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Age Discrimination and Ameliorative Program Protections to be Broadened Under *Alberta Human Rights Act*

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Legislation Commented On: Bill 23, *An Act to Amend the Alberta Human Rights Act*

On November 1, 2017, Bill 23, *An Act to Amend the Alberta Human Rights Act*, had first reading in the Alberta Legislature. As I noted in a post in February 2017, Bill 23 was spurred by a *Charter* challenge commenced by elder advocate Ruth Adria. She argued that the exclusion of protections against age discrimination in respect of services available to the public and tenancies in sections 4 and 5 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*), violated her constitutional equality rights. The Alberta government did not fight the challenge, and consented to an order requiring age discrimination to be added to the *AHRA* by January 2018. The government then undertook consultations on the apparently thorny issue of how the amendments would affect adult-only condominiums, cooperatives, and apartments. Bill 23 attempts a compromise, and if passed, it will allow some exceptions to the new prohibitions against age discrimination in this context. But there are apparent gaps and uncertainties in the Bill that the government may wish to address, as I will elaborate upon here. Bill 23 will also add to the *AHRA* a new provision, section 10.1, protecting ameliorative policies and programs, which also merits some commentary.

Age Discrimination Amendments

At its simplest, Bill 23 would add age as a protected ground to section 4 of the *AHRA*, which prohibits discrimination in the area of goods, services, accommodations or facilities that are customarily available to the public (which includes condominiums – see here), and to section 5, which prohibits discrimination in relation to tenancies of commercial and self-contained dwelling units and mobile home sites. People will now be able to bring complaints of discrimination based on age in these areas, unless one of the exceptions in Bill 23 applies.

Bill 23 retains the definition of "age" in the *AHRA* as 18 years of age or older (see section 44(a)), with some exceptions in the condominium / tenancy context. This definition means that children and youth are not protected against age discrimination for all purposes. It will still be possible, for example, for a café to exclude those under the age of 18, unless they are with a parent who could claim discrimination in services based on family status.

Bill 23 would add section 4.1 to the *AHRA*, providing that the prohibition against age discrimination in section 4 "does not apply with respect to the conferring of a benefit on (a) minors or any age-based class of minors, or (b) individuals who have reached a specified age not less than 55." The term "benefit" is defined to mean preferential access, terms, conditions or treatment in respect of goods, services, accommodation or facilities, but "does not include a

minimum age for occupancy of accommodation" (see proposed section 44(1)(a.1)). As explained by Justice Minister Kathleen Ganley, these new sections are intended to protect service providers who give special rates to youth and those over 55 for things such as transit fares, movie tickets, or – my favourite – discounts at hardware stores.

As noted, Bill 23 would create some important exceptions to the new prohibition against age discrimination in the context of condominiums and rental accommodations. Proposed section 4.2(1) would allow minimum age restrictions for occupancy in condominiums, cooperatives and mobile home sites that are currently in existence to continue for 15 years, precluding claims based on age or family status discrimination during that transition period (see also section 8 of Bill 23). This exception would extend to those who rent out these sorts of premises under the proposed new section 5(2).

Another exception, which is not time-limited, would allow premises covered by section 4 (e.g. condominiums) and section 5 (i.e. rental accommodations) to restrict occupancy in their premises to individuals over the age of 55, or to two individuals where one of them is over 55 (see sections 4.2(2) and 5(3)).

Bill 23 would also allow regulations to be made prescribing certain individuals and circumstances to be exempted from minimum age occupancy requirements (see the proposed new sections 4.2(3), 5(4) and 5.1). Minister Ganley indicated that live-in caregivers would be an example of one such class of individuals who the regulations would exempt.

One issue on which Bill 23 is not clear is whether independent minors – those between the ages of 16 and 18 – have the benefit of age discrimination protections when they are denied rental or other accommodations because of their youth. As noted in my earlier post, Ontario has clearly protected such independent minors in its human rights legislation. While age is defined in the *AHRA* as over 18, Bill 23's proposed section 44(1)(a.1) provides that this definition does not apply for the purposes of sections 4.1, 4.2, 5(2) to (5) and 5.1. Because those sections create exceptions to the new age discrimination protections in sections 4 and 5, one reading of this set of provisions is that age discrimination claims still cannot be launched by those under 18 – the exemptions in sections 4.1, 4.2, 5(2) to (5) and 5.1 are intended to apply to those of all ages in protecting age-related benefits and minimum age occupancy restrictions in some circumstances.

However, the intent of sections 4.2(1) and 5(2) appears to be to protect only existing minimum age restrictions for occupancy, such that families with children cannot be denied accommodations after January 1, 2018 in premises that do not currently have age restrictions in place (unless they are over-55 buildings). If this is the case, shouldn't independent youth also be protected from age discrimination? The interpretive problem is that if the exemptions in sections 4.1, 4.2, 5(2) to (5) and 5.1 do not apply, we are back at sections 4 and 5, which only prohibit age discrimination for those 18 and older. Prohibitions against family status discrimination will ensure that families with children are protected in these circumstances, but it is not clear that youth living independently of parents are protected given the definition of age. The government would do well to clarify this issue in Bill 23 – and I hope their intent is that independent youth are to be protected from discrimination in accommodations in the same way as families with children.

There has been a lot of negative reaction to Bill 23 from condominium owners and renters who would like to preserve their adults-only buildings. One is reminded of the outcry over Bill 6, which included farm and ranch workers in Alberta within the scope of labour and employment protections (see here), and Bill 4 and Bill 7, which extended the right to strike to previously excluded workers unless they are performing essential services. These changes to Alberta law have all been constitutionally mandated. That does not necessarily make them popular, but it should serve to quell arguments that the NDP government is somehow on a mission to overturn the status quo. For too long, Alberta had a government that was prepared to ignore its constitutional obligations in some areas (see e.g. its approach to discrimination based on sexual orientation, commented on here). In my view, the fact that we currently have a government that abides by the *Charter* – the supreme law of Canada – should be cause for celebration rather than criticism.

Ameliorative Policies, Programs and Activities Amendment

Bill 23 would also add section 10.1 to the *AHRA*, worded as follows:

> s 10.1 It is not a contravention of this Act to plan, advertise, adopt or implement a policy, program or activity that
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> (a) has as its objective the amelioration of the conditions of disadvantaged persons or classes of disadvantaged persons, including those who are disadvantaged because of their race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation, and
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> (b) achieves or is reasonably likely to achieve that objective.

Currently, employers or service providers who wish to implement ameliorative programs in Alberta are left to defend such programs under the *AHRA*'s general defence provision, section 11, which allows for contraventions of the Act that are "reasonable and justifiable in the circumstances."

All other provinces and territories and the federal government have more specific defences for ameliorative programs akin to the proposed section 10.1, either in the employment context (see section 42 of BC's *Human Rights Code*, RSBC 1996, c 210) or more broadly (see e.g. section 16 of the *Canadian Human Rights Act*, RSC 1985, c H-6; section 14 of Ontario's *Human Rights Code*, RSO 1990, c H.19; Nova Scotia's *Human Rights Act*, RSNS 1989, c 214, section 6). Some of these jurisdictions also require that the policy, program or activity that is sought to be justified "achieves or is reasonably likely to achieve" its ameliorative objective (see e.g. *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, section 48; Manitoba's *Human Rights Code*, CCSM c H175, section 11). An alternative approach is to require the ameliorative program to be approved by the human rights commission in the province or territory (see e.g. section 42 of BC's *Human Rights Code* in respect of ameliorative programs outside the employment context; New Brunswick's *Human Rights Act*, RSNB 2011, c 171, section 14).

Section 10.1 of the *AHRA* is in some ways analogous to section 15(2) of the *Charter*, which allows governments to protect ameliorative programs from claims of "reverse discrimination" – see *R v Kapp*, 2008 SCC 41 (CanLII). However, in *Kapp* the Supreme Court held that analysis of section 15(2) should focus on the ameliorative purpose of the government rather than whether its programs have the intended ameliorative effects, as long as there is a rational connection between the purpose and the means used to achieve it (at paras 48-9). The Court's rationale for focusing on purpose was to provide those implementing ameliorative programs with "some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful" (at para 47).

Section 10.1's requirement that the program or policy "achieves or is reasonably likely to achieve" its ameliorative objective may create a higher burden than section 15(2) of the *Charter* when it comes to defending ameliorative programs. Hopefully section 10.1 will not allow those with reverse discrimination claims, or claims of discrimination based on conflicting grounds, to defeat genuine ameliorative programs.

In Saskatchewan, which has an analogous provision to section 10.1, the only relevant case I could find that referenced the ameliorative programs provision did so without looking at the wording "achieves or is reasonably likely to achieve" in any detail. In *Owens v Post Media Network Inc.*, 2016 SKQB 289 (CanLII), the court dismissed Owens' claim that the Regina Leader-Post had discriminated against him based on religion when it refused to publish verses from the New International Version Bible in advertising space he had purchased during Gay Pride Week. The court cited section 48 of the *Saskatchewan Human Rights Code* to support its finding that "the rejection of Mr. Owens' advertisement was a reasonable and justifiable measure designed to prevent disadvantages suffered by a group of individuals" (at para 108) – here, members of the LGBTQ communities (at para 104). There is no relevant case law in Manitoba, the other province with a provision similar to the proposed section 10.1of the *AHRA*.

Another issue that has come up under section 15(2) of the *Charter* concerns claims of discrimination by disadvantaged persons who are excluded from the ameliorative program in question because it is aimed at another group. In *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 (CanLII), the Supreme Court held that it was open to governments to target ameliorative programs at some disadvantaged groups to the exclusion of others, provided the exclusion "serves and advances" the ameliorative program in question (at para 45). Equality rights activists and scholars have been critical of this decision (see here), as it fails to recognize the principle that once the government decides to implement a benefit conferring program, it must do so without discrimination (see *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC)). There is no case law in Saskatchewan or Manitoba considering this issue that I could find, so it remains to be seen how section 10.1, if Bill 23 is enacted, would be interpreted in this context.

This post may be cited as: Jennifer Koshan "Age Discrimination and Ameliorative Program Protections to be Broadened Under *Alberta Human Rights Act*" (8 November, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/11/Blog_JK_Bill23.pdf

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