

AFFIRMATIVE ACTION AND THE CHARTER OF RIGHTS AND FREEDOMS

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L'article 15(2) de la Charte des droits et libertés protège les programmes d'action positive de l'invalidation constitutionnelle. Donna Greschner demande si la Charte sera un obstacle, un atout, ou sans conséquence dans l'introduction des programmes d'action positive.

The Charter of Rights and Freedoms,¹ as part of the Constitution of Canada, provides new legal standards against which to measure the activities of governments.² Will the Charter be a hindrance, a help, or an irrelevance in the implementation of affirmative action programs? I will consider affirmative action programs specifically geared to women, although the arguments will be applicable generally.

Affirmative action programs are justified as methods of achieving equality. The Charter speaks directly to equality and affirmative action in section 15, Equality Rights.³ Subsection (2) appears with the marginal note of "affirmative action programs" (in the French version, "programmes de promotion sociale"):

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The inclusion of subsection (2) stemmed from a concern that the courts might interpret the rights to equality in subsection (1) in such a way as to render unconstitutional affirmative action programs.

One long-recognized type of inequality now carries the rubric of "facial in-

equality." As between women and men, it occurs when a law expressly creates an extra burden or confers an extra benefit on only one sex. An example which affected our foremothers was the law that denied women the right to vote in federal elections. Simply reading the words of the statute reveals the unequal treatment – it is obvious on the *face* of the law. There is no doubt that facial inequality has been a problem, and that typically its cure is, as with the vote, to treat women and men in an identical manner. But if the courts interpreted the rights to equal benefit and equal protection as *always* requiring identical treatment, affirmative action programs would be impermissible because they involve preferential treatment of disadvantaged groups and individuals. The provisions of human rights legislation in many jurisdictions which authorize the imposition of affirmative action programs would be vulnerable to attack, without subsection (2), as an unconstitutional infringement of equality.

One function, therefore, of subsection (2) is to protect affirmative action programs from constitutional invalidation. The protection is a recognition that identical treatment of persons does not always achieve equality. If persons are unequal to begin with, treating them in an identical manner serves to maintain the inequality. With subsection (2), if specific affirmative action programs or the provisions in human rights legislation authorizing mandatory programs are challenged in the courts, subsection (1) cannot be interpreted to "preclude" the program or law. The impugned law or program need only satisfy the criteria of subsection (2) that is, its object must be the amelioration of the conditions of disadvantaged groups or individuals. Thus, subsection (2) assists women in the attainment of equality by permitting the continued use of affirmative action programs.

Several commentators have expressed the fear that subsection (2) will also be utilized by the almost exclusively male judiciary to uphold paternalistic, facially

unequal laws which appear to them to be beneficial to women.⁴ The history of women and the legal system is rife with examples of laws justified as benefitting women which in fact were based on stereotyped assumptions about the abilities and proper role of women, and which served to perpetuate women's inferior social and economic position.⁵ The slippery phrase "amelioration of conditions" could now be interpreted in such a way as to shield such laws from constitutional scrutiny. From the gloomiest viewpoint, subsection (2) may become more of a detriment than an advantage for women.

This fear is not a compelling reason to bemoan – or ignore – the existence of subsection (2). The danger of any law being deployed for malevolent or undesirable ends always exists. Moreover, such a disastrous interpretation for women can be justly condemned as inconsistent with the principle of equality enunciated by the opening words of subsection (1), and with the principle of sexual equality underlying section 28 of the Charter. It can be strongly argued that subsection (2) is designed to realize equality by permitting programs that will help the members of an unequal group become equal. Paternalistic legislation does not contain the *positive* steps necessary to attain equality.

One method of ensuring that subsection (2) does not thwart the pursuit of equality relates to the evidence presented in support of the contention that a facially unequal law is protected by the subsection. One can expect statistics, sociological studies and economic analysis to be introduced as evidence to prove that women are in a disadvantaged condition, and that the law will ameliorate that condition. The research and studies themselves cannot be based on sexist assumptions about the roles of women and men. We should argue that all evidence of this type be scrutinized for gender bias before being accepted as evidence by the courts.⁶ Section 28, which states that all rights and freedoms are guaranteed equally to female and male persons, supports in principle our demand. How can courts

decide if rights and freedoms are being guaranteed equally if the evidence on which a decision is based is skewed against women? As well, to admit sex-biased evidence into court can by itself be a violation of equality before and under the law pursuant to section 15(1).

In the end, if our arguments about the interpretation and evidence required for subsection (2) are not accepted by the judiciary, then we must criticize loudly and publicly the approach and personnel of the courts.

To conclude that subsection (2) is a protection for affirmative action programs does not, of course, impose *by itself* any obligation on governments to establish more programs or enact legislation with tougher affirmative action requirements – tougher, that is, that the Employment Equity Act introduced in Parliament in June 1985. The Charter does not erase the need to pressure governments in the political forum. Subsection (2) was included in the expectation that affirmative action programs would be implemented by governments, and women must ensure that governments fulfill that expectation.

But subsection (2) alone, with its permission for affirmative action programs, is not the end of the story about the Charter and affirmative action programs for women. A further question is whether or not the courts can order affirmative action programs as a *remedy* for violation of the equality rights. In other words, can the court impose, through subsection (1), an obligation on governments to establish specific programs? This question raises more complicated issues about the interpretation of the Charter and the capacities of the courts.

As a matter of principle a remedy is what an affirmative action program is all about – it is a remedial measure designed to correct the disadvantages suffered in the past by individuals and groups. Courts, besides retaining an inherent remedial power, have been given in section 24 of the Charter a very broad power to grant remedies that are “appropriate and just in the circumstances.” However, an argument is made for excluding programs as within the court’s remedial power on the grounds that because the rights in subsection (1) are given to *individuals*, the remedies can only compensate individuals whose rights have been violated. Affirmative action, it is then noted, is a *group* remedy in that some beneficiaries of a program may not have actually suffered a specific infringement of their rights. But it can be pointed out that remedies often ensure that illegal activity does not persist in the future. One efficacious method of preventing an indefinite stream of individuals complaining of similar violations of specific rights is to correct permanently the situation which is causing the infringement by invoking a group remedy, such as an affirmative action program.

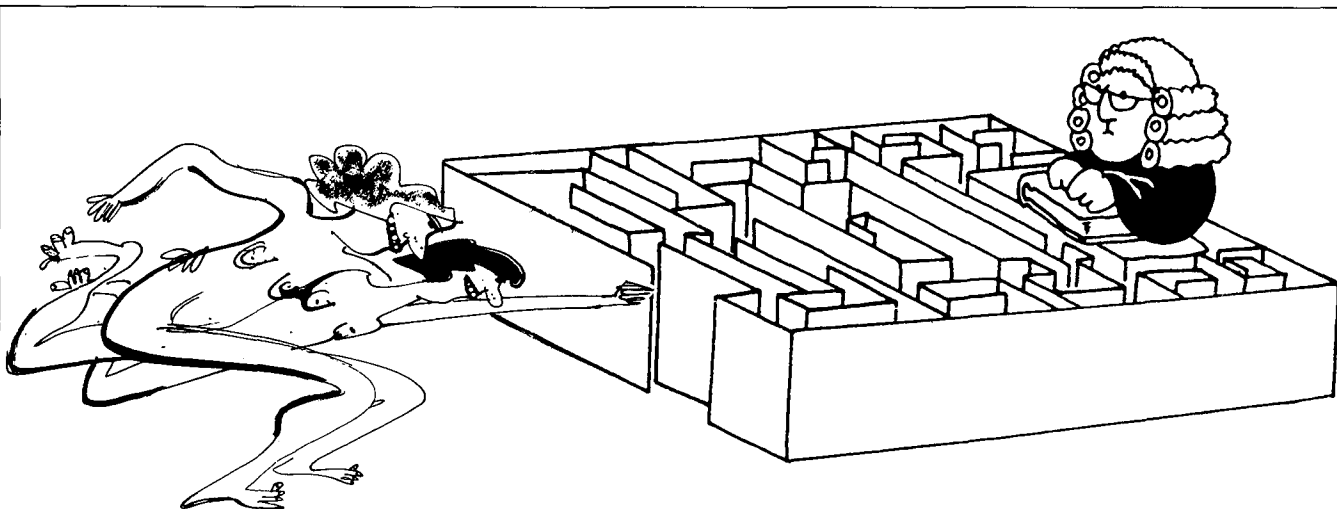
More importantly, subsection (1) also uses the language of groups. Persons have the rights to equal protection and equal benefit without discrimination on the basis of certain characteristics such as sex or race. The message is that individuals can be and have been denied equality because of their membership in groups. Since group membership can cause inequality, it is not inconsistent for a court to order a group remedy such as affirmative action.

If the courts have the power to order

affirmative action programs (and nothing in the Charter compels the opposite conclusion), the next question is when the courts will use the power. Affirmative action programs become more appropriate as remedies if the scope of the rights in subsection (1) is extended beyond facial inequality. Another type of inequality now commonly bears the label of “systemic inequality.” It refers to a facially neutral law or program which has an adverse and disproportionate impact on a particular group, such as women. The classic example is height and weight requirements for specific jobs which exclude most women and include most men. The inequality is in the operation of the rules rather than on the face of the rules.

No one would dispute that subsection (1) is aimed at facial inequality. But whether or not subsection (1) also prohibits systemic inequality is a more controversial question. On the positive side, an argument can be made that the phrase “equal benefit” requires an examination of the impact or effect of a law. How can one decide if two persons or two groups have received the equal benefit of a law unless there is a scrutiny of the effects of the law on each one? The right to equal benefit can be interpreted to encompass a prohibition on “neutral” laws with adverse and disproportionate effects on a group.

Women must argue strenuously that systemic inequality is within the compass of subsection (1) because such inequality is by far the most pervasive form today (when very few laws still expressly burden women) and has the gravest economic consequences for women. For example, the tragic financial plight of most



single elderly women can be attributed in large part to systemic inequality in pension laws.⁷

If systemic inequality is covered by subsection (1), then not only do the opportunities for court-ordered affirmative action programs increase dramatically, but the arguments for imposing programs assume greater cogency. Consider a city whose height and weight requirements for certain jobs are held to constitute systemic inequality against women. The finding of inequality, that is the breach of subsection (1) rights, stems from the adverse and disproportionate effect the employment requirements have on women as a group. Any complaint of systemic inequality by an individual is group-based in that it is the treatment of the group to which the individual belongs that is the subject-matter of the complaint. Systemic inequality is inherently group-based and demands a group-based remedy, such as affirmative action programs. Indeed, for a court simply to strike down the unconstitutional requirements and not impose a program would mean that the effects of the old requirements on the employment of women as a group would not be ameliorated for many years, if ever. And justice delayed is justice denied.

Courts may be still reluctant to order affirmative-action programs because of their lack of expertise in designing and monitoring the programs. The problem is one of the capacity of the courts, and could be addressed in some jurisdictions at least by close cooperation between the courts and the human rights commissions. Several commissions have valuable experience that can be drawn upon in formulating court orders. But even if courts hesitate to use their power, the threat alone of an imposed affirmative action program could in some cases convince a recalcitrant government to implement a program voluntarily.

In conclusion, it appears that the Charter can be of assistance in the implementation of affirmative action programs for women. Space has forestalled full consideration of the objections which could be made to the utilization of the programs as a court-ordered remedy. Objections also could be voiced against the view that systemic inequality is prohibited by the Charter. Women will need to counter such arguments in the courts.

Several hopeful indications exist that the courts will accept that systemic inequality is encompassed by section 15.

The Saskatchewan Court of Appeal has recently interpreted the Saskatchewan Human Rights Code as prohibiting systemic inequality.⁸ Several contrary decisions from other courts on the scope of other human rights legislation are on appeal to the Supreme Court of Canada.⁹ Since the Supreme Court refused leave to appeal from the Saskatchewan decision, the optimistic prediction can be offered that the Supreme Court will follow the Saskatchewan example when it renders judgment in the other two cases.

If systemic inequality is within the ambit of human rights legislation, the likelihood is increased that the courts will adopt similar reasoning in interpreting the Charter. Moreover, in one of the first Charter decisions from the Supreme Court, Chief Justice Dickson stated that the effects of a law must be analysed in assessing its constitutionality.¹⁰ Such an approach when laws are challenged under section 15 could lead to a prohibition of systemic inequality. But these are small signs of hope, and none yet are visible for affirmative action programs.¹¹

What the Charter will mean for women depends on the interpretations selected by the courts. Women, who participated in the formulation of the Charter, cannot allow it to be given legal meaning without their input. We must press for the interpretations we want of the equality rights and affirmative action. But the specific interpretations we want will be determined by our general vision of equality. Equality is, to borrow philosophical terminology, an essentially-contested concept, with different conceptions of equality spanning the full range of social and political theories. Interpretations of section 15 will be determined by these conceptions.

Women must not turn the dialogue of equality over to the lawyers and judges; they possess no special expertise as social theorists. Nor should we focus our resources exclusively on the courts and the Charter, because governments can do much more to realize our vision. The Charter adds a new legal dimension to the broad and critical debate about the meaning and methods of equality.

⁷The Charter is Part I of the *Constitution Act, 1982*, as enacted by the *Canada Act, 1982*, c. 11, (U.K.). Quebec has never signed the constitutional accord which produced the Charter and although subject to the Charter has opted out of section

2 and 7 to 15 by using the section 33 override power. Hence, the arguments based on section 15 are not available in Quebec.

²Whether or not the Charter also covers private activity is debatable. See Brian Slattery, "Charter of Rights and Freedoms - Does It Bind Private Persons?" (1985), 63 *Canadian Bar Review* 148 and citations therein.

³Section 6, Mobility Rights, also has an affirmative action provision available for economically depressed provinces, but it will not be considered herein.

⁴See, for example, Wendy Williams, "Sex Discrimination Under the Charter: Some Problems of Theory" (1983), 4 *Canadian Human Rights Reporter* C/83-1, at C/83-7.

⁵For examples from countries other than Canada, see Albie Sachs and Joan Hoff Wilson, *Sexism and the Law* (Oxford: Martin Robertson, 1978).

⁶Publications such as Margrit Eichler and Jeanne Lapointe, *On the Treatment of the Sexes in Research* (Ottawa: S.S.H.R.C.C., 1985), can be used to analyse research for sex-related bias.

⁷*Report on the Statute Audit Project* (Toronto: Charter of Rights Educational Fund, 1985), pp. 8.1 - 8.49.

⁸*Canadian Odeon Theatres v. Saskatchewan Human Rights Commission*, [1985] 3 *Western Weekly Reports* 717.

⁹*C.N.R. v. Bhinder* (1983), 48 *National Reporter* 81 (Federal Court of Appeal); *Re Ontario Human Rights Commission and Simpsons-Sears* (1983), 138 *Dominion Law Reports* (3d) 133 (Ont. Court of Appeal).

¹⁰*R. v. Big M Drug Mart* (1985), 58 *National Reporter* 81.

¹¹For a negative sign, see the decision of the Federal Court of Appeal in *C.N.R. v. Canadian Human Rights Commission and Action Travail des Femmes*, July 16, 1985. Leave to appeal has been sought from the Supreme Court of Canada.

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