Update

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EMPLOYMENT EQUITY ACT CHARTER CHALLENGE
Ferrel et al v. Attorney General Ontario

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INTRODUCTION

Immediately following the repeal of Ontario's *Employment Equity Act, 1993*, in December, 1995, an action was commenced to challenge the *Job Quotas Repeal Act, 1995* as discriminatory and in violation of section 15 of the the *Charter of Rights and Freedoms*. This action was commenced pursuant to Rules 14.05(d), (g), and (g.1) of the *Rules of Civil Procedure* before a single judge of the Ontario Court General Division.

The applicants initially brought an injunction which was dismissed by Mr. Justice Macpherson on December 29, 1995.[1] The matter later was heard on the merits before Mr. Justice Dilks who issued a ruling on July 9,1997 dismissing the application. The Court ruled that there was no section 15(1) violation because *Bill 8* had no substantive element which could be subject to the *Charter,* drew no legislative distinctions and had simply restored the situation which existed prior to the *Employment Equity Act, 1993.*

The applicants appealed and the appeal was heard by the Ontario Court of Appeal on April 6-7,1998. The Ontario Federation of Labour, the Legal Education and Action Fund and the African Canadian Legal Clinic were granted intervenor status. The OFL was represented by Mary Cornish and Fay Faraday. This UPDATE summarizes the argument presented on behalf of the OFL at the appeal. The decision on appeal is reserved.

THE FACTS

The *Job Quotas Repeal Act, 1995* was a statute enacted by the Ontario legislature which, among other things, withdraws the equality-related protections set out in the *Employment Equity Act* and other related legislation from the following disadvantaged groups: women, Aboriginal people, members of racial minorities and people with disabilities. It also directed employers to destroy information used to implement anti-discrimination measures.[2] The full title of *Bill 8* is *An Act* to *Repeal Job Quotas and To*

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Restore Merit-Based Employment Practices in Ontario. In fact, the *Employment Equity Act* did not impose job quotas. It specifically provided for flexible goals rather than quotas. Furthermore, the *Employment Equity Act* sought to restore merit to employment practices by removing discriminatory barriers.[3]

The *Employment Equity Act* was a legislative advance in the protection of human rights which provided a benefit to the above-noted disadvantaged Ontarians through enhanced access to an effective remedy for systemic societal discrimination against

them.[4] The Ontario Legislature identified in the Preamble to the *Employment Equity Act,* the following social and economic basis for the introduction of the *Act*:

- That there is a serious problem of systemic discrimination facing the above-noted disadvantaged group members which required specific legislative action;
- That such members experience higher rates of unemployment than other people in Ontario; experience more discrimination than other people in finding and keeping employment and being promoted; and as a result are under-represented in most areas of employment, especially in senior management positions, and over-represented in those areas of employment that provide low pay and little chance for advancement;
- That this lack of employment equity exists in both the public and private sectors and is caused in part by systemic and intentional discrimination;
- That people of merit are often overlooked or denied opportunities because of this discrimination;
- That, when objective standards govern employment opportunities, Ontario will have a workforce that is truly representative of its society; and
- That ending discrimination in employment and increasing the opportunity of individuals to contribute in the workplace will benefit all people in Ontario [5]

In light of this identified systemic discrimination, the Legislature expressed in the Preamble that the *Act's* purpose is to improve the unequal conditions facing designated groups; provide opportunities for people in those groups to fulfil their potential in employment by requiring proactive steps to be taken to eliminate employment discrimination; and extend the equality rights of designated group members provided by existing law such as the *Human Rights Code*, the *Employment Standards Act* and the *Pay Equity Act.*[6]

The *Employment Equity Act* was passed after wide-spread consultation and in light of extensive studies which recommended the introduction of proactive legislation specifically designed to redress the recurring and wide-spread systemic discrimination found in Ontario's workplaces. [7]

These studies specifically recognized the fact that human rights legislation such as the *Human Rights Code* had provided ineffective protection against such systemic discrimination: [8]

Bill 8 was passed after a 1995 provincial election campaign and a subsequent legislative process during which the Progressive Conservative members misleadingly characterized the *Employment Equity Act* as involving quotas and the destruction of the merit principle.

The Ontario Government acted through *Bill 8* to repeal the *Employment Equity Act* and amend other related laws in the absence of:

- any studies or assessments which found that the social and economic basis underlying the *Employment Equity Act* set out in the *Act*'s Preamble and underlying the other related laws were no longer valid ; and
- any study demonstrating that the specific measures in the repealed or amended laws were unnecessary, invalid or failed to achieve their objective.

THE ISSUES

The major issues raised at the Court of Appeal were:

a. Under s. 32 of the *Charter*, is the *Job Quotas Repeal Act, 1995* a matter within the authority of the legislature to which the *Canadian Charter of Rights and Freedoms* applies?

b. Does *Bill 8* discriminate on the basis of an enumerated or analogous ground contrary to s. 15(1) of the *Charter*?

c. If *Bill 8* contravenes s. 15(1) of the *Charter*, can this violation be justified under s. 1 of the *Charter*?

In summary, the OFL argued that the answer to these issues was as follows:

a. The *Job Quotas Repeal Act, 1995*, S.O. 1995, c. 4, is a provincial law and thus under s. 32 it constitutes government action to which the *Charter* applies. Whether legislation introduces a regulatory scheme or amends or repeals an existing statute, it is government action and is subject to the Constitution.

b. The same principles by which the court assesses the existence of a s. 15(1) violation apply regardless of whether the alleged violation is effected by means of a statutory enactment, amendment or repeal. To determine if s. 15 is violated it is necessary to compare the social, political and legal context which exists after *Bill 8* with that which existed in 1995 immediately prior to the *Bill*'s enactment. Based on this comparison, *Bill 8* prejudicially affected disadvantaged groups contrary to s. 15 of the *Charter.*

c. The appeal can be resolved without addressing the question of whether the *Charter* imposes a positive obligation upon government to enact legislation to rectify existing social inequality, such as the *Employment Equity Act*.

d. The *Charter* does not preclude a government from ever amending or repealing legislation which was previously enacted. Rather, a government may amend, repeal or replace existing legislation as long as its actions in doing so are consistent with the requirements of the *Charter*.

e. The test for justifying a *Charter* violation is stringent and the government must adduce cogent and persuasive evidence on each part of the s. 1 test. The OFL submitted that the Government had not adduced such evidence and accordingly *Bill 8's* violation of s.15(1) of the *Charter* had not been justified.

THE LAW

A. Section 32: *Bill 8* is Subject to Scrutiny Under the *Charter*

By s. 32, the *Charter* applies to all legislation enacted by a provincial legislature. The purpose, substance and effect of that legislation have no bearing on whether the *Charter* applies. Rather those factors only become relevant at the stage when the court decides if the impugned legislation violates a *Charter* right or freedom.[9]

Conceptually and legally the question of whether the *Charter* applies to a particular legislative action is wholly distinct from the question of whether the impugned action has the effect of violating a right or freedom in the *Charter*.

The threshold "application" question resolves whether the impugned action is that of the legislature or government. By contrast, the "substantive" question analyses the alleged prejudicial effect of what has been judged to constitute government action. If the matter is not "governmental" for the purposes of s. 32, an analysis of its effects is not required. Similarly, the constitutional quality of the action's effect does not alter its status as being or not being "governmental".

The OFL argument on this point was buttressed by the release of the Supreme Court of Canada's decision in *Vriend v. Alberta* dated April 2, 1998 (unreported). The Court in that case, when addressing the issue of the underinclusiveness of Alberta's *Individual Rights Protection Act* addressed the issue of section 32 and developed the following test:

> This issue is resolved simply by determining whether the subject of the challenge in this case is one to which the Charter applies pursuant to s. 32. Questions relating to the nature of the legislature's decision, its effect, and whether it is neutral, are relevant instead to the s. 15 analysis.The threshold test demands only that there is some "matter within the authority of the legislature" which is the proper subject of a Charter analysis. At this preliminary stage no judgment should be made as to the nature or validity o this "matter" or subject. Undue emphasis should not be placed on the threshold test since this could result in effectively and unnecessarily removing significant matters from a full Charter analysis. (See para.52)

> Further confusion results when arguments concerning the respective roles of the legislature and the judiciary are introduced into the s. 32 analysis. These arguments put forward the position that courts must defer to a decision of the legislature not to enact a particular provision, and that the scope of Charter review should be restricted so that such decisions will be unchallenged. I cannot accept this position. Apart from the very problematic distinction it draws between legislative action and inaction, this argument seeks to substantially alter the nature of considerations of legislative deference in Charter analysis. The deference very properly due to the choices made by the legislature will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a Charter breach. (See para.53)
>
> If an omission were not subject to the Charter, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from Charter challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. (See para. 61)
>
> It might also be possible to say in this case that the deliberate decision to omit sexual orientation from the provisions of the IRPA is an "act" of the Legislature to which the Charter should apply. This argument is strengthened and given a sense of urgency by the considered and specific positive actions taken by the government to ensure that those discriminated against on the grounds of sexual orientation were excluded from the protective procedures of the Human Rights Commission. However, it is not necessary to rely on this position in order to find that the Charter is applicable. (See para.62)

Application to the Appeal

The *Job Quotas Repeal Act, 1995* is a statute enacted by the Ontario legislature. It received first reading on 11 October 1995, second reading on 2 November 1995, third reading on 13 December 1995 and received Royal Assent on 14 December 1995. It appears in the *Statutes of Ontario 1995* as Chapter 4. Accordingly, it is an action of the legislature for the purposes of s. 32 and so is subject to scrutiny for *Charter* compliance.[10]

In finding that the *Charter* did not apply in the present situation, the Ontario Court General Division in *Ferrel* made the following errors:

- The Court erred in ruling that *Bill 8*, as a repealing statute, had “no substantive component” that could be measured against the *Charter*. In so doing, it is submitted that the Court erroneously collapsed the threshold question of the *Charter*'s application with the subsequent question of whether the *Bill*'s substantive effect violated a provision of the *Charter*.

- The Court erred in ruling that because there was no precedent for successfully challenging the repealing provisions of a statute, *Bill 8* could not be scrutinized for *Charter* compliance. It is submitted that in so ruling, the Court has erroneously immunized all repealing laws from judicial review contrary to the plain language of s. 32 of the *Charter*.

- The Court erred in ruling that the action to repeal the *Employment Equity Act,1993* was a “political” decision and that the remedy for such action must be sought at the polls. In so doing, it is submitted that the Court has created a false distinction between “political” and “non-political” laws which erroneously shields the former from judicial review. In addition, the Court has erroneously distinguished between “present” and “current” governments and has placed the will of “the electorate” above the requirements of the Constitution. [11]

“No Substantive Component” is Irrelevant for s. 32 Purposes

Whether there is any “substantive component” to *Bill 8* is a question relating to the statute’s <u>impact</u> and the manner by which the Court will determine if its <u>impact</u> violates a guarantee in the *Charter*. However, this assessment has absolutely no bearing on whether *Bill 8*, as a provincial statute, does or does not constitute government action under s. 32 of the

Charter. There is no doubt that *Bill 8* in and of itself constitutes government action for the purposes of attracting *Charter* scrutiny. The question of the *Bill*'s substantive effect must be addressed only at the s. 15 stage of the *Charter* inquiry.

Repealing Statutes are Subject to the *Charter*

At the s. 32 stage of the *Charter* inquiry it is important to distinguish between what a statute is and what a statute does. Only the first issue is relevant under s. 32 because s. 32 is concerned solely with whether something is or has the status of being government action. What a statute does -- whether it enacts, amends or repeals legislation -- is irrelevant to the s. 32 inquiry. At the preliminary stage of the *Charter* inquiry under s.32, the only question is whether *Bill 8* is, by its nature as a form of government action, a matter to which the *Charter* is intended to apply. The substance and effect of *Bill 8* only become relevant at the second stage of the inquiry when the Court is called upon to determine whether there has been a violation of s. 15 of the *Charter*.

Judicial Interpretation of Section 32

Section 32 of the *Charter* provides in part as follows:

32. (1) This Charter applies

. . .

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It never has been in doubt when interpreting the scope of s. 32 that by its reference to "legislature", s. 32 intended that the *Charter* would at a minimum apply to the government in its traditional role as law maker. It is beyond doubt that the *Charter* applies to a provincial legislature and to "the quintessential fruits of government action, legislation". This conclusion is supported by both a purposive and a textual analysis of section 32.[12]

Purposive Analysis of Section 32

Section 32 of the *Charter* must be given a broad and purposive interpretation which analyses its specific provisions in light of the *Charter*'s larger objects.[13] The rights and freedoms guaranteed in the *Charter* embody the principles and values of a free and democratic society, including a commitment to social justice and equality. In the words of the Supreme Court of Canada, the *Charter* "is intended to constrain governmental action inconsistent with those rights and freedoms".[14] In recognition of this power imbalance, the *Charter* was introduced for the express purpose of granting to minorities and disadvantaged groups enduring protection from the changing opinions of transient legislative majorities.[15]

The Supreme Court of Canada has recognized that the legislatures carry out their objectives by introducing legislation: "All legislation is animated by an object the Legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation." The Court has concluded that legislation, both in its purposes and its effects, must be subject to *Charter* scrutiny.[16] All legislation, regardless of its type or subject matter, is subject to the *Charter*. Moreover, a purposive interpretation of s. 32 emphasizes that, of all statutes, legislation relating to equality rights of minority groups must be subject to *Charter* scrutiny as it is this type of law which most closely relates to the *Charter*'s larger objectives of protecting minority rights.[17]

Textual Analysis of Section 32

Even on a purely textual analysis, the *Charter* clearly is intended to apply to all provincial legislation. On the face of s. 32, the *Charter* applies to the "legislature" of a province in respect of all matters within the legislature's authority. The legislature operates by enacting legislation on those matters over which it has jurisdiction pursuant to s. 92 of the *Constitution Act, 1867*.[18]

Reference to other sections of the *Charter* also clarifies that the *Charter* applies to provincial statutes. Section 52(1) states that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." However broad may be the scope of "any law" as used in s. 52(1), this section clearly provides the basis for judicial review of legislation in Canada. Any statute that is inconsistent with the Constitution must be of no force or effect.[19]

Finally, by reference to s. 33 of the *Charter,* the "notwithstanding clause", the drafters clearly intended the *Charter* to apply to all legislation. Section 33 creates an exception by which Parliament or a provincial legislation can enact legislation which shall operate notwithstanding the fact that it violates a provision of the *Charter*. This extraordinary override provision would be unnecessary if legislation was not as a rule subject to the *Charter*.[20]

Statutes which enact, amend or repeal legislative provisions have all been subject to scrutiny under the *Charter*. [21] What these various types of statute do does not change the status of what they are. They are all government action. To rule otherwise is to favour legislative drafting technique over legislative essence in a manner that flies in the face of both the plain language of s. 32 and the *Charter*'s objective of reviewing government action.

Based on the logic of the General Division's decision, the *Charter*'s application would depend on whether the government chose to enact a provision as part of a larger statute or to enact that same provision as a self-contained statute. If the part of the larger statute was repealed, that action would be subject to the *Charter* whereas the repeal of the stand-alone statute would be immune from *Charter* review. Such a distinction is clearly absurd.

Government's "Political" Action is Subject to the *Charter*

The distinction between "political" and "non-political" decisions is meaningless in the context of government action. All decisions of the legislature are political. The legislature is by its very nature a political institution. A government speaks through legislation. It makes political choices which it formalizes by enacting "policies" into law. This choice or action by government is subject to the *Charter*. Even a policy decision which is not enacted as legislation is subject to *Charter* scrutiny.[22]

That legislation is motivated by a political choice is no reason to exempt it from *Charter* scrutiny. It is equally arguable that the more "political" or "ideological" the legislative choice, the more necessary it is to review it for *Charter* compliance. In this respect, it is important to remain mindful of the *Charter*'s objective of protecting disadvantaged groups, from the changing tides of political opinion in the legislative majority.

Moreover, the political purposes or nature of legislation are highly relevant to determining if there has been a breach of the *Charter*'s substantive guarantees. To analyse if government action violates a substantive *Charter* right, both the purposes and the effects of the action are scrutinized and either on its own may violate the *Charter*. Purposes or political choices are also relevant at the s. 1 stage to determine if a *Charter* breach can be justified. As political decisions are highly significant in determining the existence and justification of a substantive *Charter* violation, it is submitted that there is no basis upon which a political choice, enacted as legislation, cannot constitute government action for the purposes of attracting *Charter* scrutiny under s. 32.

Mr. Justice Dilks placed great emphasis on the fact that the *Employment Equity Act* was an enactment of the "previous government" and that *Bill 8* is an enactment of the "current government" which has a different political perspective. This distinction based on which political party has the governing majority in the Legislature is irrelevant for the purposes of s. 32. The Ontario Legislature is a constant and enduring institution. Its legislative enactments are the Statutes of Ontario, not enactments of a particular political party. Following an election, all statutes remain binding acts of the Legislature. The Legislature can only dissociate itself from an existing statute by taking positive action to repeal it and this action is subject to *Charter* review pursuant to s. 32.[23]

In addition, the General Division, in *Ferrel*, placed great emphasis on the fact that the matters addressed by *Bill 8* were the subject of the Progressive Conservative Party's political campaign during the 1995 provincial election. The Court's decision emphasizes that the electorate made its choice during that election and that if the electorate prefers a different solution to the employment equity issue, it has the privilege to exercise that choice at the next election.

It is erroneous to attempt to infer from an election result a unified will of "the electorate" regarding a single issue. More importantly, it is wrong to immunize government action from *Charter* review

because the government follows what it perceives to be the will of the electorate. Political positions do not become "constitutional" simply because they are espoused by a majority. On the contrary, it is fundamental to a system of constitutional democracy that the Courts review government action, not to ensure its consistency with changing currents of political opinion, but rather to ensure it complies with the enduring principles and values enshrined in the society's supreme law which is the Constitution.[24]

Conclusion

The *Job Quotas Repeal Act, 1995* is a provincial statute which constitutes government action. As a result, it is subject to the *Charter*.

B. Section 15: *Bill 8* Contravenes the *Charter*'s Guarantee of Equality

Scope of the Issue

The second issue in the appeal is whether the *Job Quotas Repeal Act, 1995* violates s. 15(1) of the *Charter*. In considering this issue, two separate questions arise:

1. What legal principles apply to determine whether a *Charter* violation has occurred?

2. In light of the legal principles, is there sufficient evidence on the record to establish whether a violation has occurred?

No Judicial Deference to the Legislature in a Section 15 Analysis

Under the *Charter*, the Legislature and the Courts each have an independent obligation to ensure that legislation conforms with *Charter* principles. At the s. 15(1) inquiry stage, the Court is concerned solely with whether the impugned legislation imposes a prejudicial burden on a disadvantaged group. Under s. 15(1), no judicial deference is owed to the legislature.[25] The Supreme Court of Canada has recognized that in applying the *Charter*, "the courts should adopt a stance that encourages legislative advances in the protection of human rights." The scope of equality rights should not be circumscribed through deference in the s. 15(1) analysis. Any consideration of the legislature's objectives or justifications for the impugned action must be left to the analysis under s. 1 of the *Charter*.[26]

The legal question to be determined is not whether in principle the government could amend, replace or repeal the *Employment Equity Act*. The question is whether *Bill 8*, the particular action undertaken by the government, had any effect which prejudicially affected rights under s. 15(1) of the *Charter*. Some forms of government action may be more difficult than others to assess against the *Charter* standard. However, this is simply a question of proof or evidence. It does not remove from the Court the constitutional obligation to undertake that assessment.

The Ontario Government argued that repeal of the *Employment Equity Act, 1993* was not subject to the *Charter* or a violation of section 15 because with a repealing statute, there was no government action left in place to be subject to the *Charter* and therefore there could be no violation of section 15.

The OFL in this regard also relied on the Supreme Court of Canada's judgement in *Vriend* and particularly the following passage:

> If the mere silence of the legislation was enough to remove it from s. 15(1) scrutiny then any legislature could easily avoid the objects of s. 15(1) simply by drafting laws which omitted reference to excluded groups. Such an approach would ignore the recognition that this Court has given to the principle that discrimination can arise from underinclusive legislation. This principle was expressed with great clarity by Dickson C.J. in Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, at p. 1240. There he stated: "Underinclusion may be simply a backhanded way of permitting discrimination". (see para. 80)

Canada's International Equality Commitments

The Supreme Court of Canada has recognized that Canada's international human rights obligations are relevant and persuasive sources for *Charter* interpretation. It has confirmed that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada

has ratified."[27] International commitments and standards support broadening and strengthening employment equity initiatives, not weakening them or reducing their scope. The guarantees of equality in employment enshrined in international human rights documents to which Canada is a signatory, all of which are aimed at ensuring, among other things, that women, Aboriginal people, racial minorities and people with disabilities are provided with effective access to anti-discrimination measures.[28]

Government Obligations to Disadvantaged Groups

Under s. 15, courts have made clear that in enacting laws legislatures have an obligation to ensure that its statutes take account of and do not adversely affect disadvantaged groups:

> In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.[29]
>
> Although s. 15 of the *Charter* does not impose upon governments the obligation to take positive action to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality.[30]

A legislature which amends a statute to withdraw equality-related protections from particular groups bears an obligation to ensure that such amendments do not impose discriminatory burdens on disadvantaged groups or individuals. This is particularly so where the "benefit of the law" in question is access to a remedy for systemic discrimination.

The Legal Test Under Section 15(1) of the *Charter*

Section 15(1) of the *Charter* states:

> **15. (1)** Every individual is equal before and under the law and has the right to the equal protection and 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.

To establish a violation of s. 15(1), it is necessary to prove that:

- The impugned legislation creates a distinction which denies one of the four equality rights identified in s. 15(1) [the right to equality before and under the law, equal protection and benefit of the law]; and

- The distinction is discriminatory in that it is related to an enumerated or analogous ground and has the prejudicial effect of withholding an advantage or benefit from the claimant or imposing a disadvantage, limitation or burden on the claimant.[31]

While the Supreme Court of Canada in the 1995 *Equality Trilogy* did not unanimously articulate the s. 15 test, in the three s. 15(1) cases decided since the *Trilogy,* all nine judges have subscribed to common principles for establishing a s. 15(1) violation which reflect the above test. The Court of Appeal has likewise adopted the above two-part legal test.[32]

Identifying Discrimination Under Section 15(1)

Section 15(1) has the objective of promoting a "society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". It has a strong remedial component which aims to remedy or prevent discrimination against historically marginalized groups in Canadian society.[33]

Section 15(1) identifies specific grounds of distinction, including distinctions drawn on the basis of race, national or ethnic origin, colour, sex and mental or physical disability, which are the ones most likely to give rise to discrimination. These grounds have been enumerated because they serve as "ready indicators" of distinctions which relate to and reinforce historical disadvantage and other indicia of the type of vulnerability s. 15 is designed to protect.[34]

A distinction is discriminatory if it perpetuates an injustice which s. 15 of the *Charter* is aimed at preventing.

Discrimination arises when a legislative distinction relates to a prohibited enumerated or analogous ground and "engages the purpose" of s. 15(1) by imposing a prejudicial limitation, disadvantage or burden on the claimant which does not reflect the claimant's merit, capacity or circumstance.[35]

A distinction relating to an enumerated ground will, except in "rare" or "exceptional" cases, constitute discrimination contrary to s. 15(1) of the *Charter*. If a claimant brings the distinction within the scope of the enumerated or analogous grounds, "in most cases, this suffices to establish discrimination". The Supreme Court of Canada has clearly stated that when faced with a distinction on the basis of an enumerated or analogous ground, "one would be hard-pressed to show that the distinction is not discriminatory".[36]

Applying the Section 15(1) Test in the Context of a Repeal

The principles enunciated above apply in all cases where government action is alleged to have violated rights under s. 15(1) regardless of whether the alleged violation is effected by means of a statutory enactment, amendment or repeal. The manner by which the government has effected the alleged violation will simply shape the context of the analysis and the nature of the evidence by which the violation may be established.

In finding that there was no s. 15(1) violation, the Ontario Court General Division made the following errors:

- The Court erred in ruling that "the issue is not whether the repealing statute is intrinsically bad, as being in violation of the *Charter*." With all due respect, it is submitted that this is the very issue in dispute. By its ruling, the Court failed to examine the effect of *Bill 8* and failed to address the substantive issue in the case.
- The Court erred in ruling that there was no s. 15(1) violation because *Bill 8* had no substantive element, *Bill 8* drew no legislative distinctions, and because the Legislature had simply restored the situation which existed prior to the enactment of the *Employment Equity Act,1993*. In so doing, it is submitted that the Court erred in conducting its contextual analysis and failed to examine *Bill 8*'s effects.
- The Court erred in ruling that there was no legal significance to whether the government had properly characterized the effect of the *Employment Equity Act*,*1993* and the purpose of its repeal. It is submitted that government's purpose in enacting legislation and the effect of its characterizations of its purpose are highly relevant to determining whether the government action had a discriminatory effect.

The Context in Which the Analysis Takes Place

The Supreme Court of Canada has made it clear that s. 15(1) claims must be evaluated within the broader social, political and legal context within which they arise.[37] It is necessary to distinguish between social inequality that is not caused by the government and prejudicial effects that flow from government action. As found by the General Division, it is clear that systemic discrimination in employment pre-existed the introduction of the *Employment Equity Act*. The present appeal does not seek to hold the government responsible under the *Charter* for this discrimination which was not of its creation. Under the *Charter*, the government can be held to account for discriminatory effects which flow from its own action in enacting *Bill 8*.

The s. 15 analysis must take place in a context which recognizes the social reality of systemic employment discrimination against women, racial minorities, Aboriginal people and people with disabilities. The context must also take into account the history of legislative efforts in Ontario to address this systemic problem. The context must acknowledge the existence of and limited protection afforded by the *Human Rights Code*, the studies which indicated the inadequacy of that *Code* to address problems of systemic discrimination, the studies which recommended the introduction of legislation specifically designed to promote employment equity, the introduction of the *Employment Equity Act* and the actions which took place under that *Act* to redress systemic employment inequality.

The evolution of the political, social and legal context outlined above is the context into which *Bill 8* was inserted. It is submitted therefore that this cumulative history constitutes the context in which the impact of *Job Quotas Repeal Act* must be assessed. Thus, to determine if *Bill 8* violated s. 15(1), the relevant comparison must take place between *Bill 8* and the social, political and legal context which existed immediately prior to *Bill 8.*

Simply because part of *Bill 8* repeals the *Employment Equity Act* does not make the operative comparison one between what exists after *Bill 8* and what existed prior to the *Employment Equity Act,* as the General Division asserted. To accept this as the basis of the comparison constitutes a serious error because it ignores significant aspects of the actual social, political and legal context; it treats this part of history as if it had never existed. Moreover, making such a comparison evades the whole crux of the dispute which is about what impact *Bill 8* had.

The focus of the legal inquiry under s. 15(1) is on the impact of the impugned government action. According to the Supreme Court of Canada, this issue concerns the constitutionality of the distinction created by “the questioned law” or “the impugned legislation”. Whether the claimants have been denied equality under the law or equal benefit and protection of the law relates to the effects of the “questioned law” which is *Bill 8*.[38]

The issue to resolve under s. 15 in the *Ferrel* appeal is “what purpose and effect did *Bill 8* have?” *Bill 8* created a social, political and legal context that differs from what existed immediately before *Bill 8* was enacted. Accordingly, the relevant comparison is between the social, political and legal context with *Bill 8* and the social, political and legal context without *Bill 8*.

The Legislative Distinction: Adverse Effect Discrimination

On its face, the *Job Quotas Repeal Act* does not draw explicit distinctions on the basis of grounds enumerated in s. 15(1) of the *Charter*. However, the Supreme Court of Canada has emphasized that the legislative distinction need not be designed with reference to a specific ground in order for the distinction to be based on that ground. The critical issue is whether the impugned government action has a negative impact on the basis of a protected ground.

To this end, the Court has distinguished between direct and indirect, or “adverse effect”, discrimination. Direct discrimination involves a law, rule or practice which on its face discriminates on a prohibited ground. Adverse effect discrimination occurs when a facially neutral provision has an effect that disproportionately disadvantages a particular group. Both forms of discrimination are prohibited under the *Charter*.[39]

In identifying a differential impact based on a particular ground, it is not necessary that all persons sharing that characteristic be equally affected by the government action.[40]

Without doubt the appellants in *Ferrel* are entitled to the protection of the *Charter*. As women, disabled persons and racial minorities, they fall squarely within the groups enumerated in s. 15(1) against whom discrimination is prohibited. Accordingly, based on the evidence in the appeal record, it is necessary to determine what are the effects of the *Job Quotas Repeal Act* and of the government’s statements with respect to that *Act*'s purpose; what was the social, political and legal context experienced by members of the claimant groups prior to *Bill 8* and how did their experience of this context change when *Bill 8* was enacted.

What Substantive Effect Did Bill 8 Have?

Whether or not *Bill 8* has any “substantive” terms that will be reproduced in any future Revised Consolidation of Ontario Statutes is not determinative of whether the statute is constitutionally sound. *Bill 8* had its own particular purpose and the text of *Bill 8* had specific results and impacts. These purposes and effects must be measured against the *Charter*. [41]

The full title of the impugned statute - *An Act to repeal job quotas and to restore merit-based employment practices in Ontario* - on its face reinforces and perpetuates prejudicial attitudes towards minority groups and negative stereotypes about the employability of members of these groups. It further casts suspicion on the merits of members of minority groups who are employed in the province.

Evidence of such prejudicial effects were found in the appeal record.

Bill 8 had the following additional effects:

- It repealed the *Employment Equity Act*. As well as removing legislative entitlements, this repeal also dismantled the institutional infrastructure for conducting public education and research, monitoring the implementation of employment equity and adjudicating and enforcing employment equity rights. The Employment Equity Commission and the Employment Equity Tribunal were disbanded and their individual employees' positions were discontinued.

- *Bill 8* declared that all Commission and Tribunal orders and policy directives were "of no force or effect".

- Where the Employment Equity Commission and employers had entered settlement agreements to secure compliance with employment equity, *Bill 8* declared that all such agreements "cease to be binding on the parties and are of no force or effect".

- *Bill 8* declared that all Employment Equity Tribunal proceedings and all prosecutions instituted with the Tribunal's consent which were not concluded by 14 December 1995 were immediately discontinued without costs.

- To design and implement employment equity practices, employers had to conduct workplace surveys and collect information about the composition of their workforces. *Bill 8* positively requires every person in possession of such information to destroy it as soon as possible after the *Bill* came into force.

- *Bill 8* repealed provisions in the *Education Act*, R.S.O. 1990, c. E-2 which had required school boards to develop employment equity or affirmative action policies. These provisions of the *Education Act* had been enacted up to seven years prior to the introduction of the *Employment Equity Act,1993*.

- *Bill 8* repealed provisions in the *Human Rights Code* which related to the interpretation of the *Code* in the context of evaluating employment equity plans.

- *Bill 8* repealed extensive provisions in the *Police Services Act*, R.S.O. 1990, c. P-15 which had required every police force to prepare an employment equity plan and had created mechanisms for enforcing compliance with such plans. These employment equity provisions had all been enacted by the government in 1990, three years before the *Employment Equity Act,1993* was introduced.

- *Bill 8* declared that all hearings before the Ontario Civilian Commission on Police Services regarding a police board's or municipal police chief's failure to comply with the employment equity provisions of the *Police Services Act* and its regulations that were not completed by 14 December 1995 were immediately discontinued without costs.[42]

The Supreme Court of Canada has held that a significant benefit of legislation is state recognition of the legitimacy of the status of particular groups. Denying such recognition can have detrimental effects on disadvantaged groups. In this context, it is relevant that *Bill 8* repeals not only the *Employment Equity Act,1993* but <u>all</u> statutory provisions recognizing the need for employment equity initiatives. By so doing, *Bill 8* undermines and discredits the entire concept of employment equity rather than addressing any limitations of a particular method.[43]

Finally, the OFL argued that in the course of enacting *Bill 8* the government made disparaging and damaging statements which created a social, political and legal climate in which the principle of employment equity was discredited and in which the employability of members of the designated groups was rendered suspect. These statements should be analysed both with respect to assessing the extent to which they reflect on an improper government purpose and to the extent that their effect has shaped the post-*Bill 8* context experienced by minority groups.

Does *Bill 8* Prejudicially Affect Disadvantaged Groups?

This issue at this stage is whether the effect of *Bill 8* constitutes "discrimination" for the purposes of s. 15. Section 15(1) of the *Charter* was intended to ensure a measure of substantive equality rather than merely formal equality. To this end, the Supreme Court of Canada has consistently recognized that not every difference in treatment between individuals under the law will necessarily result in inequality. By the same token, identical treatment may frequently produce serious inequality. Accordingly, the Court has recognized that equality sometimes requires that different groups of people be treated differently.[44]

In order to establish discrimination, it is necessary to consider whether the effect of impugned government action reinforces or perpetuates prejudicial attitudes and negative stereotypes and whether it places or replaces additional burdens, limitations or disadvantages upon the affected groups which are not placed on others.[45]

Finally, both the purpose and the impact of legislation is reviewable under the *Charter*. Accordingly, in determining whether the impact of *Bill 8* is discriminatory it is necessary to assess both the substantive impacts of the legislation itself and the impacts of the statements made by the government about the purposes of the legislation.

There appears to be sufficient evidence in the *Ferrel* appeal record that the enactment of *Bill 8* was discriminatory in violation of section 15(1) of the *Charter.*

C. Section 1: Can the Government Justify the Infringement?

The Ontario Government conceded the section 1 issue at the Court of Appeal by stating that it was not seeking to justify *Bill 8* under section 1. Accordingly, if the Court finds a section 15 violation, then the case is won.

D. REMEDY

The remaining issue would be the remedy to be awarded.

The appellants are asking that the Court strike down *Bill 8* which would have the effect of restoring the *Employment Equity Act*, 1993. The Attorney General stated that if the Court found in favour of the appellants, it would want the Court to suspend the declaration of unconstitutionality for a period of time to allow the Government to decide how to proceed in a constitutionally permissible manner.

1. Court file No. Re 6078/95

2. *See* ***Job Quotas Repeal Act,1995*** s.3; ***Employment Equity Act***, Schedule B, Appendix 1

3. **Working Towards Equality: The Discussion Paper on Employment Equity Legislation**, 1991, Appeal Book, Vol.3, Tab 25 at 439-440,443-446, 452,465-468.

4. ***Employment Equity Act***, Schedule B, Appendix 1

5. ***Ibid***, Preamble, Schedule B, Appendix 1

6. ***Ibid***, Preamble, Schedule B, Appendix 1

7. **Working Towards Equality: The Discussion Paper on Employment Equity Legislation**, 1991, Appeal Book, Vol.3, Tab 25; **Opening Doors: A Report on the Employment Equity Consultations**, Office of the Employment Equity Commissioner, 1992 Appeal Book, Vol.3, Tab 27; **Equality In Employment, Abella Report**, 1984 Appeal Book Vol. 7, Tab 79, at 1755-1763, 1819-1857; **Achieving Equality**, Ontario Human Rights Code Review Task Force, Appeal Book, Vol.10, Tab 89 at 2516-2517 and 2526-2528

8. ***Working Towards Equality: The Discussion Paper on Employment Equity Legislation*** (1991), supra at 452; **Equality In Employment, Abella Report**, supra at 1758; **Achieving Equality**, Ontario Human Rights Code Review Task Force, supra at 2526-2528

9. ***Symes v. Canada*** (1993), 110 D.L.R. (4th) 470 (S.C.C.) at 550

10. ***Job Quotas Repeal Act, 1995***

11. ***Decision of Ontario Court General Division*** (9 July 1997), Appeal Book, Vol. 1, Tab 3 at pp. 21, 22, 23-24, 25-26, and 28

12. ***Lavigne v. OPSEU*** (1991), 81 D.L.R. (4th) 545 (S.C.C.) at 562, per Wilson J. and at 621, per LaForest J.; ***RWDSU Local 580 v. Dolphin Delivery Ltd.*** (1986), 33 D.L.R. (4th) 174 (S.C.C.) at 195

13. ***Hunter v. Southam Inc.*** (1984), 11 D.L.R. (4th) 641 (S.C.C.) at 650

14. ***R. v. Oakes*** (1986), 26 D.L.R. (4th) 200 (S.C.C.) at 225; ***Dolphin Delivery****, supra* at 191-194;***Hunter v.***

15. Federal-Provincial First Ministers' Conference, *The Canadian Charter of Rights and Freedoms: Division III of the Constitutional Amendment Bill*, Document No. 800-8/069 (30 October -1 November 1978) at pp. 499-500 (The Hon. Otto E. Lang, Minister of Justice); Canada, House of Commons, *Debates* (6 October 1980) at 3285 (The Hon. Jean Chrétien, Minister of Justice)

16. ***R. v. Big M Drug Mart Ltd.*** (1985), 18 D.L.R. (4th) 321 (S.C.C.) at 350-352; ***Dolphin Delivery****, supra* at 195; ***McKinney v. University of Guelph****, supra* at 635, per LaForest J.

17. ***Symes v. Canada***, *supra* at 550

18. P. Hogg, ***Constitutional Law of Canada,*** 3d ed (updated to 1997) at 34-7 to 34-10

19. ***Charter of Rights and Freedoms***, s. 52(1); P. Hogg, ***Canada Act 1982 Annotated*** (1982), *supra* at 104-105

20. ***Charter of Rights and Freedoms***, *supra*, s. 33(1)

21. ***Stoney Creek (City) v. Ad Vantage Signs Ltd.*** (1997), 34 O.R. (3d) 65 (C.A.) [re: by-law enacting restrictions on expression rights]; ***Reference re Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)*** (1991), 81 D.L.R. (4th) 16 (S.C.C.) [re: legislation amending provincial constitution]; ***A & L Investments Ltd. v. Ontario*** (1997), 36 O.R. (3d) 127 (C.A.) [re: legislation amending *Residential Rent Regulation Act*]; ***R. v. Bickford*** (1989), 34 O.A.C. 34 (C.A.) [re: legislation repealing parts of the *Canada Evidence Act* and the *Criminal Code*]; ***SEIU Local 204 v. Ontario (Attorney General)*** (1997), 35 O.R. (3d) 508 (Div. Ct.) [re: legislation repealing part of the *Pay Equity Act*]

22. ***Operation Dismantle***, *supra* at 442, 455, 463-464

23. ***Driedger on the Construction of Statutes***, 3d ed (1994) at 492-493

24. B. Strayer, ***The Canadian Constitution and the Courts***, 2d ed (1983) at 50-56; ***RJR-MacDonald Inc. v. Canada (Attorney-General)*** (1995), 127 D.L.R. (4th) 1 (S.C.C.) at 92, per McLachlin J.

25. ***Andrews v. Law Society of British Columbia*** (1989), 56 D.L.R. (4th) 1 (S.C.C.) at 20-21; ***Miron v. Trudel*** (1995), 124 D.L.R. (4th) 693 (S.C.C.) at 741-744, per McLachlin J.; ***Thibaudeau v. Canada*** (1995), 124 D.L.R. (4th) 449 (S.C.C.) at 500-501, per Cory and Iacobucci JJ.; ***Egan v. Canada*** (1995), 124 D.L.R. (4th) 609 (S.C.C.) at 633-4, per L'Heureux-Dubé J.

26. ***McKinney v. Guelph University***, *supra* at 676, per LaForest J.; ***Andrews v. Law Society of British Columbia***, *supra* at 20-21

27. ***Ref. re: Public Service Employee Relations Act (Alta.),*** [1987] 1 S.C.R. 313 at 348-350; ***Slaight Communications Inc. v. Davidson***, *supra* at 427, per Dickson C.J.C.

28.
   a. ***Universal Declaration of Human Rights*** (1948), Art. 2, 23(1)
   b. ILO, ***Convention Concerning Discrimination in Respect of Employment and Occupation (Convention 111)*** (1958), Art. 1(1), 2
   c. ***Convention on the Elimination of All Forms of Racial Discrimination*** (1970), Art. 1(1), 1(4), 2, 5(e)
   d. ***Declaration on the Rights of Disabled Persons*** (1976), Art. 7
   e. ***International Covenant on Economic, Social and Cultural Rights*** (1976), Art. 2,3, 7
   f. ***Convention on the Elimination of All Forms of Discrimination Against Women*** (1979), Art. 2(a)(b)(f), 3, 11(1)(b)(c)(d)

29. ***Rodriguez v. British Columbia (Attorney General)*** (1993), 107 D.L.R. (4th) 342 (S.C.C.) at 362-363, per Lamer C.J.C. (dissenting but not with respect to this comment)

30. ***Thibaudeau v. Canada***, *supra* at 466, per L'Heureux-Dubé J. (dissenting but not with respect to this comment)

31. ***Egan v. Canada***, *supra* at 661-662, per Cory J.; ***Miron v. Trudel***, *supra* at 739, per McLachlin J.; ***Thibaudeau v. Canada***, *supra* at 500 per Cory and Iacobucci JJ., 508 per McLachlin J.

32. ***Eaton v. Brant County Brd. of Education*** (1997), 142 D.L.R. (4th) 385 (S.C.C.) at 404; ***Benner v. Canada (Secty of State)*** (1997), 143 D.L.R. (4th) 577 (S.C.C.) at 598-601;
Eldridge v. British Columbia*, supra* at 614; ***M. v. H.*** (1996), 27 O.R. (3d) 593 (Gen. Div.) at 602-603; aff'd (1996), 31 O.R. (3d) 417 (C.A.) at 439; ***Schafer v. Canada (Attorney General)*** (1996), 29 O.R. (3d) 496 (Gen. Div.) at 525-531; rev'd (1997) 35 O.R. (3d) 1 (C.A.) at 16; ***R. v. LePage*** (1997), 36 O.R. (3d) 3 (C.A.) at 20-21, 32-33

33. ***Andrews v. Law Society of British Columbia****, supra* at 15; ***Egan v. Canada****, supra* at 661, 676-677; ***R. v. Turpin***, [1989] 1 S.C.R. 1296 at 1333

34. ***Miron v. Trudel****, supra* at 741

35. ***Andrews v. Law Society of British Columbia****, supra* at 18; ***Miron v. Trudel****, supra* at 740-74; ***Egan v. Canada****, supra* at 676-677

36. ***Miron v. Trudel****, supra* at 741, 745; ***Andrews v. Law Society of British Columbia****, supra* at 18-19;
M. v. H. (C.A.)*, supra* at 439, 443

37. **R. v. Turpin**, supra at 1331-1332; ***Egan v. Canada****, supra* at 663 per Cory J.; ***Eldridge v. British Columbia****, supra* at 613-614

38. ***Egan v. Canada****, supra* at 661; ***R. v. Turpin****, supra* at 1331

39. ***Egan v. Canada****, supra* at 671-672, per Cory J.; ***Eldridge v. British Columbia****, supra* at 615; ***Rodriguez v. British Columbia****, supra* at 367, per Lamer C.J.C. (dissenting but not on this issue)

40. ***Gibbs v. Battlefords and District Co-operative Ltd.*** (1996), 140 D.L.R. (4th) 1 (S.C.C.) at 12-14; ***Brooks v. Canada Safeway Ltd.*** (1989), 59 D.L.R. (4th) 321 (S.C.C.) at 339, 341; ***Symes v. Canada****, supra* at 562-563

41. ***R. v. Big M Drug Mart****, supra* at 350

42. ***Job Quotas Repeal Act, 1995*****,** s. 1 to 4

43. ***Egan v. Canada****, supra* at 669, per Cory J.; ***Job Quotas Repeal Act****,* s. 2, 4

44. ***Andrews v. Law Society of British Columbia****, supra* at 10-12; ***Eldridge v. British Columbia****, supra* at 615-618

45. ***Miron v. Trudel****, supra* at 470-471; ***Egan v. Canada****, supra* at 676-677