

**When the Shield becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support People with Disabilities by
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Summary and comments by Colin Phillips

Canada has a rich history of supporting vulnerable populations through government programs and services. In the past, courts and human rights tribunals have served as an avenue to challenge the fairness and adequacy of these initiatives. In *The Shield becomes the Sword*, Tess Sheldon details how recent jurisprudence has made these challenges less accessible. Her findings will be analyzed in the context of the lives of Canadians with communication disabilities.

The Context: The Need, Prevalence, and Legislative Framework of Ameliorative Programs

Governments and other, mostly public, institutions recognize that widespread prejudice, and other systematic barriers, impedes the availability of marginalized groups to equally participate in society. Examples of these barriers include; widespread unemployment among disabled adults, leading to extremely high incidences of poverty, and poor educational outcomes among racialized youth due to a lack of access to supports enjoyed by their culturally dominant peers. Ameliorative programs, sometimes referred to as special programs or affirmative action, are mechanisms the state uses to address the substantive outcomes of these injustices. Income support payments for adults with disabilities and considering the race of university applicants when making admission decisions are both considered ameliorative programs.

In Canada, the legality of such initiatives is established in both the Charter of Rights and Freedoms and provincial human rights codes. Section 15(1) of the Charter guarantees universal equality before the law, regardless of “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”. However, Section 15(2) goes on to say that such discrimination is permitted if the legislation or program has the objective of “the amelioration of conditions of disadvantaged individuals or groups”. Similar language is used in provincial human rights codes (for example, see Section 14 of the Ontario Human Rights Code).

The Current Situation: An Expanded Ameliorative Program Defence

Historical jurisprudence in Canada maintained that even though ameliorative programs were legal under Section 15(2), their administration and scope still was subject to the equality rights that are afforded under Section 15(1). This was particularly important for members of disadvantaged groups who were challenging the administration of a program intended for their benefit. For

example, a person with a disability who was denied access to a program could argue that her equality rights had been violated. However, in 2008, the Supreme Court found that if the government identified a program as being ameliorative, it was immune from the scrutiny of Section 15(1).

The ramification of this decision has been a decreasing ability of disadvantaged groups to use the courts or tribunals to force governments to improve the programs they rely on. In 2010, the Ontario Human Rights heard a challenge to how disability is narrowly defined by the Ontario Disability Support Program. The adjudicator cited the Supreme Court's 2008 ruling in his decision that, because of the ameliorative nature of the program, the government had the authority to define the population being served as narrowly as it sees fit. Governments are now able to set extremely limited target populations for special programs without legal scrutiny. It is also quite plausible that even members of the targeted population will not be able to mount a successful court challenge, if their rights are violated.

Comment on Impact for Canadians with Communication Disabilities

Sheldon speaks of several implications these developments will have on the broader disability community. Unfortunately, in every case, they will be magnified for those with a communication disability. It is important to understand that the degree of exclusion that people with communication disabilities face is often higher than their peers. Likewise, their more "complex" disabilities often require more accommodations by government services. Sheldon raises concerns about the extent to which ameliorative programs play a pivotal role in the lives of people with disabilities. This is especially the case where communication is an issue.

As a population that is relatively small, with no political capital, yet who is heavily reliant on special programs, people with communication disabilities could particularly be victim of now narrowly defined programs. Consider the following hypothetical example: The government offers an employment support program that includes funding for attendant care and sign language interpretation, but not communication assistance for people who use an augmentative communication device. If a person was to mount a Charter or human rights challenge to this lack of funding, it is likely that the Crown could successfully mount a defence merely saying that communication disabilities are not a target population.