Human Rights Legislation and Redress for Past Wrongs

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ABSTRACT

This paper examines the utility of existing anti-discrimination legislation in redressing racially-motivated wrongs and explores whether concepts of accommodation can be applied to redress these historical disadvantages. The paper also reviews the history of voluntary redress on the part of government in attempting to remedy past discrimination based on race.

The resolution of discrimination complaints has always been the main focus of statutory human rights agencies throughout Canada. It is true that these agencies have an additional preventative mandate in relation to ongoing education promoting diversity and understanding, but the emphasis is essentially that of resolving complaints. Members of some minority groups, including racial minorities, have felt that this process is insufficient to redress egregious, historical wrongs suffered by members of those minorities. The central question here is whether existing human rights legislation (anti-discrimination and other quasi-constitutional instruments) are able to provide useful avenues to address these concerns and provide the redress and healing sought. The related issue is whether our courts are willing and/or able to utilize these various instruments to address these issues.

Can regular or quasi-constitutional anti-discrimination statutes address historical disadvantage?

Can regular or quasi-constitutional anti-discrimination statutes (with primacy over other laws) address historical disadvantage in response to particular contemporary complaints? The answer to this question has to be a qualified no. Anti-discrimination laws, federally and provincially, do not have a retrospective application. That is to say, like the Canadian Bill of Rights, they are frozen as to the day of their enactment. As a result, the Canadian Human Rights Act speaks from 1977 forward and provincial laws speak from their days of enactment forward. Even this conclusion is rigidly altered when one considers that most anti-discrimination laws have their own limitation periods. For example, under the Canadian Human Rights Act, the Canadian Human Rights Commission can only entertain a complaint where the cause of action giving rise to the complaint occurred within the previous year prior to the formal making of the complaint. Similarly, under section 34 (1)(d) of the Ontario Human Rights Code there is a six-month limitation period. But not all such acts have limitation periods, and even when they do, there is the difficult issue as to when a limitation period begins where the practice complained of is in the nature of a continuing breach. As indicated above, limitation periods notwithstanding, these acts are still restricted to complaints in relation to matters that have occurred since their enactments.

There is, however, a possibility that a board or tribunal might fashion a remedy that goes beyond a particular complaint and addresses historical disadvantage. That is why the answer to the earlier question as to whether human rights law can address historical disadvantage is a qualified no. The qualification relates to the possibility of a remedy that goes beyond the contemporary complaint and addresses past disadvantage. For example, one can refer to the 1987 case under the Canadian Human Rights Act, *Canadian National Railway Company v. Action Travail des femmes* 8 C.H.R.R. D/4210 (S.C.C.), where the Supreme Court of Canada upheld an order of a Tribunal to hire one woman for every four new hires into unskilled and blue-collar jobs. In effect, the Supreme Court of Canada was addressing here a past disadvantage based on gender in resolving a particular complaint. A note of caution, however, should be made with respect to this discussion since the case does not involve issues of racial discrimination and therefore might be limited in its application.

If, therefore, human rights legislation cannot generally address historical disadvantage with respect to 'old' complaints, or to use the popular jargon, in respect of 'cold case files', can these laws address disadvantage in other ways? With respect to the possibility of remedial creativity to redress past wrongs, can this so-called creativity provide the courts an opportunity to address disadvantage through the remedial institution of essentially mini-affirmative action programs?

In response, it should be noted that in some rare instances the courts and/or tribunals have recognized historical disadvantage in dealing with current complaints and have resolved those matters through the courts'/tribunals' remedial authority. This remedial possibility has taken the form of imposing a limited or mini-affirmative action program as a means of resolving the current complaint. This possibility is illustrated in the important 1997 decision of a federal Tribunal under

the Canadian Human Rights Act in *National Capital Alliance on Race Relations v. Health Canada*. In this case, the Tribunal imposed a remedy in the nature of an employment equity remedy (or, if you will, an affirmative action remedy) in order to prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices identified. In effect, it issued a "special corrective measures program."

The objectives of the special corrective program are to:

(i) Eliminate discriminatory employment barriers for visible minorities…
(ii) Remove discriminatory barriers to the full participation of visible minorities…
(iii) Ensure the maximum utilization of the knowledge, skills, and expertise of visible minorities;
(iv) Redress the effects of past discrimination…[1]

Can concepts of accommodation be applied to redress race-based historical disadvantage?

In addition to the foregoing, one should consider the notion of accommodation as a remedial possibility in dealing with race-based complaints. It is, at the outset, difficult to imagine many instances where accommodation would be an appropriate remedy to resolve a race-based complaint.[2]

The application of the notion of accommodation to racial discrimination has, however, been addressed specifically in a number of cases. In *Naraine v. Ford Motor Co.* [1996] O.H.B.I.D. No. 23, Ford was found to have discriminated against Naraine. It had neither acknowledged nor remedied an atmosphere of racial harassment/derogation and, when dismissing Naraine because of temper/outbursts, it did not take into account that these outbursts were the result of the adverse effect of a poisoned workplace atmosphere. This harassment took the form of graffiti, racial slurs and other incidents that constituted conditions of employment and were thus a violation of s. 4(1) of the Ontario Human Rights Code.[3]

The duty to accommodate arises most frequently with respect to employment and in respect of employees with disabilities, particular religious needs, pregnant women, employees with family responsibilities and employees with drug and alcohol dependencies.[4] However, the duty to accommodate stops short of requiring undue hardship be placed upon an employer. The issue of undue hardship raises such issues as the cost of providing accommodation, the risk of accommodation to an employee's own health and safety and the risk to the health and safety of others.

It is difficult to foresee a complaint that is race-based that would be amenable to a resolution in the nature of reasonable accommodation. Accommodation, theoretically, applies to all grounds enumerated in the various statutes. In fact, in addition to the 'common law' or unwritten possibility of accommodation as a remedy, the Ontario Human Rights Code specifically provides for accommodation in section 17(2) in relation to disability and in section 24(2) in respect of employment. Under most anti-discrimination statutes, accommodation has been used in respect of employment and the provision of services but, theoretically, it is available in respect of any other area of activity covered by the acts.

The Supreme Court of Canada has held that in those cases involving indirect discrimination, the employer has a reasonable duty to accommodate. As indicated in the *Meiorin* case[5], the Supreme Court of Canada has now developed a unified approach to discrimination. As a result of the *Meiorin* case, once a complainant has established a prima facie case of discrimination, the employer must accommodate its employees in respect of a wide range of differences among its employees and cannot justify direct discrimination on the basis of a bona fide occupational requirement unless it satisfies other standards set out in this case. The notion of a bona fide occupational requirement is strictly defined in the case. Moreover, the case requires that accommodation must take place even if the employer suffers some hardship, as long as it does not constitute an 'undue' hardship' as defined in the case.

The history of Charter jurisprudence under section 15 somewhat mirrors this same approach. In *Eldridge v. British Columbe (Attorney General)* [1997] 3 S.C.R. 624, Justice LaForest said:

> This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefits scheme…
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> If we accept the concept of adverse affects discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. … [I]f there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the Charter.

Although the courts do not directly impose a duty to accommodate, Justice LaForest does employ the phrases "special measures" and "positive action" which are tantamount to the imposition of a duty to accommodate. As Chief Justice McLachlan stated in *Meiorin*, the approach taken in discrimination cases should essentially be the same as the approach taken under s. 15 of the Charter. The language of s.15 is broad and, taken together with the courts' mandate under s.24(1), permits the court to impose remedies that incorporate the notion of accommodation.[6]

Returning now to the central question; namely, whether human rights legislation allows for redress of past discrimination – the answer was a qualified no based upon individual complaints. But through remedial measures that incorporate a notion of systemic accommodation, through court-mandated programs of affirmative action and/or through an application of s. 15(1) of the Charter, the answer looks more positive than appears at first glance. Legislated measures in the nature of employment equity, provide a fourth avenue of redress for past wrongs, although this avenue is, in contrast to the others, non-complaint based.

Voluntary Redress of Instances of Past Discrimination based on Race

What then of the final issue, namely, the seeking of voluntary redress for major egregious instances of past discrimination based on race? The major redress claims that have been advanced to date, relating to racial discrimination by past Canadian governments include the following.[7]

a) 1847-1985: Forced Assimilation and Abuse of Aboriginal children in Residential Schools
b) 1885-1946: Chinese Head Tax and Exclusion Acts[8];
c) 1891-1956: Imprisonment of Lepers, mostly Chinese, on two Victoria Area Islands;
d) 1900-1932: Unjust Treatment of Blacks from the Caribbean;
e) 1914-1920: Internment of Ukrainian Canadians during WWI;
f) 1938-1948: Denial of Entry to persons of Jewish descent in Canada;
g) 1940-1943: Internment of Italian Canadians during WWII;
h) 1940-1943: Internment of German Canadians during WWII;
i) 1942-1949: Internment of Japanese Canadians during and after WWII; and
j) Post 1949: Denial of benefits to Aboriginal War Veterans.

Only two claims have actually led to compensation. One is a result of a comprehensive compensation and redress package for Japanese Canadians interned and stripped of their assets during and after the Second World War. The second involves litigation of individual cases arising from the Aboriginal Residential Schools, which are presently ongoing in the courts.

With respect to the Japanese Canadian internment, the 1988 landmark settlement was negotiated by the federal government with the National Association of Japanese Canadians.[9] With respect to Aboriginal residential schools, an amendment to the Indian Act in 1920 made it mandatory for native children to attend these schools. Further, these children were subjected to cultural, physical, psychological and sexual abuse and indoctrinated into foreign religions.[10] As a result of claims by Ukrainian, Italian and Chinese Canadians, an announcement was made in the House of Commons in September of 1994 that no redress of any kind would be offered to these groups.

It is also instructive to examine the last official statement of federal government policy of March 6-9, 2001 in this regard, effectively denying future compensation for past racial wrongs. This policy provides an acknowledgment that "human history has not been one of inclusion and respect, but rather has been and somewhat remains one often characterized by racism, racial discrimination, xenophobia and related intolerance" and that "Canada believes that acknowledging injustices in history … essential to reconciliation". As well, it addresses redress and remedies and states that although work is needed to build a future free from racial (and other) discrimination, the government of Canada does "not believe that granting financial compensation for historical action is appropriate".

It should be noted that there have been redress claims at both the federal and provincial levels, for wrongs unrelated to race. Unlike race, however, these other claims have largely been successful. They include health related claims in relation to the drug Thalidomide, government misfeasance in the use of tainted blood when testing was available to detect with HIV/AIDS and hepatitis C and compulsory sterilization of designated 'mentally retarded' persons in Alberta. Other redress claims relate to Canadian prisoners of war held in Hong Kong, compensation for wartime victims in Canada's merchant marine and persons wrongfully convicted of murder.

Clearly, the success story in respect of redress for past racial wrongs is somewhat limited. The redress movement, it appears, has made little gain in the courts. The essential element is that government policy is key to successful redress and it is doubtful that government has any great enthusiasm to re-visit the sins of the past. Perhaps, the best answer does lie in remedial creativity by tribunals and the courts in respect of existing human rights legislation together with legislative policy that continues to support notions of affirmative action and other programs akin to that of employment equity.

Endnotes

1 The notion of affirmative action is codified in several pieces of Canadian legislation. Section 16 of the Canadian Human Rights Act (Cases under the Canadian Human Rights Act include *Roberts v. Ontario* (1994) 117 D.L.R. (4th) 297 (Ont CA), *Macnutt v. Shubenacadie Indian Band* (1997) 154 D.L.R. (4th) 344 (Fed T.D.), *Vermette v. CBC* (1994) 94 C.L.L.C. 17 (CHR Commission) and *Macnutt v. Shubenacadie Indian Band* (2000) 187 D.L.R. (4th) 741); The Ontario *Human Rights Code*, s. 14; *Manitoba Human Rights Code*, C.C.S.M. c. H175 s. 11; B.C. *Human Rights Code* RSBC 1996 Chapter 210 s.42; Nova Scotia's *Human Rights Act*, RS 1989 c. 214 s. 6(i); Newfoundland Human Rights Code s. 19; PEI Human Rights Code s. 20; New Brunswick Human Rights Act s. 13; Quebec Charter of Rights and Freedoms s.86 and Saskatchewan Human Rights Code s. 47.

2 In the United States, one major case concerning the duty to accommodate and racial discrimination is *Bradley v. Pizzaco of Nebraska*, 939 F. 2d 610.

3 Similar results occurred in the following cases: *Hinds v. Canada Employment and Immigration Commission* (19989) 10 C.H.R.R. D/5683 at D/5693; *Mohammad v. Mariposa Store Ltd. Partnership* (1991) 14 C.H.R.R. D/215 at D/218; and *Aluwalia v. Metropolitan Toronto Board of Commissions of Police* (1983), 4 C.H.R.R. D/1757 (Ont. Bd. Of Inq.) at D/1772. These cases are concerned with the workplace atmosphere. Although the relevant statutes do not specifically oblige an employer to maintain a "pristine working environment", they do nonetheless require the employer to maintain a healthy work environment and to take prompt and effective action to remedy racial harassment in that environment when the employer knows or should have known of the poisoned environment. The underlying notion is that the employer's passive inaction in such a racially poisoned environment is in effect a violation of the relevant statute. The employer has the obligation to take adequate measures to remedy the racially tainted atmosphere.

4 See Audrey Dean and Janice Ashcroft, "Duty to Accommodate", Alberta Human Rights and Citizenship Commission, 2002.

5 *B.C. v. BCGEU* [1999] 3 S.C.R. 3.

6 See the paper by Zinn and Brethour from the work *The Law of Human. Rights in Canada* in which the "Duty to Accommodate" is discussed in Chapter 14. In addition, in August 2004, the Alberta Human Rights and Citizenship Commission published an Interpretive Bulletin entitled the "Duty to Accommodate Students with Disabilities in Post-Secondary Institutions".

7 For a fuller account of the redress movement, see Gall, Cheng & Miki, "Redress for Past Government Wrongs", a working paper prepared for the Government of Canada in preparation for the 2001 World Conference Against Racism.

8 See *Mack v. Canada* [2001] O.J. No. 2794; *Mack v. Canada* [2002] 217 D.L.R. (44th) 583; *Mack v. Canada* [2002] S.C.C.A. No. 476. These lawsuits were not successful. See also Beverley Baines, "When is Past Discrimination Un/Constitutional? The Chinese Canadian redress Case", (2002), 65 Sask. L. Rev. 573-585.

9 The settlement included a formal apology and acknowledgment of unjust treatment and violation of human rights, symbolic individual redress of $21,000 for each Japanese Canadian eligible and a $12 million payment to the Japanese Canadian community to undertake educational, social and cultural activities or programs that contribute to the well-being of the community or that promote human rights.

10 See *M.C. v Canada* (Attorney General) [2002] C.C.S. No. 2998; *Lafrance Estate v. Canada* [2002] C.C.S. No. 4990; and *W.R.B. v. Plint* [2001] B.C.J. No. 1446. See also *Re Indian Residential Schools* [2000] A.J. No. 638; *Re Indian Residential Schools* [2002] A.J. No. 482, and *Re Residential Indian Schools* [2002] A.J. No. 1265.