

LOOKING AT THE INDIVIDUAL OR THE GROUP WHEN ASSESSING DISADVANTAGE IN CHARTER LITIGATION

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THE CREATION OF ANALOGOUS SUBGROUP VS. A RELIANCE ON STATISTICAL EVIDENCE OF DISADVANTAGE

The creation of analogous grounds generally requires a finding of a "discrete and insular minority" and/or "the stereotypical application of presumed group or personal characteristics", which suggests a cluster of individuals who uniquely share personal characteristics, and that it is these characteristics which distinguishes them from all others. This task of recognizing and defining analogous grounds into distinct groups has been problematic for the Court when overlapping grounds of discrimination are not acknowledged.

Three cases illustrate how the ability to carve out a subgroup of individuals based on personal characteristics shared among members of protected groups can be determinative. The Court's reluctance to recognize the shared personal characteristics as defining an analogous group has been an obstacle in two such cases, and can be compared with a decision where the Court was able to define a new subgroup entitled to *Charter* protection. Recognition of these subgroups would further the anti-discrimination objectives of the *Charter*, but is not accomplished because of the categorical group approach which predominates *Charter* analysis. I will first review one case where a sub-

group was defined by the Court as being analogous, and compare it with two other cases where the Court focussed its analysis on the traditional enumerated and analogous grounds.

Dartmouth/Halifax County Regional Housing Authority v. Sparks

The personal characteristic of public housing tenancy was found to be an analogous subgroup by the Nova Scotia Court of Appeal. This case shows how a *Charter* claim can succeed where the subgroup is recognized. In *Dartmouth/Halifax County Regional Housing Authority v. Sparks*,¹ a single, black mother and her two children had been public housing tenants for over ten years. The *Residential Tenancies Act* gave tenants with five years' possession a security of tenure such that they may only be evicted if a judge is satisfied that the tenant is in breach of his or her obligations. However, there was an exception for public housing tenants which stated that, in such cases, the terms of the lease prevailed. In this case, the public housing tenant was only afforded one month's notice and no "cause" was alleged. The public housing exception was challenged as infringing the tenant's section 15 equality rights on the basis of race, sex, and income.

The evidence presented showed that public housing tenants were disproportion-

ately comprised of women, blacks, and social assistance recipients. Therefore, the group entitled to protection was argued to be public housing tenants. That is, the personal characteristic of public housing tenancy overlapped with the protected grounds of sex, race, and source of income. The respondent argued, however, that public housing tenancy is not a "personal characteristic." In finding that tenancy is a personal characteristic, the Nova Scotia Court of Appeal stated: "The phrase 'based on grounds relating to personal characteristics' as used in the *Andrews* case cannot be taken to mean that the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifestly directed at such characteristics. Such an interpretation would fly in the face of the effects-based approach to the *Charter* espoused by the Supreme Court of Canada."

"It is clear that a determination of the constitutionality of legislation must take account of both the purpose and effects of the legislation."

The Court held that the challenged sections of the legislation "deny benefits to a certain group of the population (public housing tenants) while extending them to others." Such a distinction has the effect of discriminating "against public housing tenants who are a disadvantaged group analogous to the historically recognized groups enumerated in s. 15(1)." In finding an analogous group, the Court stated, "the public housing group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1)."

The ability of the Court to carve out this subgroup of

disadvantaged individuals, based on the fact that this characteristic overlapped with grounds already protected, was therefore crucial to the *Charter* claimant's success. The Court did not require a showing that the legislation made a distinction on an established enumerated or analogous ground. The fact that public housing tenancy overlapped with other protected grounds was sufficient. Therefore, through the recognition of this personal characteristic among already protected groups, an analogous subgroup was defined. However, other cases have been more onerous in their evidentiary requirement of establishing the existence of an analogous ground.

East York (Borough) v. Ontario (Attorney General)

In the Ontario Court of Appeal decision of *East York (Borough) v. Ontario (Attorney General)*,² (the *Megacity* case), it was argued that the personal characteristic of political powerlessness was aggravated by the *City of Toronto Act, 1997*. According to this legislation and the population demographics of the new city of Toronto, the ratio between voters and elected representatives would increase significantly. More voters would be represented by fewer city councillors. Since Toronto, as compared to other surrounding municipalities, is disproportionately made up of members of protected groups who lack political power (i.e., single mothers, visible minorities, the disabled, etc.), it was argued that the new legislation creates a burden among several analogous and enumerated groups who reside in Toronto which

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does not exist in the surrounding municipalities. It was the lack of "effective representation" which constituted the burden.

One of the very reasons for protecting minorities and disadvantaged groups through the Constitution is to recognize their inability to achieve equal rights through the legislative process. If this were not the case, these groups would not have to resort to the Charter's protection for relief from oppressive legislation, and could simply vote for elected representatives to effectuate the desired change.

The case is similar to *Sparks* in that a group of individuals who lack political power sought to be defined as an analogous subgroup, based on the fact that groups already protected by the *Charter* lack political power. It can be taken as a fact that political powerlessness is a trait that overlaps among most, if not all, enumerated and analogous groups protected by the *Charter*. One of the very reasons for protecting minorities and disadvantaged groups through the Constitution is to recognize their inability to achieve equal rights through the legis-

lative process. If this were not the case, these groups would not have to resort to the *Charter's* protection for relief from oppressive legislation, and could simply vote for elected representatives to effectuate the desired change.

However, the Court in *Megacity* did not accept that the legislation negatively affected members of a protected group. The Court stated: "The levels of governance and institutional responsibility have been changed within [the city's] boundaries, but those changes cannot be described as a distinction based on stereotypical assumptions about disadvantaged groups. Further there was nothing beyond speculation to show discriminatory impact on any disadvantaged group. The theoretical concern that adjustments in the ratios would negatively impact on the access of disadvantaged groups to the elected representatives in the new City of Toronto did not meet the burden of proof of s. 15."

Had the Court framed its analysis around a subgroup of individuals who lack political power, comprised of members of enumerated or analogous grounds, rather than requiring that statistical evidence be produced establishing that minorities and disadvantaged groups lack political power, the Court's conclusion may very well have been different. The direct result of the legislation is to reduce the political power of those who already lack such power. Indeed, had the Court recognized political powerlessness as an analogous subgroup, it may have been satisfied that the ratios of decreased access to city councillors was a sufficient burden to justify a finding of discrimination. The

Court's focus on the enumerated and analogous grounds, however, makes this conclusion impossible.

Clark v. Peterborough Utilities Commission

A final case worthy of comment is *Clark v. Peterborough Utilities Commission*,³ a case heard by the Ontario Court (General Division) and on appeal to the Court of Appeal. In this case, a section 15 challenge was brought against a mandatory deposit policy of the Peterborough Utilities Commission from tenants who could not show a "satisfactory payment history." The policy applied only to tenants. Two recipients of social assistance challenged the policy as infringing their right to equality, arguing that "the application of the deposit requirement to tenants and not to homeowners results in a disproportionate number of members of disadvantaged groups being required to provide the deposit."

The applicants relied on *Sparks* and presented statistical evidence showing that women, the disabled, visible minorities, Aboriginal people, and single mothers disproportionately fell below the Low-Income Cut-Offs (LICO) established by Statistics Canada. Evidence was also presented showing tenants in Peterborough to be disproportionately below the LICO. As such, the disadvantage suffered, namely the inability to provide a deposit due to poverty, is disproportionately endured by tenants who are disproportionately made up of groups protected by the *Charter*. In essence, the claimants were seeking to characterize low-income tenancy as an analogous ground based on its overlap

with enumerated and analogous grounds.

The Court based its decision on the fact that the policy only applied to tenants who had a poor credit history, and that deposits were only required in such instances. The Court stated that low-income people should not be assumed to have less satisfactory payment histories. As such, the Court could not conclude that the policy adversely affects persons based on personal characteristics. The Court, therefore, found it unnecessary to consider whether low-income tenants constituted an analogous ground.

We would argue, however, that the case was wrongly decided for the following reason. First, the Court failed to define the analogous ground. Since low-income tenants are disproportionately comprised of people who are members of enumerated or analogous grounds, the personal characteristic of being a low-income tenant is an analogous ground. Second, had the Court made this initial finding, it would have then been able to find the correct distinction being made, namely, that between low-income tenants who have unsatisfactory payment histories as compared to homeowners who similarly have unsatisfactory payment histories. The distinction is based on tenancy, not on whether tenants are able to pay their bills. This fact is clear given that the policy does not apply to homeowners. Third, the distinction creates a disadvantage because it deprives low-income tenants who have poor payment histories of access to a necessary service when homeowners with poor payment histories are not similarly deprived.

An examination of the group can result in significant negative consequences for members of a protected group. This is because current Charter analysis assumes that the remedy for a Charter claimant is good for all members of the affected group. In comparison, an examination of the individual, may lead to a Charter claim being unsuccessful when most members of a protected group could be alleviated from the challenged burden or disadvantage.

Based on these arguments, the Court's error stems from its failure to recognize an analogous subgroup based on a personal characteristic which overlaps several enumerated and analogous groups. The Court would have been able to draw the correct comparison groups had it recognized low-income tenants as an analogous group. Rather, the Court focussed its analysis on reviewing the evidence of the protected groups—the disabled, visible minorities, women, single mothers, and Aboriginal peoples. The Court then relied on *Symes* for the proposition that clear evidence of adverse effects must be established. However, the policy distinction directly af-

fecting low-income tenants, and only had adverse effects on the underlying disadvantaged groups. In order for the distinction to be considered a direct distinction, the Court had to first find that low-income tenants are an analogous group. As this was not done, success eluded the claimants.

To summarize, depending on whether an analogous subgroup is defined as comprising an individual personal characteristic which overlaps among other protected groups, a Charter claim is more likely to succeed. This is evident from a comparison of the decision in *Sparks* with those in *Megacity* and *Clark*. In *Sparks*, the analogous subgroup was defined and comparisons were easily made. However, in *Megacity* and *Clark*, the respective analogous subgroups were not defined. Both Courts were prevented from finding discrimination because of a lack of statistical evidence showing that the already recognized groups were further disadvantaged. However, if the respective Courts had made an initial determination of the disadvantage actually suffered, and thereby defined a subgroup of individuals analogous to those enumerated under section 15, the outcome of each case would have arguably been different.

CONCLUSION

In *Eaton*, the Supreme Court of Canada has established a different test for examining burdens or disadvantage based on the ground of discrimination alleged. For disability, it is clear that the individual is to be examined. For other grounds, a group analysis is appropriate. However, this classification departs from previous Charter analysis

which suggests that, in some cases, the individual has been examined.

The effect of starting a section 15 claim by defining a subgroup is to clearly define the disadvantage suffered by focussing on the disadvantage, not the traditional enumerated or analogous grounds. This approach is one which best meets the anti-discrimination objectives of the Charter.

An examination of the group can result in significant negative consequences for members of a protected group. This is because current Charter analysis assumes that the remedy for a Charter claimant is good for all members of the affected group. In comparison, an examination of the individual, may lead to a Charter claim being unsuccessful when most members of a protected group could be alleviated from the challenged burden or disadvantage. Judicial economy and access to justice principles ought to ensure that overemphasis is not placed on individual considerations when a successful claim which can benefit the group is made out. Several approaches have been suggested for future section 15 cases. An approach which achieves substantive equality and which is reflective of the principles of access to justice and judicial economy, we argue, is the most desirable approach. Such a goal would

be to give true effect to the equality provisions of the Charter.

One such approach is for the Court to more readily recognize discrete analogous subgroups. An analogous subgroup would be defined by a personal characteristic that exists among several enumerated or analogous grounds. The effect of starting a section 15 claim by defining a subgroup is to clearly define the disadvantage suffered by focussing on the disadvantage, not the traditional enumerated or analogous grounds. This approach is one which best meets the anti-discrimination objectives of the Charter.



NOTES

1. (1993), 101 D.L.R. (4th) 224 (N.S.C.A.).
2. (1997), 153 D.L.R. (4th) 299 (C.A.).
3. (1995), 24 O.R. (3d) 7 [hereinafter *Clark*].

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