Ontario government wins one, loses one in challenges to equity legislation

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Ontario courts have recently handed down rulings involving *Charter* challenges to two of the more controversial moves of the Harris government.

CHARTER APPLIES TO GOVERNMENT ACTION, NOT INACTION

In the first case, *Ferrell v. Attorney General of Ontario* (July 9, 1997), the applicants attempted to have the *Job Quotas Repeal Act*, which repealed the NDP government's *Employment Equity Act*, declared unconstitutional. The applicants argued that the government had a positive duty under the equality provisions of the *Charter* to enact employment equity legislation. In the alternative, they argued that, even if it had no positive duty to enact the legislation, the government was obliged to leave existing employment equity legislation in place. Finally, they contended, the repeal of the legislation had resulted in a "poisoned environment" which contravened their *Charter* rights.

The court disagreed, ruling that, while it may be socially or politically desirable for the government to enact laws in a certain area, it is not obliged to do so constitutionally. The *Charter* applies to government action, not inaction. Where societal systemic discrimination creates inequality, the government may well choose to address it, but does not have to. For the *Charter* to apply, the court held, there must be some legislative distinction which gives rise to the inequality.

Nor is the government obliged to retain previously enacted legislation, the court stated. When a government chooses to act, it must act in a non-discriminatory manner, and provide equal protection to all groups entitled to it. But here, the government had simply repealed a statute, and did not enact any substantive provisions that could be measured against the *Charter*. The government was entitled to take a political decision to scrap what it viewed as a quota-driven response in favour of its own voluntary method of combatting discrimination.

The court also rejected the "poisoned environment" argument, stating that the distinction resulting in discrimination was "not legislative but societal; the enactment and repeal of the *Employment Equity Act, 1993* did nothing to alter its intrinsic character".

SCRAPPING PROXY COMPARISON METHOD UNCONSTITUTIONAL

The government was not as successful in *S.E.I.U., Local 204 v. Attorney General of Ontario* (September 5, 1997), where the issue was the constitutionality of Schedule J of Bill 26, the *Savings and Restructuring Act, 1996*. That provision discontinued the use of the proxy method of comparison, which had been added to the *Pay Equity Act* in 1993.

The proxy method involves comparing the jobs of female job classes to job classes found outside a predominantly female workplace. It applied only to some 100,000 women working in female-dominated organizations in the broader public sector for whom no other comparators could be found; and it was to be introduced gradually. At maturity, it would have cost the government $484 million annually.

When the government moved to eliminate the proxy comparison method, it also capped pay equity adjustments for the women covered by the method. The result was that, while other women in the public sector had achieved pay equity at government expense, the women under proxy plans, some of the lowest-paid women in the public sector, had had only 22 per cent of their wage gap satisfied. The applicants argued that this created a discriminatory distinction against the most disadvantaged group of women and denied them equal protection under the *Pay Equity Act*.

The court agreed. It stated that the situation would have been different had the government chosen simply to repeal the *Pay Equity Act*, or to spread the burden of its fiscal restraints to all women in the public sector receiving pay equity adjustments at government expense. Here, however, it had to justify why it threw the entire weight of its funding reductions on women in the proxy sector, while other women in the public sector continued to benefit from government-funded wage adjustments.

In justification of its action, the government had argued that the proxy comparison method was flawed and incompatible with pay equity principles. However, the court disagreed, stating that the proxy method was appropriate and had been researched and endorsed by the Pay Equity Commission. By contrast, the government had removed the proxy method without any study of its efficacy and in the absence of any demonstrated problem.

A government can choose whether or not to provide legislative remedies to inequality, the court reiterated. However, where it does legislate in favour of a disadvantaged group, it must make the law apply equally and fairly to all within the group, or it will be found to have discriminated.

In Our View

The issue of government inaction in equality matters is before the Supreme Court of Canada in *Vriend v. Alberta*, in which the province of Alberta is defending its refusal to make sexual orientation a ground of discrimination in its human rights legislation. Alberta appears to be making the argument, described in the two Ontario decisions, that governments have the prerogative not to provide remedies to societal inequality. However, the question remains whether, once a government enacts human rights legislation, it can then refuse to extend its protection to a group that is protected under the equality provisions of the *Charter*.

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