Justice's reasons, he found four grounds for refusing the injunction. In the first place, he indicated that the Court should not be involved in 'running these institutions on a day to day basis'. That sentiment, while no doubt quite proper in its place, seems to me to be quite irrelevant to the question as to whether or not an injunction should be granted. The judge had before him an application alleging that the applicant was receiving differential and unfavourable treatment because of her sex. Whether this happened as a part of the day to day running of the institution or was some exceptional event has really no bearing on the matter".

The Provincial Attorney General's argument that J.C.'s. denial to this program was not discriminatory in that it was motivated solely by financial considerations, is irrelevant to s. 15 considerations. Since Andrews v. Law Society of British Columbia (supra), it is clear that the Charter protects individuals not only from direct or intentional discrimination, but also from adverse impact discrimination. The fact that discrimination is motivated by "administrative, institutional or socio-economic" considerations does not alter its character under s. 15. It remains "discrimination". (McKinney at 647)

J.C. by most accounts needs the benefit of the Cottage program to make the transition into the community. She has been denied that program because of her gender and for no other reason. I find that it is both a denial of equality and discriminatory under s. 15 of the Charter.

Mr. Pearlman argued that in the event a s. 15 violation is found, it is justified by s. 1 and pointed to the evidence of competing claims to finite funds, citing McKinney (supra). He also argues

that the "impairment" is minimal and the plaintiff enjoys far more benefits than she has lost. In this respect the "loss" is occasioned by legitimate claims to the allocated funds not by any capricious denial of equality. The authorities are utilizing limited resources in the best possible way he says and if that incidentally affects J.C. in a discriminatory way it is justifiable.

The s. 1 discussion unfortunately did not occupy much of the argument. The onus is upon the defendant to justify a limitation to a Charter right and while McKinney (supra) offers some guidance for analysis in the area, I do not think it stands for the proposition set forth by Mr. Pearlman. I propose to examine this aspect in the manner suggested by Mr. Justice LaForest in McKinney at pages 647-654. He particularly set out the methodology at 647:

> "The approach to be followed in weighing whether a law constitutes a reasonable limit to a Charter right has been stated on many occasions beginning with R. v. Oakes (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, and I need merely summarize it here. The onus of justifying a limitation to a Charter right rests on the parties seeking to uphold the limitation. The starting point of the inquiry is an assessment of the objectives of the law to determine whether they are sufficiently important to warrant the limitation of the constitutional right. The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right, the extent of its infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society."

In determining whether the defendant has discharged its burden of proof concerning "justification", an examination of each of the areas referred to in Oakes (supra) is required.

THE OBJECTIVE TEST:

It is necessary to determine whether the objectives of the impugned law are "sufficiently important" to warrant the limitation of the s. 15 Charter right. The "objective" of the Forensic Psychiatry Act is reasonably clear: to provide "forensic psychiatric services" [s.4(b)] and "treatment" [s.4(c)] to persons under their care. The defence argues that implicit in the statute is a directive to accomplish those goals within current budget restrictions. If that is the case I do not consider such implied direction to be "sufficiently important" to warrant the limitation of a constitutional right.

THE PROPORTIONALITY TEST:

This test involves balancing the above objective against "the nature of the right, the extent of its infringement, and the degree to which the limitation furthers other rights of policies of importance in a free and democratic society". (McKinney at 647) This proportionality requirement has three components, all of which must be met in order for the law, program, or activity in question to be reasonably and demonstrably justified under s. 1.

(1) The "rationality" test:

The question to determine is whether the present policy which excludes women from the Cottages is rationally connected to a budgetary restraint objective. I accept that a "rational" connection exists but it is not strong, as no one has suggested additional funds could not be made available or that changes could not be made to existing programs to accommodate the requested transfer.

(2) The "minimal impairment" test:

This involves ascertaining "whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives". (McKinney 652). In this analysis Mr. Justice LaForest (McKinney 653) approved the reasoning in Irwin Toy Ltd. v. Quebec (Attorney General, which "made it clear that the reconciliation of claims not only of competing individuals or groups but also the proper distribution of scarce resources must be weighed in a s. 1 analysis". However, LaForest, J. went on to emphasize that the courts must attempt to ascertain with "some certainty" whether the "least drastic means" has been chosen to "achieve" a desired objective (653-654). The "desired objective" of the Institute in this situation is to provide forensic psychiatric services and treatment to all persons under their care, while meeting current budgetary requirements. The requirements of the "minimal impairment" test have not, in my view, been met. The onus is upon the defence and there is no evidence that other sectors of the Institute would suffer. Mr. Richardson spoke in very general terms and did not offer any compelling evidence in this regard. One might assume an effect of some kind but in the absence of evidence there is nothing for me to "weigh".

Evidence must also exist proving (on reasonable grounds) that the relevant right was impaired "as little as possible given the government's pressing and substantial objectives". (McKinney 652). In my view, given that the plaintiff's right to equal treatment is extinguished, that outweighs any (unproven) competing interests.

Furthermore, the evidence indicates that no alternative means has ever been adequately explored by the Institute. There were occasional meetings and discussions but not much more. Thus it cannot be said that there has been a "proper distribution of scarce resources" by the Institute such that the "least drastic means" of meeting the Institute's objective has been proven. No one suggested that additional funds could not be obtained and the additional staffing requirement is not onerous.

> One also ought not to lose sight of the fact that in this instance, no resources are being allocated to achieve equality in treatment. It is not a question of stretching finite resources while attempting to achieve treatment for female patients, rather no resources at all are expended toward that goal. Financial concerns ought to be considered in the context of achieving a desired objective. Here the Institute chose to exclude women from the program and in doing so favoured the budgetary side of its "objective" equation, and thus failed to meet the legislated "treatment" objective.

(3) The "effect" test:

> This requires that the same factors as weighed in the "minimal impairment" analysis now need to be balanced to determine if the effects of the Institute's policies are so severe that they outweigh the government's "pressing and substantial objective" of fiscal restraint. The effect of denying the Cottage program to women, is that women patients are categorically denied an equal right to a "treatment" program which is considered a "critical stepping stone in the rehabilitation of forensic patients in their progression into the community." [see evidence of Dr. Enright, March, 1986 Executive Committee Report; March 1987 Report and May 23, 1990 Letters from Vancouver and Victoria Clinics]. I have concluded that this effect cannot be reasonably justified in a free and democratic society, particularly when one considers the increasing number of female admissions into the Institute.

The plaintiff has established a breach of s. 15 insofar as the first two named defendants are concerned, which I am satisfied is not justified by s. 1. The claim against the Attorney General for Canada is dismissed for the reasons given. Counsel for that defendant did not seek costs.

Although the plaintiff is entitled to relief consequent upon this decision, I am reluctant to impose any order which would have an immediate effect. I am also concerned about the precise form of the order. Counsel considered this difficulty when asking that the defendants be permitted some period of grace in which to accomplish the objectives of any judgment. There were also some very general comments about the form of a mandatory injunction but no consensus. I will, therefore, leave that issue, and the issue of costs to be addressed at a time and place convenient to all concerned.

McKINNON J.

DRS/DRS/DRS