

Age Discrimination: From Children to the Elderly

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I. INTRODUCTION

Lawyers required to give effect to a direction that "every individual is equal before and under the law ... without discrimination based on ... age" are likely to start with an analysis of the language and ask what is meant by "equality" and "discrimination" as if those concepts can be analyzed independently from their real world context. This leads to a debate about whether s. 15 of the *Charter* covers (1) every distinction, or (2) unjustifiable or unreasonable distinctions, or (3) distinctions on enumerated or analogous grounds. In *Andrews v. Law Society of B.C.*¹ the Supreme Court adopted the enumerated or analogous grounds test and McIntyre J. added:

*I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits or advantages available to other members of society.*²

Where such discrimination exists it may be possible to justify it under s. 1 of the *Charter* as a reasonable limit "demonstrably justified in a free and democratic society."

The danger with this approach is that we will pay too much attention to language and insufficient attention to the social realities that prompted the *Charter* provisions. An alternative approach is to start with the social phenomenon of discrimination and ask "why do we treat children and elderly people differently from other people?" This is hardly a novel approach. For example, gerontologists study the concept of ageism which they consider as real as racism and sexism.³ Where it exists ageism results in elderly people being treated as lesser persons merely because of their age. Another reason why I want to concentrate on this phenomenon of discrimination rather than on the language of s. 15, is that our attitudes on what is justifiable discrimination in Canadian society will affect not only our interpretation of s. 15 but also our interpretation of other sections of the *Charter*.

I want to suggest a simple analysis of discrimination into three basic types.

1. (1989) 56 D.L.R. (4th) 1.

2. *Ibid.* at 18.

3. See J. Levin & W. Levin, *Ageism: Prejudice and Discrimination Against the Elderly* (Belmont, Ca.: Wasworth, 1980).

A. Discrimination Based on Factual Differences

Most people would accept that very young children, or old people who are frail and incompetent, not only may, but should, be treated differently to reflect their incapacities and different needs. This does not mean that an "equality" argument cannot arise in relation to such groups. For example, if the state were to deny all medical services to such groups I have no doubt that a successful *Charter* challenge could be made to that policy. However it will generally be easier to justify reasonably appropriate differential treatment where the legislative discrimination reflects factual differences.

B. Discrimination Which is Culturally Based but Operates at an Unconscious or Irrational Level (Prejudice)

Our differential treatment of young people and elderly people is a social or cultural construction rather than a recognition of factual differences. We know that many young people are capable of exercising independent judgment. Indeed the *Young Offenders Act* (Can.) imposes criminal liability on children twelve years of age or older. Similarly we know that the majority of retired people are intellectually competent and free of any disabling physical incapacity. But it is not enough to say that the discrimination is culturally based. Social structures are just as real as physical differences so I need to distinguish between discrimination which is irrational and unconscious (blind prejudice) and discrimination that reflects social realities.

C. Discrimination Which is Culturally Based but Reflects Social and Cultural Realities

Consider the question of when a child should be considered an adult. The natural assumption is that we should be guided by child development experts who can provide us with information about the physical, psychological and moral development of children. But when this issue was considered by Arlene Skolnick, a research psychologist, she pointed out that social and cultural factors were more important than information about child development

Although, for example, this article argues that the incompetence and dependency of children may be largely a product of cultural belief and practice, rather than an inherent condition, this is not to say they are unreal. The existing social and economic context places limits on the exercise of children's competence and responsibility. Children do have further to go to achieve adult levels of competence in "advanced" technological societies than they do in small subsistence-level ones. Their economic dependency arises out of their inability to play productive roles in an advanced economy.⁴

4. A. Skolnick, "The Limits of Childhood: Conceptions of Child Development and Social Context" (1974) 39:3 L. & Contemp. Prob. 38.

A similar argument can be made about retirement. In farming communities people used to continue working while they had the physical capacity to do so. Retirement was a product of the industrial revolution and grew out of a concern by employers for productivity and efficiency. Indeed the concept of retirement, as we know it, is a relatively modern invention. William Graebner in his book, *A History of Retirement*, commented:

Between 1940 and 1965, retirement triumphed over alternative methods of dealing with the aged. This was in part a mechanical process. Pension plans grew in numbers and coverage, social security was extended to additional elements of the workforce while benefits were increased and retirement ages lowered. As this process met with resistance, the leading advocates and beneficiaries of retirement — corporations, labour unions and insurance companies — became increasingly aggressive in marketing retirement as a consumable commodity, ignoring its origins as a device for corporate and bureaucratic efficiency and control.⁵

Other commentators have given a less conspiratorial explanation of developments in that period. According to W. Andrew Achenbaum, "retirement was seen as a well deserved and earned release from the instrumental chores of work."⁶

In summary if we examine discrimination as a social phenomenon we discover that much of our age discrimination is culturally based — but it is not necessarily irrational and unconscious. Much of it reflects accepted social and cultural norms.

II. THE JUDICIAL DILEMMA

A. Children and the *Charter*

Judges are a product of their society and culture. It is inevitable that this fact will influence their interpretation of the *Charter*. Consider the recent case of *Catholic Children's Aid Society (Toronto) v. T.S.*⁷ This case involved two children, now aged nine and seven. They had been in foster care for approximately seven years following a scalding incident caused by the mother. The mother had continued to see the children while they were in foster care. In 1987 the Children's Aid Society obtained an order for Crown wardship with a view to adoption and an order that the birth parents be denied access to their children. The birth mother appealed. She argued that the order violated her rights under sections 2(d), 7 and 15 of the *Charter*. You might object that this is a case of an adult, rather than a child, invoking the *Charter* but access is usually seen as a reciprocal right or a right of the child.

5. W. Graebner, *A History of Retirement: The Meaning and Function of An American Institution, 1985-1978* (New Haven: Yale University Press, 1980).

6. W.A. Achenbaum, *Shades of Gray: Old Age, American Values and Federal Policies Since 1920* (Boston: Little, Brown, 1983).

7. (1989), 20 R.F.L. (3d) 337 (Ont. C.A.).

Tarnopolsky, J.A., delivering the judgment of the Ontario Court of Appeal, held that none of the *Charter* provisions were infringed and, therefore, he did not need to consider s. 1. In a note to the case, Professor D.A. Rollie Thompson argues that the legislation did infringe s. 2(d) and s. 7 — but that it was saved by s. 1.⁸ In an earlier article,⁹ which reviewed the *Charter's* impact on family matters, Professor Thompson noted: "Especially disconcerting has been the failure of superior non-specialist courts to take family *Charter* challenges seriously¹⁰ ... In protection matters ... the Canadian courts have been unduly timid and deferential, failing to employ the *Charter* to offer even modest procedural protections to families, parents and children in their disputes with state agencies. While some of the blame for this state of affairs may rest with counsel for not bringing forward well-defined strategic challenges, unreceptive and unsympathetic courts do serve to dampen counsel's enthusiasm."¹¹

Professor Thompson draws a distinction between family cases and other *Charter* cases. In support of my thesis that broad social values are involved, I offer the decision in *Irwin Toy Ltd. v. Quebec*.¹² The Quebec legislature enacted legislation prohibiting commercial advertising directed at persons under 13 years of age. This was challenged under the Quebec *Charter of Human Rights and Freedoms* and s. 2(b) and s. 7 of the Canadian *Charter*. The majority of the Supreme Court of Canada found that there was a violation of s. 2(b) but that it was justified under s. 1. They stated:

*In dealing with inherently heterogeneous groups defined in terms of age or a characteristic analogous to age, evidence showing that a clean majority of the group requires the protection which the government has identified can help to establish that the group was defined reasonably. Here the legislature has mediated between the claims of advertisers and those seeking commercial information on the one hand, and the claims of children and parents on the other. There is sufficient evidence to warrant drawing a line at age 13, and we would not presume to re-draw the line. We note that in Ford, supra at pp. 626-8, the court also recognized that the government was afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence.*¹³

On the analysis I have offered it is not surprising that Canadian courts have made little use of the *Charter* in cases involving children. Indeed some recent U.S. authorities show the same respect for U.S. institutions. In *New Jersey v. T.L.O.*,¹⁴ a 14-year-old high school student and a friend were caught smoking in a school restroom. They were taken to the principal who searched T.L.O.'s purse and found drug paraphernalia, money and documents

8. *Ibid.* at 340.

9. D.A. Rollie Thompson, "A Family Law Hitchhiker's Guide to the Charter Galaxy" (1988) 3 C.F.L.Q. 315.

10. *Ibid.* at 387.

11. *Ibid.* at 388.

12. (1989) 58 D.L.R. (4th) 577.

13. *Ibid.* at 623.

14. 469 U.S. 325 (1985).

connecting T.L.O. with drug dealing. In subsequent criminal proceedings T.L.O. complained that the search violated the Fourth Amendment's prohibition on unreasonable searches and seizures. Delivering the judgment of the court, White J. said:

*How then should we strike the balance between the school child's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.*¹⁵

The majority decision shows a broad deference to the authority of school administrators and some of the dissenting judges felt it gave them too much latitude. Stevens, J. (dissenting) noted that other school search cases had involved suspected criminal activity, violence or a substantial disruption of school order. "Few involved matters as trivial as the no-smoking rule violated by T.L.O. The rule the Court adopts today is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context."¹⁶

In *Hazelwood School District v. Kuhlmeier*¹⁷ the U.S. Supreme Court had to consider whether high school students were entitled to the protection of the First Amendment's right to free speech. The school principal had ordered two articles deleted from the high school newspaper. The articles described three high school students' experience with pregnancy and the impact of divorce on students. The U.S. Supreme Court said that it would defer to the school authorities as long as their actions "are reasonably related to legitimate pedagogical concerns."¹⁸ This was "consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers and state and local school officials and not of federal judges."¹⁹

It should be noted that the U.S. Supreme Court was able to create these qualifications on the rights of students without the benefit of a clause comparable to s. 1 of the *Charter*. I remain sceptical whether the *Charter* can be used to affect the status of children in Canadian society.

B. The Elderly and the *Charter*

The position of elderly Canadians may be very different. The cynical may comment that judges can empathize more readily with elderly retired people than with adolescent school children. But the situation is much more complex than that flip comment suggests. Canada is experiencing an unprecedented shift in the age structure of the population. The percentage

15. *Ibid.* at 340.

16. *Ibid.* at 385.

17. 108 S. Ct. 562 (1988).

18. *Ibid.* at 571.

19. *Ibid.*

of the population aged 65 or more is projected to grow from 9.76% in 1981 to 21.8% in 2031.²⁰ One of the basic themes of this paper is that judges are a product of their society and culture. But Canadian society and culture is experiencing such dramatic demographic changes that it must affect its social and cultural values. Moreover elderly people, unlike children, can be effective advocates of change.

Apart from employment and retirement issues, other important issues concern the elderly people of Canada. In its draft report on age discrimination, *Human Rights and Aging in Canada*,²¹ the Standing Committee on Human Rights identified (1) health and social services, (2) housing and transportation services, and (3) pensions and financial services as matters of concern. I would like to discuss the provision of medical services because it is likely to be the next major issue after mandatory retirement and it can function as a model for the other services.

In his book *Strained Mercy: The Economics of Canadian Health Care*,²² Professor Robert Evans argued that Canadian society has not resolved the fundamental question of who should decide how much care is enough and how they should do it. In the seventies, factors such as a decline in utilization growth, and an increase in the supply of physicians, contributed to a spirit of compromise between governments and the health professions. At present, however, there are signs that the health care system is under increasing stress. This may force us to redefine our objectives: what do we expect from the health care system. Unless there is agreement on our health care objectives any discussion of potential policy options will be inconclusive and unsatisfactory.

If there are limits on the medical services to be provided, and priorities have to be established, should the elderly receive a lower priority? In England, for example, dialysis is rarely available to anyone over the age of 55. A hospital administrator explained that "[e]veryone over fifty-five ... is "a bit crumbly" and therefore not really a suitable candidate for therapy."²³

Before you react to that assessment, consider the following assessment of the position facing the U.S.:

It is estimated that 80% of health care resources are devoted to chronic disease. Over 45% of those individuals aged 65 to 74 have some chronic disease and this percentage doubles in those over age 75. Moreover during this decade, the

20. See F.T. Denton & B.G. Spencer, "Population Aging and the Economy: Some Issues in Resource Allocation" in J.E. Thornton & E.R. Winkler, eds, *Ethics and Aging: The Right to Live, the Right to Die* (Vancouver: University of British Columbia Press, 1988) at 101. An even higher projection is contained in *Human Rights and Aging in Canada* (Second Report of the Standing Committee on Human Rights, 1988) at 11.

21. *Supra* note 18.

22. R.G. Evans, *Strained Mercy: The Economics of Canadian Health Care*, 2d ed. (Toronto: Butterworths, 1989).

23. Quoted in J.D. Silver, "From Baby Doe to Grandpa Doe: The Impact of the Federal Age Discrimination on the 'Hidden' Rationing of Medical Care" (1988) 37 *Catholic U.L.R.* 993 at 1006.

*number of individuals in this country who are over age 75 is projected to increase four times as fast as the population under age 65.*²⁴

In his book *Setting Limits: Medical Goals in an Aging Society*²⁵ Daniel Callahan attempts to provide some guidance on the issue of priorities. He notes that retirement no longer represents the "end" of a healthy and productive life. Many retirees contribute to society by their post-retirement activities. It is no longer accurate, if it ever was, to conceptualize elderly people as a group who have completed their lives and are waiting for the inevitability of death. While age may be a factor in determining who receives the benefit of advanced medical technology it should be considered in the context of other factors.

Recently, J.D. Silver, a lawyer with the Civil Rights Division of the U.S. Department of Justice examined the "hidden" rationing of medical care in the U.S.²⁶ She concluded that age was a factor currently used to ration heart transplants and, possibly, other medical care. In her view where a hospital had established a protocol or engaged in a consistent practice of considering a patient's age, that practice was subject to scrutiny under the "virtually forgotten" *Age Discrimination Act* of 1975. She concludes

*The result, under the ADA, is not certain. A court may find that a hospital has no choice but to ration if, as with heart transplants, there is a natural scarcity of critical medical resources. That conclusion might be different, however, if the scarcity is created artificially through budget restraints on health providers. Under such circumstances, rationing is more difficult to justify as a valid program objective, especially if the rationed treatment is life-saving. Common acceptance of the "life-saving imperative" could make rationing an improper purpose of the medical program of a hospital. The very fact that the rationing has been hidden may convince a court that it is not a valid program objective. On the other hand a court might reject this argument as judicial overreaching; the anti-discrimination laws were not intended to control neutral program objectives, but simply to assure the even-handed treatment of individuals within the confines of a given program.*²⁷

Whatever decisions courts reach, Silver believes that the public exposure that will result from judicial inquiry into hidden rationing will produce a political response — and that the legislature is the "appropriate forum for examining competing concerns and interest."²⁸

III. CONCLUSION

24. *Ibid.* at 996.

25. D. Callahan, *Setting Limits: Medical Goals in an Aging Society* (New York: Simon & Schuster, 1987).

26. *Supra* note 21.

27. *Ibid.* at 1071-72.

28. *Ibid.* at 1072.

The premise underlying this paper is that discrimination involves difficult questions of social policy and community values — and those questions may be refined, but not resolved, by an analysis of the language of the *Charter*. Because of the impact of demographic changes some of the most difficult cases under s. 15 will involve allegations of discrimination against the elderly citizens of Canada. We can predict that the courts will have difficulty with such cases. They will not be able to retreat to their usual sanctuary — accepted social and cultural values — because *ex hypothesi* these will be changing in response to the demographic changes. There is even a risk that the courts will operate as a barrier to change — preserving twentieth century values as the legislature marches into the next century.

Of course the courts may also be "saved" by appropriate legislative action. But those seeking legal change will approach the courts as well as the legislature, and courts may be confronted with the issue before it has received the attention of the legislature.