October 3, 2019

Discrimination Justified in Elder Advocates of Alberta Society Class Action

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Case Commented On: *Elder Advocates of Alberta Society v Alberta*, 2019 ABCA 342 (Can LII)

The Alberta Court of Appeal has dismissed the appeal of the Elder Advocates of Alberta Society from the January 2018 judgment of Justice June Ross, which had dismissed their class-action challenging accommodation fees charged to long-term care residents by the province. Accommodation fees cover expenses such as meals, housekeeping, and building maintenance, and currently range from $55.90 per day for a standard shared room to $68.00 per day for a private room. The essence of the class action claim was that long-term care residents are subsidizing their health care costs, something no other users of the Alberta health care system are required to do.

In *Elder Advocates of Alberta Society v Alberta*, 2018 ABQB 37 (CanLII), Justice Ross had dismissed all of the claims made by appellants – claims of unjust enrichment, negligence, contract and discrimination on the basis of age and mental / physical disability. Our colleague, Lorian Hardcastle, commented on the statutory interpretation, unjust enrichment, negligence, and contract issues in Justice Ross's judgment in her post Court Dismisses Allegations that Long-Term Care Residents Subsidize Their Health Care Costs. The Court of Appeal decision does not add to the lower court decision on these issues. Justices Peter Costigan, Jo'Anne Strekaf and Rita Khullar agreed with Justice Ross that the accommodation charge is a maximum *per diem* amount set by the Minister, in their discretion, that is not required by statute to be related to the cost of accommodation and meal services for the residents (at paras 20, 47). They saw no reviewable error in Justice Ross's determination that there was a reasonable nexus between the accommodation charge and the cost of providing accommodation and meals, even if no such nexus was required (at para 50). Justice Ross's determinations that her interpretation of the statute was a complete answer to the claims in unjust enrichment, contract and negligence were found to be reasonable and to disclose no reviewable error (at para 55).

The only ground upon which the Court of Appeal differed with Justice Ross was the claim that the accommodation charge was a breach of section 15 of the *Canadian Charter of Rights and Freedoms*. That claim was that, because long-term care residents are in long-term care facilities as a result of their disability, the accommodation charge is a distinction based on enumerated grounds, and it is discriminatory because it is a financial burden that other users of the health care system do not have to bear. That is the aspect of the Court of Appeal judgement that this post focuses on.

We commented on Justice Ross's finding that there was no discrimination on the ground of disability in No Discrimination Against Long-Term Care Residents in Elder Advocates of Alberta Case. In that post, we critiqued Justice Ross's decision on the basis that it did not use the

most recent test for discrimination set down by the Supreme Court of Canada, that it failed to recognize adverse effects discrimination against the elderly, that it relied upon a mirror comparator group, that it focused on prejudice and stereotyping, that it took into account government objectives and intent while determining whether there was a *Charter* breach, and that it found the accommodation charge did not perpetuate the historical disadvantage of the claimant group.

While the Court of Appeal decision does not deal with the adverse effects discrimination claim, it does correct all of the issues that we identified, and it does so in short order. Nevertheless, while finding that the accommodation charge was a breach of section 15 of the *Charter*, the Court of Appeal went on to find that the breach was justified under section 1 of the *Charter*.

The Errors in the Queen's Bench Section 15 Analysis

Justice Ross relied upon the test for discrimination under section 15 of the *Charter* that was set out by the Supreme Court of Canada in *R v Kapp*, 2008 SCC 41 (CanLII) and *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII). She did not mention the two Supreme Court of Canada equality rights decisions rendered subsequent to *Kapp* and *Withler*, and before her decision. The Court of Appeal remedied this by briefly describing the evolution of the test for discrimination and, in particular, the changes made to that test by Justice Abella, writing for the majority on section 15, in *Québec (Attorney General) v A*, 2013 SCC 5 (CanLII) – changes confirmed by the unanimous judgment written by Justice Abella in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII). The Court of Appeal recognized that, in the latter two decisions, the Supreme Court stated that it was wrong to require proof that the law perpetuated prejudice or stereotyping in order to establish discrimination because that was an additional requirement on section 15 claimants that improperly focused attention on the existence of discriminatory intent, rather than discriminatory impact (at para 60).

The Court of Appeal went on to note that, subsequent to Justice Ross's judgment, the Supreme Court decided two additional section 15 cases: *Attorney General v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII) (*Alliance*) and *Centrale des syndicats du Québec v Québec (Attorney General)*, 2018 SCC 18 (CanLII). These companion cases confirmed Justice Abella's analysis and articulated the test for a breach of section 15 in the following terms:

> 1. Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous ground?
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> 2. If so, does the law impose burdens or deny benefit[s] in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage? (*Elder Advocates* at para 64, citing *Alliance* at para 25)

In discussing the consequences of Justice Ross incorrectly using the test set out in *Kapp* and *Withler*, the Court of Appeal noted several errors. First, they noted – as we had in our earlier post – that Justice Ross used a mirror comparator group to determine whether a distinction had been made on an enumerated or analogous ground (at para 66). Oddly enough, it was the Supreme

Court of Canada's decision in *Withler* that first rejected the mirror comparator group approach and Justice Ross appeared to appreciate that when she warned against its use. The second error was the one we note above: Justice Ross's use of the definition of discrimination in *Kapp*, a definition that asked whether the distinction created a disadvantage by perpetuating prejudice or stereotyping (at para 67). This narrow definition of discrimination was rejected by the Supreme Court of Canada in its four most recent cases (at paras 60, 67). The third error was Justice Ross's use of the purpose of the law and the interests it was trying to balance in determining if the distinction was discriminatory (at para 67). The Court of Appeal also identified as erroneous Justice Ross's reliance on her finding of a reasonable connection between the accommodation charge and the cost of accommodation, as well as her reliance on the accommodation charge being part of a larger benefit scheme that was sensitive to the needs of the claimants in achieving the purposes of that scheme (at para 68). The Court of Appeal noted that the legislation's purpose must be considered under section 1, where the government bears the burden of proving that a breach of a *Charter* right is justified, and not when deciding whether there has been a breach of section 15 (at paras 69-70).

As a consequence of those errors in her analysis, Justice Ross concluded that there was no breach of section 15. The Court of Appeal concluded that, if the proper test for discrimination had been used, the accommodation charges would be seen to be in breach of section 15 (at para 71).

The Court of Appeal's Section 15 Analysis

After identifying the errors in Justice Ross's section 15 analysis, the Court of Appeal went on to apply the Supreme Court of Canada's most recent test for breach of section 15 (at para 64, citing *Alliance* at para 25). In discussing the first step and whether the accommodation charge created a distinction based on an enumerated or analogous ground, the Court of Appeal agreed with Justice Ross that the charge distinguished between persons with disabilities and those without (at para 72). The Court of Appeal also held that the first step was not onerous and simply weeded out claims that were not based on enumerated or analogous grounds (at para 66, citing *Alliance* at paras 26-27). In making this point, the Court implicitly rejected the dissenting opinion in *Alliance*, which would have modified the first step to require not just proof of a distinction, but also proof of some disadvantage flowing from that distinction (see our post on *Alliance* here).

The Court of Appeal did not agree with Justice Ross's analysis that resulted in her failure to recognize that the accommodation charge resulted in adverse effects discrimination on the basis of age. However, neither did they address the argument that the accommodation charge disproportionately affected elderly patients. Because all long-term care residents and members of the class are disabled, and not all of them are elderly, the Court of Appeal felt it was unnecessary to engage in an adverse impact discrimination analysis (at para 74). This is a missed opportunity, particularly in light of how rarely adverse effects discrimination is recognized by the courts as such. A finding of adverse effects discrimination does not require all members of a group to be disadvantaged in the same way (see *Vriend v Alberta*, [1998] 1 SCR 493) and this case would have been a good one in which to reinforce that point.

As for the second step – whether the distinction is discriminatory – the Court of Appeal identified the accommodation charge as a burden imposed by the law that perpetuated an existing

disadvantage (at para 77). The accommodation charge is imposed on those in long-term care facilities, but not those in nursing homes or hospitals unless they are assessed as requiring long-term care. Because only the residents of long-term care facilities must pay the accommodation charge, the Court of Appeal had little trouble identifying that those residents, all of whom were persons with disabilities, bore a financial burden that others in the healthcare system do not pay (at para 77). By enumerating physical and mental disability as grounds within section 15, the Court of Appeal concluded that the *Charter* itself recognized persons with disabilities as a historically marginalized group. Imposing a burden on persons with disabilities therefore perpetuated their existing disadvantage (at para 77). With this brief analysis, the Court of Appeal concluded that "[n]othing more need be shown to meet the second part of the *Alliance* test (at para 77). In particular, there was no need to look for prejudice or stereotyping in light of the Supreme Court's broader definition of discrimination in recent cases. A *prima facie* violation of section 15 of the *Charter* was made out based on the perpetuation of historical disadvantage alone. This aspect of the Court's decision, as well as their finding that it is erroneous to consider the legislation's reasonableness until section 1, are important reminders of what equality rights analysis should look like.

Just as the Court of Appeal took only six brief paragraphs to reach their conclusion that the accommodation charge was a breach of the *Charter*'s equality guarantee, they took only seven further paragraphs to conclude that the breach was justified under section 1.

In determining first whether the objective of the challenged law was sufficiently important and pressing, the Court of Appeal used the evidence that Justice Ross had erroneously applied in determining that there was no breach – evidence of the legislative history and purpose of the accommodation charge and its place within a broader scheme of benefits (at para 80). They held that the objective of the accommodation charge and the wider legislative scheme in which it is embedded is "to create an economically viable long-term care system that fairly distributes the costs of care and accommodation" (at para 81). The Court of Appeal had no problem finding that the objective of cost-sharing in long-term care was both pressing and substantial (at para 82).

The Court of Appeal agreed with the government that the accommodation charge was rationally connected to the objective. However, the conclusion that a rational connection existed depended upon Justice Ross's finding that the accommodation charge bore a reasonable relation to the actual cost of accommodation and meals. The Court of Appeal held that, had the accommodation charge "significantly exceeded the actual costs," it would not have been rationally connected to the objective of fairly distributing the costs of care and accommodation (at para 83). This is an important limit on the burden that can be imposed upon residents in long-term care facilities. It is a partial "win" for the Elder Advocates of Alberta Society, long-term care residents, and those helping to support them.

In assessing whether the accommodation charge minimally impaired the rights of the long-term care residents, the Court of Appeal noted that the legislature is given a "margin of appreciation" in deciding how to achieve its objectives, "especially in matters involving the distribution of scarce resources" (at para 84). They found that the accommodation charge served the objective

of cost-sharing in long-term care in a "restrained way" because the government bore the costs of healthcare and subsidizes those who could not afford the accommodation charge (at para 84). The Court did not suggest that this finding also depended upon the accommodation charge not significantly exceeding the actual costs of accommodation and food. However, it does seem to depend on the accommodation charge bearing a reasonable relation to the actual costs, because the Court describes the accommodation cost as "a contribution from residents for accommodation and food" while the entire costs of healthcare are paid by the government (at para 84). Indeed, in summarizing their section 1 analysis, the Court of Appeal emphasized that the residents of long-term care facilities "do not have to pay for any healthcare services that any other resident of Alberta receives free of charge," as well as the subsidy provided to those who cannot afford the accommodation charge (at para 86). Those two aspects of the government's current accommodation charge appear to be essential to its justification. They also appear to be important limits on the burden that can be imposed upon residents in long-term care facilities. As such, they are also a partial "win" for the Elder Advocates of Alberta Society, long-term care residents, and those helping to support them.

In assessing whether the beneficial effects of the law in terms of achieving its objectives are proportionate to the deleterious effects of the law on the equality rights of the long-term care residents, the Court of Appeal simply stated that it was satisfied the latter were outweighed by the former (at para 85). No reasons were given.

It is interesting to note the Court's characterization of the beneficial effects of the law as "a legislative scheme which provides long-term care to those who need it" (at para 85). This statement suggests that long-term care could not be provided without a cost-sharing arrangement of some kind, which begs the question of why that is so for long-term care residents but not for other users of the healthcare system requiring accommodation. Government objectives which focus on cost savings – a term we prefer over "cost-sharing" – by imposing costs on members of a disadvantaged group in a discriminatory way should not be accorded deference by the courts. This is not to say that it would be constitutionally acceptable for the government to impose costs on more people in the healthcare context (e.g. on those in auxiliary and acute carte hospitals). That approach would amount to what has been called equality with a vengeance (see *Schachter v Canada*, [1992] 2 SCR 679) and may violate the *Canada Health Act*. While the Court of Appeal's decision in *Elder Advocates of Alberta Society v Alberta* is a partial win for the claimants, and we welcome the Court's clear and doctrinally sound section 15 analysis, the case raises important issues about whether governments should be held to account when they burden disadvantaged groups in the name of limited resources.

This post may be cited as: Glenn ZoBell, "[Title]" (October 3, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/10/Blog_JWH_JK_ElderAdvocates.pdf

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