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No Discrimination Against Long-Term Care Residents in Elder Advocates of Alberta Case

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Case Commented On: *Elder Advocates of Alberta Society v Alberta*, 2018 ABQB 37 (CanLII)

Our colleague Lorian Hardcastle recently posted a comment on the *Elder Advocates of Alberta Society* case, where a class of long-term care residents brought a claim against the Alberta government challenging its ability to charge accommodation fees in their facilities. As she noted, the plaintiffs were unsuccessful in their claims of unjust enrichment, negligence, and contract. The plaintiffs also argued that the accommodation charges were discriminatory on the basis of age and mental / physical disability, contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. Justice June Ross also dismissed this argument, and her reasons on the section 15 claim will be the focus of this post.

The relevant legislation for the purposes of the *Charter* claim was a series of statutes and regulations: the *Nursing Homes Act*, RSA 2000, c N-7 and *Nursing Homes Operation Regulation*, Alta Reg 258/1985, which permit operators of nursing homes to charge their residents a daily accommodation charge; and the *Hospitals Act*, RSA 2000, c H-12 and *Hospitalization Benefits Regulation*, Alta Reg 244/1990, which require residents of auxiliary hospitals and patients in acute care hospitals who are awaiting nursing home or auxiliary hospital care to pay an accommodation charge. Read together, "the relevant legislative provisions prescribe the accommodation charge when a person is assessed [as] being in need of chronic care in an institutional setting" (at para 350). The decision notes that accommodation charges increased in 2003 (at para 3) by 40% (from $30 to $42 a day) for a semi-private room and by 48% (from $32.60 to $48.30 a day) for a private room (at paras 91, 98). As indicated in Professor Hardcastle's post, the current charges range from $53.80 a day for a shared room to $65.50 a day for a private room. Subsidies for the accommodation costs are available to lower income long-term care residents through the Supplementary Accommodation Benefit (SAB).

The plaintiffs argued that the accommodation charges authorized by the legislation were discriminatory, as patients in acute care facilities were not required to pay similar fees. As we will discuss, section 15 requires discrimination claims to be based on protected grounds, and the plaintiffs' contention was that they were treated adversely based on "a combination of age and disability factors" (at para 353). The government's response was that the services offered in acute care hospitals are distinguishable from those offered in long-term care facilities, and that "any legislative distinction is based on the nature of care required, not on age or disability" (at para 354). They also noted that if long-term care residents required acute care, they would not have to pay accommodation charges, similar to other acute care patients.

The Decision

Justice Ross commenced her decision with a discussion of the purpose of the equality rights guarantee in section 15 of the *Charter*. Relying on leading Supreme Court of Canada decisions such as *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143; *R v Kapp*, 2008 SCC 41 (CanLII); and *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII), she noted their agreement that section 15 protects substantive equality, meaning that "the actual impact of the law on the claimant group" must be considered, as well as the "historical and contemporary positioning of the claimant group" (at para 338). Justice Ross relied (at para 340) on the test for discrimination established in the *Kapp* and *Withler* cases:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

She noted that the analysis should be holistic and contextual, with a range of factors to be considered, including the claimant's historical position of disadvantage, existing prejudice against the claimant group, the nature of the interest affected, whether there is correspondence between the law and the claimants' actual characteristics or circumstances, and the law's ameliorative effect on others (at para 344, citing *Withler* at para 38).

Justice Ross also remarked upon the need for a comparative approach under section 15, but one that must be undertaken flexibly to avoid "fall[ing] into the formal equality trap by assuming that identical treatment of similarly situated groups, and differential treatment of different groups, avoids discriminatory effects" (at para 345, citing *Andrews* at 164).

Applying the test for discrimination, Justice Ross found that the first step was met – there was a distinction based on a protected ground. She found that the appropriate comparison was between those who are assessed as requiring long-term care and those who are in-patients in acute care facilities. Only the former group is required to pay the accommodation charge, and this is so regardless of what kind of facility they reside in. Citing an earlier judgment of Justice Sheila Greckol in the decision to certify the class action, Justice Ross held that this distinction was based on the nature of the disability: "those institutionalized with chronic, long-term health care needs as compared to those institutionalized with acute, short-term health care needs" (at para 358, citing 2008 ABQB 490 (CanLII) at para 499). The evidence also showed that the elderly are "much more likely" than younger persons "to experience the type of chronic health care needs that require institutional care", but Justice Ross declined to find that the accommodation charge created an adverse impact on the basis of age, stating that "the distinction is directly based on the personal characteristic of disability and not age" (at para 359). At the same time, she rejected the government's argument that the distinction was based not on protected grounds but on the services being provided (i.e. health care services versus other care-related services), noting that "this distinction is not maintained in an acute care hospital setting" (at para 360).

However, Justice Ross went on to deny the claim at the second step of the *Kapp / Withler* test, finding that the distinction did not create a disadvantage by perpetuating prejudice or stereotyping. She began this stage of analysis with a comparison of the plaintiffs' claim to that in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC),

where the claimants successfully argued that the failure to provide sign language interpretation in the context of medical services violated section 15 of the *Charter*. Justice Ross noted that unlike *Eldridge*, the case at hand did not involve an inability to access health care services; rather it involved the requirement to pay a charge for accommodation services (at para 373). She found the claim to be more like that in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 (CanLII), where the Supreme Court held that a government's failure to fund services they had defined as "non-core" – behavioural treatment for autistic children – did not violate section 15. According to Justice Ross, where "the legislative scheme reveals an intention of the Province not to completely fund all medical services, including long-term care facilities, the Plaintiffs have a higher hurdle to prove that the accommodation charge is discriminatory, and not merely part of the intended legislative scheme" (at para 377). She found that the legislative scheme at issue in this case "has never been comprehensive", citing legislation dating back to the 1960s (at para 378). However, because the plaintiffs claimed that the scheme itself was discriminatory, this was not the end of the analysis, and the presence of prejudice and stereotyping had to be considered.

Justice Ross found that the interests of the plaintiffs were "purely economic", noting that they had not led evidence that persons in need of chronic long-term care "suffer disadvantage in terms of either the quality of health care services that they receive or the quantity of health care resources devoted to them" (at paras 382, 381). Any economic disadvantage only applied to members of the class who have sufficient financial resources, given the availability of a subsidy for low income long-term care residents, the SAB. Furthermore, she found that the accommodation charge did not perpetuate prejudice, as it was "intended to cover costs associated with accommodation and meals, and the amounts charged in fact bore a reasonable relationship to those costs" (at para 383). Nor was the accommodation charge based on stereotyping; instead, it reflected a "real difference in the circumstances of those who pay the accommodation charge, as compared with the comparator group, in patients in acute care hospitals" (at para 384). Quoting a 1984 statement in the House of Commons of the Honourable Monique Bégin, Justice Ross relied on the idea that long-term care facilities are the homes of senior citizens; "it is normal that these people use part of their pension to pay a daily amount for food and maintenance as well as for accommodation cost" (at para 385).While some residents of long-term care facilities will continue to incur costs for their homes, especially in the first stages of long-term care, "the discrimination analysis does not require perfect correspondence" between a benefit program and the claimants' actual needs and circumstances (at para 392, citing *Withler* at para 67). Justice Ross also noted that the accommodation charge "is part of a larger benefits scheme" in the context of which "multiple interests must be balanced, and limited resources allocated accordingly" (at paras 387, 389). There was therefore no discrimination and no violation of section 15 of the *Charter*.

Commentary

We begin by noting that Justice Ross did not mention two Supreme Court of Canada equality rights decisions subsequent to *Kapp* and *Withler* which modified the test for discrimination. In *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII), a majority of the Supreme Court held that prejudice and stereotyping are two indicia of discrimination, but they do not cover the field (at para 329) – government action that worsens a group's historical disadvantage or "widens the

gap" between that group and others should also be seen as discriminatory (at para 332). The Court's 2015 decision, *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII) (at paras 16, 18, 20, 28, and 34), suggests that the arbitrariness of government actions is still a relevant consideration in setting out the test for discrimination, and while Justice Ross did use the word arbitrary once (at para 336), she did not reference *Taypotat*.

Quebec v A and *Taypotat* did not modify the first step of the test for discrimination, but the Court in *Taypotat* did fail to recognize the adverse effects based on protected grounds created by the law at issue in that case, which we critique in "*Kahkewistahaw First Nation v. Taypotat*: An Arbitrary Approach to Discrimination" (2016) 76 Supreme Court Law Review (2d) 243. Similarly, Justice Ross's failure to recognize that the accommodation charge resulted in adverse effects discrimination for the elderly – i.e. a distinction based on the protected ground of age – can be critiqued. While it may be true that the accommodation charge is more directly connected to disability than age, section 15 also protects against adverse effects discrimination. Justice Ross's reluctance to accept age as a relevant intersecting ground may be related to her reliance on what appears to be a mirror comparator group, even though she earlier warned against that kind of analysis because it risks embedding formal equality. Although she did not recognize the intersection of disability and age at the first stage of the analysis, however, Justice Ross does appear to consider the fact that the plaintiffs are elderly when analyzing discrimination at the second stage (see paras 381-382).

We also commend Justice Ross's dismissal of the government's argument that the distinction in this case was based on the nature of the care provided and not on the nature of the disability. A similar argument was problematically accepted by the Supreme Court in *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 (CanLII), where the Court found that any distinction in the government's treatment of workers was based on the nature of the work they did rather than their personal characteristics (even though the health care workers at issue were largely women). However, Justice Ross seems to return to the distinction in the nature of care at the second stage of the section 15 analysis, as we will elaborate on below.

At the second stage, Justice Ross focused on prejudice and stereotyping, flowing from her use of the *Kapp / Withler* test for discrimination. We have critiqued this approach to discrimination previously (see "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination Under Section 15 of the Charter" (2014) 19:2 Review of Constitutional Studies 191), on the basis that it tends to focus on government objectives and intent rather than the effects of government action on the claimants. The problem with focusing on the government's intent is especially evident in Justice Ross's reliance on *Auton* and the question of whether the legislative scheme at issue was meant to be comprehensive. *Auton* has been critiqued for its circular reasoning (see Michael P. Perlin, "Benefits Provided, Hidden and Denied: A Critique of the Supreme Court of Canada's Test in *Auton v. British Columbia"* (2012) 30 National Journal of Constitutional Law 33; Margot Finley, "Limiting Section 15(1) in the Health Care Context: The Impact of *Auton v. British Columbia"* (2005) 63 U Toronto Faculty L Rev 213) and Justice Ross's reasoning also has this quality. To say that "the legislative scheme reveals an intention of the Province not to completely fund all medical services, including long-term care facilities" and that the plaintiffs must "prove that the accommodation charge is discriminatory, and not merely

part of the intended legislative scheme" (at para 377) is entirely circular and narrowly focused on the government's intent. It allows the government to avoid the charge of discrimination simply by saying they intended to exclude the very benefit that the claimants argue was withheld from them in a discriminatory way. The longstanding nature of the accommodation charge should have deepened the claim of discrimination rather than supported the government's position (see para 378), and a statement from 1984 about the normalcy of accommodation charges (see para 385) should have been discounted as it was made before section 15 of the *Charter* took effect in 1985.

Justice Ross also used the contextual factors that the Supreme Court set out as relevant to discrimination in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CanLII 675 (SCC), creating a somewhat old-fashioned feel to the decision. In particular, she relied on the correspondence between the law and the claimants' actual circumstances – *Law*'s much maligned second contextual factor, which was seen as relevant to stereotyping in *Kapp.* This factor reinforces the focus on government intent rather than the effects of the law, thereby importing section 1 considerations of arbitrariness into the analysis. Not only must the plaintiffs disprove arbitrariness to overcome this factor, they must deal with *Withler*'s point that "perfect correspondence is not required." In this case, although Justice Ross admitted that not everyone pays for residential costs once and only once, she confined those "exceptions" to the short term, suggesting an almost perfect correspondence (at para 386). However, she failed to acknowledge that discrimination does not have to occur against every member of a group for a claim to be made out, making the notion of an exception problematic here. It is also surprising that there was no mention of couples, with one at home and one in a long-term care facility, which could result in one person paying for two residences, thus undermining the claim of correspondence (although the evidence did show that most long-term care residents are not-married or single, at para 380). Justice Ross's indication that the claim would be strong(er) if the accommodation charge did not bear a reasonable relationship to the cost of accommodation and meals also relied on the correspondence factor. Overall, the application of this factor seems to accept the government's argument that the distinction in this case is based on the nature of the care facility rather than disability and / or age, in spite of Justice Ross having rejected this argument at the first stage of analysis.

Had Justice Ross focused on the effects of the accommodation charge in terms of the perpetuation of historical disadvantage of long-term care residents – elderly persons with disabilities – would the outcome have been different? She did consider the disadvantage of the plaintiffs as a factor, if not focus. There was expert evidence that the majority of long-term care residents are "very old and frail"; female; single; low income; transient; and "very ill and very medically unstable" (at para 380). Yet she found that the disadvantage caused by the accommodation charge itself – in other words, the nature of the interest affected, another factor from *Law* – was purely economic and not related to quality of health care services or quantity of health care resources (at para 381). For Justice Ross, the availability of the subsidy for low income long-term care residents meant that the disadvantage caused by the accommodation charge did not perpetuate the historical disadvantage of the group, as it only affected those with sufficient financial resources to pay themselves.

But what are "sufficient resources"? Justice Ross's judgment does not indicate where the line is drawn for the Supplementary Accommodation Benefit or how much that benefit is. The Alberta Seniors Benefit website indicates that benefits are available to single seniors with annual incomes of $27,300 or less and that "[b]enefits for seniors living in long-term care and designated supportive living facilities are calculated to ensure that a senior has at least $315 in disposable income every month after paying monthly room, meals and housekeeping charges." It goes on to say that the disposable income is usually used for "expenses such as personal hygiene, telephone, cable, etc." There might be room for overlap in what is included by the government in "accommodation costs" and what is included in "disposable income." However, it seems impossible to say based on the information available.

It is nevertheless true that a large percentage of the affected long-term care residents receive a Supplemental Accommodation Benefit. But it appears that roughly half of long-term care residents (or their families in the event of mental disability on residents' part) had no choice but to go along with the unexplained 40% or 48% increase and find a way to pay for it. This seems even more unfair because, as Professor Hardcastle pointed out in her post, the government's evidence made it clear that the government does not know the actual costs of long-term care residents' accommodation or what to include in accommodation costs, so that residents and other members of the public do not know whether the charges are fair or who is subsidizing whom. It thus appears that the government singled out a particularly vulnerable population; not only are they elderly, with chronic disabilities and incapable of living on their own, but 40% of the residents in long-term care have no visitors (Factum of the Respondents in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII) at para 18).

This class action was initially motivated by the 2003 price increase — a more than 40% increase imposed with very little notice to those who had to pay it. It does seem unfair to impose such a drastic hike in the cost of accommodation on those who, for the most part, cannot choose whether to move or stay. If bargaining fails, moving is the way most Albertans in rental accommodation respond to drastic rent increases. But, whether due to illness, low income, or lack of an advocate able to make things happen, most long-term care residents cannot move.

Reading the judgment, the equality guarantee does not seem to be capable of righting the wrongs in this class action. But is that the correct outcome? There is clearly differential treatment of a vulnerable population. The very ill in acute care do not pay accommodation costs for using Alberta's health services, but neither does anyone else in Alberta except those in long-term care. Those in long-term care are the only group to pay for the room and board and a percentage of facility overhead that comes with the provision of their health care inside a health care facility. So the law does create a distinction based on intersecting grounds of age and disability. But did it perpetuate the disadvantage of long-term care residents? This is a population that cannot move when 40-48% increases are imposed on them with little notice and less consultation. They cannot move because they do not have the resources, whether monetary or health resources, and many do not have anyone to take up their cause for them. Although the very poorest are subsidized, a significant percent are not. The 2003 increase — the impetus for this law suit — does seem to perpetuate the disregard and historical disadvantage suffered by long-term care residents. The government's justification for this differential treatment is that everyone except those in long-term care has a residence that is outside a health care facility. Those in long-term care have their

residence within a health care facility and so they pay for the costs of shelter and food within that facility. They are "long-term care residents," as well as "long-term care patients". That justification sounds like a section 1 argument, an argument that should have been kept separate from the section 15 analysis. Yes, we have distinguished between long-term care residents and everyone else; yes, we have done so in a way that increases their disadvantage; but we have done so for reasons and in a way that can be justified in a "free and democratic society". Ultimately, Justice Ross's focus on government intent rather than effects, and her importation of section 1 considerations into section 15 – which the Supreme Court continues to support given its focus on "arbitrary" disadvantage – doomed a discrimination claim that appears to us to have merit.

This post may be cited as: Jennifer Koshan and Jonnette Watson Hamilton "No Discrimination Against Long-Term Care Residents in Elder Advocates of Alberta Case" (23 February, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/02/Blog_JK_JWH_Elder_Advocates.pdf