Court File No. 25285

IN THE SUPREME COURT OF CANADA

[ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA]

BETWEEN

DELWIN VRIEND and GALA-GAY AND LESBIAN AWARENESS SOCIETY OF EDMONTON and GAY AND LESBIAN COMMUNITY CENTRE OF EDMONTON SOCIETY and DIGNITY CANADA DIGNITÉ FOR GAY CATHOLICS AND SUPPORTERS

Appellants
[Applicants]
[Respondents by Cross-Appeal]

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and HER MAJESTY'S ATTORNEY GENERAL IN AND FOR THE PROVINCE OF ALBERTA

Respondents
[Respondents]
[Appellants by Cross-Appeal]

FACTUM OF THE INTERVENOR, THE ATTORNEY GENERAL OF ONTARIO

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PART I - FACTS

1. The Attorney General of Ontario takes no position with respect to the facts of this case.

PART II - POSITION OF THE ATTORNEY GENERAL OF ONTARIO

2. The Attorney General of Ontario intervenes in this appeal to submit that the Charter does not require human rights legislation to prohibit discrimination on the same grounds, or on all of the grounds, enumerated or analogous to the grounds enumerated in s. 15(1) of the Charter.

PART III - ARGUMENT

A. Legislative History of Human Rights Codes

3. Since the enactment of the Racial Discrimination Act in 1944, the scope of human rights legislation in Ontario and throughout Canada has undergone incremental expansion. Originally, The Racial Discrimination Act prohibited the publishing or displaying of representations discriminating on the basis of race or creed. Between 1944 and 1954, additional legislation was enacted to prohibit racial discrimination in employment and accommodation, and to prohibit the unequal remuneration of male and female employees.

> The Racial Discrimination Act, S.O. 1944, c. 51 [rep. 1954 c. 28, s. 19]
>
> The Fair Employment Practices Act, S.O. 1951, c. 24 [rep. 1961-62, S.O. c. 93, s. 19]
>
> The Female Employee's Fair Remuneration Act, S.O. 1951, c. 26 [rep. 1961-62, S.O. c. 93, s. 19]
>
> The Fair Accommodation Practices Act, S.O. 1954, c. 28 [rep. 1961-62, S.O. c. 93, s. 19]

4. The first Ontario Human Rights Code, enacted in 1962, consolidated then existing anti-discrimination legislation. The original version of the Code prohibited discrimination on the basis of race, creed, colour, nationality, ancestry or place of origin, and required that female and male employees receive equal remuneration for doing the same work in the same establishment.

The Ontario Human Rights Code, S.O. 1961-62, c. 93

The Racial Discrimination Act, S.O. 1944, c. 51 [rep. 1954 c. 28, s. 19]

The Fair Employment Practices Act, S.O. 1951, c. 24 [rep. 1961-62, S.O. c. 93, s. 19]

The Female Employee's Fair Remuneration Act, S.O. 1951, c. 26 [rep. 1961-62, S.O. c. 93, s. 19]

The Fair Accommodation Practices Act, S.O. 1954, c. 28 [rep. 1961-62, S.O. c. 93, s. 19]

5. The Ontario Human Rights Code was amended several times between 1965 and 1969, with the general effect of widening the scope of the Code. In 1982 the Code was revised and re-enacted to incorporate The Age Discrimination Act and the Women's Equal Employment Opportunity Act. The Code added age, sex and marital status to the prohibited grounds of discrimination.

The Ontario Human Rights Code Amendment Act, 1965, S.O. 1965, c. 85

The Ontario Human Rights Code Amendment Act, 1967, S.O. 1967, c. 66

The Ontario Human Rights Code Amendment Act, 1968, S.O. 1968, c. 85
The Ontario Human Rights Code Amendment Act, 1968-69, S.O. 1965, c. 83

The Age Discrimination Act, S.O. 1970, c.7 [rep. 1972, c. 119 s. 14]

The Women's Equal Employment Opportunity Act, S.O. 1970, c. 33 [rep. 1972, c. 119 s. 15]

Ontario Human Rights Code Amendment Act, 1972, S.O. 1972, c. 119

6. The Ontario Human Right Code was again re-enacted in 1981. Under the new Code, the prohibited grounds of discrimination were further broadened to include ethnic origin, citizenship, family status and handicap.

Human Rights Code, 1981, S.O. 1981, c. 249

7. In 1986, the Equality Rights Statute Law Amendment Act amended Ontario's Human Rights Code to add sexual orientation to the prohibited grounds of discrimination. As a result of this incremental expansion, the Human Rights Code currently prohibits discrimination on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and handicap. The Code also prohibits discrimination on the basis of "receipt of public assistance" with respect to occupancy of accommodation and "record of offences" with respect to employment.

Equality Rights Statute Law Amendment Act, S.O. 1986, c. 64

Human Rights Code, R.S.O. 1990, c. H.19

8. Even with these changes and expansions, the Human Rights Code does not include every conceivable ground of discrimination which may be held to be analogous to those grounds of discrimination listed in s. 15(1), nor does it include every ground of discrimination which is prohibited in other Human Rights Codes across Canada.

See para. 19, infra

9. For example, unlike some other provinces, the Ontario Human Rights Code does not provide protection against discrimination on the basis of “political opinion”. The Legislature has simply chosen not to regulate this aspect of private relations. The absence of “political opinion” from the Code has been held by the Ontario Divisional Court not to infringe Charter s. 15(1).

Jazairi v. Ontario Human Rights Commission [April 16, 1997, unreported, Ont. Div. Ct.]

B. The “Protection” and “Benefit” of the Law

10. The "protection" and "benefit" provided by the Human Rights Code is protection from discrimination on the basis of the grounds listed therein, namely - race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and handicap. The "protection" and "benefit" is provided to all individuals without discrimination. The Code does not draw any distinction between individuals on the basis of analogous grounds, and, therefore, does not infringe Charter s. 15(1).

Jazairi v. Ontario Human Rights Commission, supra

11. In the case of McKinney v. University of Guelph, the Code provided protection from age-based employment discrimination to persons between the ages of 18-65, but did not extend this protection to persons over age 65. The source of the infringement was the fact that one age group was protected from age-based employment discrimination while the other age group was not.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229

12.. While the Charter and the Human Rights Code share many common principles, one fundamental distinction between them is that the Charter applies only to government and not to private conduct, while the Code applies to private conduct. To accept the Appellants' argument would mean that the Human Rights Code must mirror the Charter in all respects, and effectively impose the Charter on all private conduct in the province. The fact that the Legislature chooses to impose some Charter principles on the private sector does not oblige the legislature to impose the entire Charter on the private sector.

> McKinney, supra, at p. 318 -
>
> This leads to a final consideration. The Charter, we saw earlier, was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice. As counsel for the Attorney General for Saskatchewan colourfully put it, this "should lead us to ensure that the Charter doesn't do through the back door what it clearly can't do through the front door".

13. The fact that the Legislature has chosen to enact human rights legislation to prohibit discrimination on the basis of some grounds of discrimination does not impose any obligation on the Legislature to prohibit discrimination on the basis of all conceivable grounds of discrimination.

14. In Andrews v. Law Society, the Supreme Court of Canada recognized that a fundamental distinction between Human Rights Acts and the Charter is that "Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the Charter is not so limited". The Appellants' analysis would abolish this important distinction by requiring that Human Rights Acts be open ended in order to

prohibit any ground of discrimination which a Court might hold is analogous to those listed in Charter s. 15(1).

> Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at pp. 174-175 [pp. 18-19 D.L.R.]

Charter s. 1

15. The Supreme Court of Canada has recognized that it is legitimate for the government to approach human rights legislation governing private relations in incremental measures, and that the courts should defer to the legislative judgment "as to just how quickly it should proceed in moving forward towards the ideal of equality".

> But generally, the courts should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.
>
> McKinney v. University of Guelph, supra, at pp. 317-319
>
> Egan v. Canada, [1995] 2 S.C.R. 520, at pp. 540 [per LaForest J.], pp. 573-576 [per Sopinka J.] and p. 617-618 [per Iacobucci J.]

16. It is in this context that the s. 1 criteria must be considered. The history of the Human Rights Code shows an evolving expansion of the prohibited grounds of discrimination. Successive amendments expanded the prohibited grounds on the basis of the legislature's

assessment as to those in the greatest need of its protection and benefit. At each step the legislature "addressed itself to the phase of the problem which seems most acute to the legislative mind".

McKinney, supra

Egan, supra

17. The Legislature must consider the effect of including additional prohibited grounds in the legislation, including whether the Human Rights Commission has sufficient staff and resources to administer and enforce an expanded Code, and whether such an expansion could weaken human rights by spreading the Commission's efforts too thinly. Expansion of the grounds of discrimination could undermine the ability of the Commission to deal effectively with the prohibited grounds of discrimination in its current mandate.

> Life Together - A Report of Human Rights in Ontario, [1977] [Ontario Human Rights Commission] pp. 55-56 -
>
> But simply to include more prohibited grounds in the legislation is not enough. The Commission has neither enough staff nor enough funds to administer and enforce the present *Act*, much less an expanded *Code*. Even if more adequate resources were provided, there would remain the problem of diffusion. That is, the Commission's efforts to protect human rights could be weakened by spreading these efforts too thinly. If the *Code* is broadened too much, there is danger that the Commission would be required by law to handle complaints under so many categories of discrimination that it might not be able to deal effectively with even the most serious problem areas, for example racial discrimination. In some southern jurisdictions in the United States, people with racist views have been known to favour the addition of new grounds to human rights legislation for this very reason. Each new area of responsibility added to the workload of their Commission reduced its ability to protect human rights, particularly when staff and financial resources were not provided to help cope with these added responsibilities....

> The Ontario Human Rights Commission is concerned that its ability to deal with major problems of discrimination should not be reduced by an undue expansion of the *Code*, or by an extension of responsibilities that is not accompanied by the provision of adequate resources.

18. The problem of an "open-ended" Code is particularly acute given the fact that the identity of the "analogous grounds" under Charter s. 15 is unknown and may change from time to time. The category of analogous grounds is an open-ended concept dependent not only on the context of the law which is subject to challenge, but also on the context of the place of the affected group in the entire social, political and legal fabric of our society. In considering whether a certain distinction is based on an analogous ground of discrimination, this Court has been careful not to close the category of analogous grounds. Even in cases where this Court has held that a particular distinction is not based on an analogous ground of discrimination, it has often noted that the same classification might still be an analogous ground in a different context.

> Andrews v. Law Society of Upper Canada, [1989] 1 S.C.R. 143, at 152 [per Wilson J.]
>
> Miron v. Trudel, [1995] 2 S.C.R. 418, at 497 [per McLachlin J.] -
>
> For example, analogous grounds cannot be confined to historically disadvantaged groups, if the *Charter* is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination.
>
> Miron v. Trudel, supra, at 436, 439 [per Gonthier J.] -
>
> The identification of such a disadvantaged group in our society can serve as a meaningful indicium of discrimination, that is, it may help to identify the existence of a disadvantage attributable to an irrelevant personal characteristic. However, I agree with McLachlin J. that membership in such a disadvantaged group is not an essential precondition for bringing a claim under s. 15 of the *Charter*.
>
> . . . .

> Finally, it is worth stressing that the contextual analysis may lead to fundamentally different assessments as to whether distinctions drawn on the basis of the same ground will amount to discrimination. In other words, depending on the context, the same ground may be discriminatory with respect to certain classes of distinction but not with respect to others.
>
> Egan v. Canada, [1995] 2 S.C.R. 513, at 599 [per Cory J.] -
>
> While historical disadvantage or a group's position as a discrete and insular minority may serve as indicators of an analogous ground, they are not prerequisites for finding an analogous ground. They may be of assistance in determining whether the interest advanced by a claimant is the sort of interest that s. 15(1) was designed to protect.
>
> Turpin, supra, at 1333 -
>
> I would not wish to suggest that a person's province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination. I simply say that it is not so here.
>
> R. v. Généreux, [1992] 1 S.C.R. 259, at 311 -
>
> I do not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class analogous to those enumerated in s. 15(1) under those circumstances.
>
> Haig v. Canada, [1993] 2 S.C.R. 994, at 1044 [per 'Heureux-Dubé J.]
>
> ...the appellants submit that a person's place of residence may be a personal characteristic which is analogous to those prohibited characteristics listed in s. 15(1). Though this may well be true in a proper case, this case is not such a case.

19. Requiring Human Rights Codes to mirror Charter s. 15 would create a situation of perpetual uncertainty; neither the Human Rights Commission nor persons to whom the Code

may apply would know whether conduct was proscribed by the Code until after a judicial determination. This would turn the administrative scheme on its head by requiring a judicial determination before the administrative process could proceed. Open-textured provisions like Charter s. 15 are often found in constitutional documents because consitutions are difficult to amend and must adapt by means of judicial interpretation. In contrast, such open-textured provisions are generally not appropriate in the context of an administrative scheme which can be amended by the legislature and must be written so as to give affected parties reasonable notice of their statutory rights and obligations.

Bell v. Canada [Canadian Human Rights Commission] [1996] 3 S.C.R. 854
Bhadauria v. Board of Governors of Seneca College [1981] 2 S.C.R. 181

PART III - ORDER REQUESTED

20. The Attorney General of Ontario takes no position on the order requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Robert E. Charney

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Counsel for the Intervenor,

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May 21, 1997

SCHEDULE "A"

LIST OF AUTHORITIES

SCHEDULE "B"

LIST OF STATUTES

The Age Discrimination Act, S.O. 1970, c. 7 [rep. 1972, c. 119 s. 14]

Canada Human Rights Act

Equality Rights Statute Law Amendment Act, S.O. 1986, c. 64

The Fair Employment Practices Act, S.O. 1951, c. 24 [rep. 1961-62, S.O. c. 93, s. 19]

The Fair Accommodation Practices Act, S.O. 1954, c. 28 [rep. 1961-62, S.O. c. 93, s. 19]

The Female Employee's Fair Remuneration Act, S.O. 1951, c. 26 [rep. 1961-62, S.O. c. 93, s. 19]

Human Rights Code, 1981, S.O. 1981, c. 249

Human Rights Code, R.S.O. 1990, c. H.19

Legislature of Ontario Debates [Hansard], Dec. 1, 1981 pp. 4086 - 4089, per Hon. Mr. Elgie

Public Service Act, R.S.O. 1990, Chap. P.47, as amended S.O. 1993, c. 38, s. 63(5)

The Ontario Human Rights Code, S.O. 1961-62, c. 93

The Ontario Human Rights Code Amendment Act, 1965, S.O. 1965, c. 85

The Ontario Human Rights Code Amendment Act, 1967, S.O. 1967, c. 66

The Ontario Human Rights Code Amendment Act, 1968, S.O. 1968, c. 85

The Ontario Human Rights Code Amendment Act, 1968-69, S.O. 1965, c. 83

Ontario Human Rights Code Amendment Act, 1972, S.O. 1972, c. 119

The Racial Discrimination Act, S.O. 1944, c. 51 [rep. 1954 c. 28, s. 19]

The Women's Equal Employment Opportunity Act, S.O. 1970, c. 33 [rep. 1972, c. 119 s. 15]