Court File No.: 223/21

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

DAVID DANESHVAR

Applicant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF HEALTH, and the HONOURABLE CHRISTINE ELLIOTT, MINISTER OF HEALTH for the PROVINCE OF ONTARIO

Respondents

BRIEF OF AUTHORITIES OF THE RESPONDENTS

April 13, 2021

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Stay at home except for essential travel and follow the restrictions and public health measures.

Ontario

Ontario

Order in Council 1551/2020

On the recommendation of the undersigned, the Lieutenant Governor of Ontario, by and with the advice and concurrence of the Executive Council of Ontario, orders that:

Whereas the Government of Ontario is committed to an efficient and effective vaccine distribution plan in response to the covid-19 pandemic;

And whereas the Government of Ontario has established a special advisor position in order to provide advice and recommendations in support of its vaccine distribution plan and related initiatives;

Therefore, pursuant to the prerogative of Her Majesty The Queen in Right of Ontario to appoint special advisors to serve Her Majesty's Government of Ontario in the discharge of its executive obligations and responsibilities,

General Rick Hillier

be appointed Special Advisor, covid-19 Vaccine Distribution Plan, to serve at pleasure, effective the date of this order, for a period ending March 31, 2021.

Premier and President of the Council

Approved and Ordered: November 23, 2020

Published: November 24, 2020

DATE: 19981207
DOCKET: C27917

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COURT OF APPEAL FOR ONTARIO

MORDEN A.C.J.O., WEILER and MOLDAVER JJ.A.

B E T W E E N :	**Chile Eboe-Osuji, Mark Hart and Barbara Bedont for the appellants**
MARILYN FERREL, SANDRA WHITING, GRACE EDWARD GALABUZI, and KIRSTEN LANGE	**Janet Minor and Richard Stewart for the respondent**
Appellants	**Mary Cornish and Faye Faraday for the intervener, Ontario Federation of Labour**
and	
ATTORNEY GENERAL OF ONTARIO	
Respondent	**Caroline Engmann for the intervener, African Canadian Legal Clinic in coalition with The Toronto Chapter, Congress of Black Women of Canada**
and	
ONTARIO FEDERATION OF LABOUR	
Intervener	**Jennifer Scott and Carissima Mathen for the intervener, Women's Legal Education and Action Fund and the DisAbled Women's Network Canada**
and	
AFRICAN CANADIAN LEGAL CLINIC in coalition with TORONTO CHAPTER, CONGRESS OF BLACK WOMEN OF CANADA	
Intervener	**Heard: April 6 and 7, 1998**
and	
WOMEN'S LEGAL EDUCATION AND ACTION FUND and DISABLED WOMEN'S NETWORK CANADA	
Interveners	

MORDEN A.C.J.O.:

[1] The appellants commenced an application for a declaration that the *Job Quotas Repeal Act, 1995*, S.O. 1995 c. 4 is unconstitutional as being in violation of s. 15 of the *Canadian Charter of Rights and Freedoms* and for an order requiring the Government of Ontario to implement employment equity as prescribed in the *Employment Equity Act, 1993*, S.O. 1993, c. 35. The *Job Quotas Repeal Act, 1995* had repealed the *Employment Equity Act, 1993* and, also, repealed what may be called the employment equity provisions in the *Education Act,* R.S.O. 1990, c. E.2, the *Human Rights Code*, R.S.O. 1990, c. H.19, and the *Police Services Act*, R.S.O. 1990, c. P.15. Dilks J., whose reasons are reported at (1997), 149 D.L.R. (4th) 335 and 45 C.R.R. (2d) 177, dismissed the application and the appellants appeal from his decision.

[2] As the foregoing indicates, the appellants' claim is based on s. 15 of the *Charter,* the equality rights provision. Specifically, they claim that their rights "to the equal protection and equal benefit of the law" were infringed when the *Job Quotas Repeal Act, 1995* repealed the *Employment Equity Act, 1993.*

THE EMPLOYMENT EQUITY ACT, 1993 AND ITS REPEAL

[3] A statement of the facts should begin with a brief description of the *Employment Equity Act, 1993*. This statute, which comprised 59 sections, provided that "[a]boriginal people, people with disabilities, people of racial minorities and women constitute the designated groups for the purposes of this Act" (s. 4). Each of the four appellants represents one of the four designated groups. The Act reflected the choice of the previous government, which was replaced by the current government in June of 1995, on how best to accomplish equity and equal opportunity in the workplace. The term "employment equity", a term coined in the *Report of the Commission on Equality in Employment, 1984* (R.S. Abella, Commissioner) (the "Abella Report") at p. 7, was adopted by the previous government to describe the mandatory scheme enacted to carry out this purpose.

[4] The motivation for the 1993 Act was, appropriately, set forth in its preamble which reads:

> The people of Ontario recognize that Aboriginal people, people with disabilities, members of racial minorities and women experience higher rates of unemployment than other people in Ontario. The people of Ontario also recognize that people in these groups experience more discrimination than other people in finding employment, in retaining employment and in being promoted. As a result, they are underrepresented in most areas

of employment, especially in senior and management positions, and they are overrepresented in those areas of employment that provide low pay and little chance for advancement. The burden imposed on the people in these groups and on the communities in which they live is unacceptable.

The people of Ontario recognize that this lack of employment equity exists in both the public and private sectors of Ontario. It is caused in part by systemic and intentional discrimination in employment. People of merit are too often overlooked or denied opportunities because of this discrimination. The people of Ontario recognize that when objective standards govern employment opportunities, Ontario will have a workforce that is truly representative of its society.

The people of Ontario have recognized in the *Human Rights Code* the inherent dignity and equal and inalienable rights of all members of the human family and have recognized those rights in respect of employment in such statutes as the *Employment Standards Act* and the *Pay Equity Act*. This Act extends the principles of those Acts and has as its object the amelioration of conditions in employment for Aboriginal people, people with disabilities, members of racial minorities and women in all workplaces in Ontario and the provision of the opportunity for people in these groups to fulfil their potential in employment.

The people of Ontario recognize that eliminating discrimination in employment and increasing the opportunity of individuals to contribute in the workplace will benefit all people in Ontario.

[5] Although the preamble refers to both systemic and intentional discrimination in employment it is clear that the chief target of the statute was systemic discrimination. This form of discrimination has been described as follows in the Abella Report at p. 2 as follows:

> Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.
>
> . . . .
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> . . . .
>
> This is why it is important to look at the results of a system.

This description was accepted by Dickson C.J.C. for the court in *Action Travail des Femmes v. Canadian National Railway Co.*, [1987] 1 S.C.R. 1114 at 1138-39. He went on to say at p. 1139:

> In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.

[6] The existence of systemic discrimination is not in issue in this proceeding, nor is it in issue that it is a serious problem that requires government response.

[7] Generally, the 1993 Act imposed an obligation on employers to work toward the goal of a workplace that reflected the various groups that make up Ontario society. The Act was based on the key principles outlined below, which were set forth at greater length in section 2:

> (1) The members of the designated groups were entitled to be considered for employment, hired, retained, treated, and promoted free of discriminatory barriers.

(2) Every employer's workforce should reflect designated group representation in the community.

(3) Every employer was to ensure that its employment policies and practices were free from barriers and was obliged to implement positive and supportive measures with respect to the recruitment, hiring, retention, treatment and promotion of members of the designated groups.

[8] The Act required employers to implement four steps to employment equity:

(a) conduct a workforce survey to determine the extent to which members of the designated groups were present in the workforce (s. 10);

(b) conduct a review of all employment policies and practices to identify barriers to the recruitment, hiring, retention, treatment and promotion of the

designated groups (s. 11);

(c) prepare a plan to provide for specific goals and timetables for:

(i) the elimination of barriers (s. 12(1)(a));

(ii) the implementation of positive measures designed to assist in recruitment, hiring, retention, treatment and promotion of the designated groups (s. 12(1)(b)), and supportive measures for the workforce as a whole (s. 12(1)(c));

(iii) the implementation of measures designed to accommodate members of the designated groups (s. 12(1)(d));

(iv) specific goals and timetables for the matters referred to above (s. 12(1)(e)); and

(v) specific goals and timetables with respect the composition of the employer's workforce (s. 12(1)(f).

(d) review the plan and prepare reports on progress (ss. 13 and 15).

[9] The Act allowed the Lieutenant Governor in Council to make a regulation governing the content of employment equity plans which required plans to contain "numerical goals determined ... with reference to percentages approved by the [Employment Equity] Commission, that in the opinion of the Commission, fairly reflected the representation of the designated groups in the population of a geographical area or in any other group of people" (s. 55(2)).

[10] The *Job Quotas Repeal Act, 1995* has provisions that are consequential to the repeal of the *Employment Equity Act, 1993*. Section 1(5) is relevant to the issues raised in this proceeding. It reads:

> (5) Every person in possession of information collected and compiled exclusively for the purpose of complying with section 10 of the *Employment Equity Act, 1993* shall destroy the information as soon as reasonably possible after this Act comes into force.

[11] The current government is of the view that the *Employment Equity Act, 1993* was numbers-driven, undermined the merit principle in hiring, and did not adequately address

the attitudes at the root of discrimination. In addition to repealing the *Employment Equity Act, 1993* and the related employment equity provisions in the *Police Services Act*, the *Education Act* and the *Human Rights Code*, the government introduced a voluntary equal opportunity plan mandating:

> (a) The Ministry of Citizenship, Culture and Recreation to develop the equal opportunity itself to support the efforts of employers and employees to remove barriers and share equal opportunity experience and expertise;
>
> (b) The Ministry of the Solicitor General was to prepare guidelines for police services and work with the police community towards a new equal opportunity police recruiting process;
>
> (c) The Management Board Secretariat was to design equal opportunity initiatives emphasizing the merit principle, removal of barriers, and zero tolerance of workplace harassment and discrimination; and
>
> (d) The Ministry of Education and Training was to create a plan for the educational sector, including a policy statement for school boards, colleges and universities.

[12] The Equal Opportunity Plan is directed at supporting equal opportunity in the workplace for all people in Ontario based on the following principles:

i. individual merit should be the basis for fair employment practices;

ii employment practices must be in compliance with the *Human Rights Code*;

iii. it is important to provide and maintain a work environment free of discrimination and harassment;

iv. eliminating barriers in the workplace, particularly for persons with disabilities, and creating a climate that values diversity, enables all employees to maximize their potential and contributes to organizational success.

The Equal Opportunity framework includes seven components:

i. services to support the equal opportunity efforts of employers and employees in the private and broader public sectors, including a one-window information and referral service, a resource clearinghouse via the "Gateway to Diversity", a website designed to provide integrated information, demonstration projects and best practices, and training and education;

ii. a fund to support access and accommodation for persons with disabilities to participate in both the paid workforce and the volunteer sector;

iii. a review of how existing employment-related programs within government can better support accommodation for persons with disabilities;

iv. a self-financing credential assessment service to evaluate academic credentials, improving access to opportunity for those trained and educated outside Canada;

v. measures to promote equal opportunity in the Ontario Public Service;

vi. specific measures for police services and the education sector;

vii. improvements in the efficiency and effectiveness of the Ontario Human Rights Commission.

THE CONCLUSIONS OF DILKS J.

[13] According to the reasons of Dilks J., the appellants before him advanced four basic submissions. I shall set them forth and then state, very briefly, Dilks J.'s responses to these submissions.

1. *The Ontario Government has a positive duty under s. 15 of the Charter to enact employment equity legislation and, having done so, has a corresponding duty to leave the same in place.*

[14] Dilks J. concluded on this issue that "the overwhelming weight of authority negates the existence of any duty under the *Charter* to legislate".

2. *Alternatively, even if there was no duty to enact legislation, having done so, the government was bound to leave the legislation in place.*

[15] Dilks J. held that, in these circumstances, there was no constitutional requirement obliging the government to leave the *Employment Equity Act, 1993* in place.

3. *The very manner and form in which the Job Quotas Repeal Act, 1993 was enacted has resulted in a poisoned atmosphere, which itself is a violation of the s. 15 rights of the applicants.*

[16] Dilks J. held that "[t]he difficulty with this argument is that it presupposes a "legislative distinction" from the effect of Bill 8 (the *Job Quotas Repeal Act, 1995*) whereas any distinction that may be said to have arisen following the repeal of the *Employment Equity Act, 1993* is indistinguishable from that which existed prior to the enactment of that Act." He observed further that while the applicants and perhaps others "may well deplore the government's actions ... the action had no substantive component; it merely restored the *status quo* as it existed prior to the enactment of the *Employment Equity Act, 1993*."

4. *The Job Quotas Repeal Act, 1995 is not saved or justified by s. 1 of the Charter.*

[17] Because Dilks J. had concluded that there was no *Charter* violation it was unnecessary for him to consider this issue.

THE APPELLANTS' SUBMISSIONS

[18] Before this court the appellants' submissions, which were elaborated upon by the interveners, were framed in the form of issues, as follows:

1. Did Dilks J. err in holding that the *Job Quotas Repeal Act, 1995* is not subject to review under the Canadian Charter of Rights and Freedoms?

2. Did Dilks J. err in failing to find that the *Job Quotas Repeal Act* violated s. 15 of the *Charter*?

3. In the alternative, did Dilks J. err in failing to find that s. 15 of the *Charter* creates a positive duty on the government to enact employment equity legislation?

4. Did Dilks J. err in failing to find that the Government of Ontario misrepresented the *Employment Equity Act, 1993* as entailing job quotas, creating reverse discrimination, and being contrary to merit, and that these misrepresentations resulted in the violation of s. 15 of the *Charter*?

5. In the event that a violation of s. 15 of the *Charter* is found, is it saved by s. 1 of the *Charter*?

6. If the answer to question 5 is no, what is the appropriate remedy in the circumstances?

[19] I shall deal with these issues in the order presented.

1. *Did Dilks J. err in holding that the Job Quotas Repeal Act, 1995 was not subject to review under the Charter?*

[20] Section 32(1)(b) of the *Charter* provides:

> 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.

[21] It is not clear to me that Dilks J. held that the *Job Quotas Repeal Act, 1995* was not subject to review under the Charter. If he had, it would not have been necessary for him to engage in the s. 15 analysis that forms an important part of his reasons. In any event, I think that this issue can be dealt with briefly. The *Job Quotas Repeal Act, 1995* is an enactment of the legislature of Ontario. As such, regardless of what may be argued to be its effect (changing the law, returning to the *status quo* before the *Employment Equity Act,*

1993, etc.) it is clearly a form of government action which requires scrutiny under the *Charter* - in this case, under s. 15.

2. *Does the Job Quotas Repeal Act, 1995 violate s. 15 of the Charter?*

[22] Section 15 reads:

> (1) Every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental of physical disability.

[23] By reason of the manner in which the appellants have stated and ordered their submissions it can be seen that their submission on this issue is not dependent on there being any constitutional obligation on Ontario to have enacted the *Employment Equity Act, 1993* in the first place. In proceeding this way, the appellants have reversed the order of the presentation which they made before Dilks J., at least in so far as this is indicated in his

reasons. Before Dilks J. the first argument was that because the province had a duty to enact employment equity legislation it was constitutionally enjoined from repealing it.

[24] For reasons which I shall give, I do not think that in arriving at an ultimate conclusion on the validity of the repeal of the *Employment Equity Act, 1993* one can properly ignore the question of whether there was a constitutional obligation to enact this Act in the first place. I turn now to the s. 15 analysis.

[25] In *Vriend v. Alberta*, [1988] 1 S.C.R. 493, Cory J., for the majority, set forth several judicial statements of the proper approach to analyzing claims under s. 15 and then said at paragraphs 73 and 74:

> [para 73] These approaches to the analysis of s. 15(1) have been summarized and adopted in subsequent cases, e.g. Eaton [*Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241] (at para. 62), Benner [*Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 241] (at para. 69) and, most recently, Eldridge [*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624]. In Eldridge, La Forest J., writing for the unanimous Court, stated (at para. 58):
>
> > While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework; see Eaton v. Brant County Board of Education, [1997] 1

> S.C.R. 241, at para. 62, Miron, supra, and Egan, supra. A person claiming a violation of s. 15(1) must first establish that, because of a distinction between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto.

> [para 74] In this case, as in Eaton, Benner and Eldridge, any difference that may exist in the approach to s. 15(1) would not affect the result, and it is therefore not necessary to address those differences. The essential requirements of all these cases will be satisfied by enquiring first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground.

[26] In the case of a law that is challenged, as opposed to governmental action taken under law (e.g., as in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624), the first part of the analysis would be directed specifically to "a distinction created by the questioned law", see, e.g., *Egan v. Canada*, [1995] 2 S.C.R. 513 at 584.

[27] The "questioned law" in this case is submitted to be the *Job Quotas Repeal Act, 1995*. The appellants submit that women, persons with disabilities, aboriginal persons, and members of racial minorities (the designated groups) experience systemic employment

discrimination which is significant and intractable. The repealed *Employment Equity Act, 1993* and employment equity provisions in the *Police Services Act* and the *Education Act*, provided a remedy for this systemic employment discrimination. The *Job Quotas Repeal Act, 1995*, by removing this statutory remedy for systemic employment discrimination has an adverse and disproportionate impact on, and thereby denies, substantive equality to members of the designated groups because of the social reality that it is designated group members who experience this systemic discrimination and not white able-bodied males.

[28] The *Job Quotas Repeal Act, 1995* is discriminatory, the appellants submit, because the distinction between the impact on designated group members and on white able-bodied males is on the basis of the enumerated grounds of race, sex and disability. The Act is also discriminatory since it has the effect of:

(a) Denying designated group members effective legal recourse for systemic employment discrimination;

(b) Reinforcing negative stereotypes and prejudicial attitudes that members of these groups are unqualified or lack merit; and

(c) Making it more difficult for willing employers to proceed with equity programs.

[29] Finally, the appellants submit that s. 1(5) of the *Job Quotas Repeal Act, 1995*, which requires the destruction of workforce survey data, provides an independent basis for finding a violation of s. 15.

[30] In considering the appellants' submission, certain important factors, in my view, must be considered. One is that systemic discrimination relating to employment was, before the enactment of the 1993 Act, and still is, prohibited by the *Human Rights Code*, R.S.O. 1990, c. H.19, ss. 5, 9, 11 and 14 (which authorizes special programs designed to assist disadvantaged persons). The Code provides for more prohibited grounds of discrimination than does the 1993 Act. Every individual has the right not to be systematically discriminated against in relation to employment and any person who experiences discrimination has recourse to the Human Rights Commission. The contribution of the 1993 Act is the creation of machinery designed to promote this right. The *Human Rights Code*, in the main, provides for a complaints-driven process.

[31] Accepting that the *Human Rights Code* confers a substantive right not to be discriminated against in relation to employment, either directly or systemically, the question is whether the differences between the enforcement approaches of the 1993 Act and the *Code* are a matter of constitutional dimension. The appellants strongly submit that they are.

They submit that the intractable nature of systemic discrimination requires pro-active measures like those found in the 1993 Act. The *Human Rights Code*, which is reactive in its scheme, depending as it does on individual complaints of discrimination in employment, is inadequate to the task. (See Lepofsky, "Understanding the Concept of Employment Equity: Myths and Misconceptions" (1994), 2 Canadian Labour Law Journal 1 at 3-4.)

[32] The respondent has advanced voluminous materials to the effect that the appellants' assertions are, at least, debateable. As I have indicated, the respondent accepts that systemic discrimination in employment is a significant problem, but submits that the choice as to which social policy response is most appropriate and effective is inevitably informed by the policy maker's views or assumptions about the nature and causes of the problem, the costs and effects of both the problem and the policy response, as well as potential public acceptance of a given policy response. The respondent submits that many of these issues are the subject of controversy and debate. Further, the extent to which a proposed policy response will be accepted as legitimate will depend on the balance struck between the benefits of the remedy and its costs and consequences. The "harder" the policy response, the greater the likelihood that negative consequences will be assumed to occur. Negative consequences would include concerns that the merit principle is being subverted, that program beneficiaries are stigmatized by others, and that the recruitment of persons to

satisfy goals is unfair to those with merit and is occurring at the expense of safety and competency considerations, to name only a few.

[33] While I may be inclined to agree with the Abella Report that "[s]ystemic discrimination requires systemic remedies" (p. 9) - of the kind in the 1993 Act - I accept, as did MacPherson J. at the interlocutory stage, and Dilks J. on the main application, that the question is clearly debatable. Even strong supporters of employment equity legislation leave some room for the effectiveness of the *Human Rights Code*:

> In terms of employment equity, s. 11 is of particular importance; s. 11(1) protects workers against constructive (systemic/adverse impact/effect) discrimination and s. 11(2) puts the onus on employers to accommodate the needs of workers covered by the *Code* short of undue hardship. The Commission, a board of inquiry or a court under subsection 11(3) shall consider any standards prescribed by the regulations for assessing what is undue hardship. Finally, s. 14(1) permits special programs for all groups covered under the *Code* that have been found to be disadvantaged in employment. The Commission has published guidelines for such programs. Hence, employment equity programs are protected against claims of reverse discrimination.
>
> While s. 11 does not introduce a novel concept of human rights in employment, it holds within itself the possibility of an effective attack on systemic discrimination. (Tremblay and Rudner, "Enforcement Mechanisms in Employment Equity Assessment and Direction for the Nineties" in Racial

Discrimination Law and Practice (1995), 6-1 at 6-48.1 and 6-49.)

The same point is made in Judith Keene's *Human Rights in Ontario*, 2nd ed. (1992) at p. 115.

[34] Accepting that the government recognizes the existence of systemic discrimination and that its *bona fides* in approaching the problem cannot be reasonably challenged, and that the policy issues are complex and the responses to them debatable, I am persuaded that the differences between the *Human Rights Code* and the 1993 Act are not a matter of constitutional dimension, i.e., that they do not involve a s.15(1) distinction.

[35] Two other factors to be taken into account are the important considerations that there was probably no constitutional obligation to enact the *Employment Equity Act, 1993* in the first place and that this statute was enacted under the shield of s. 15(2) of the *Charter*. In the next part of these reasons, in addressing the appellants' third submission, I set forth reasons why, in my view, s. 15(1) probably does not impose the obligation to enact the *Employment Equity Act, 1993*.

[36] If there is no constitutional obligation to enact the 1993 Act in the first place I think that it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under section 1 of the *Charter*. If this is so, it cannot be said that there is any legislative distinction involved as a first step in a s. 15(1) analysis. The effect of the repeal is that there is, as was the case before the enactment of the 1993 Act, no mandatory affirmative action law operating in the area of employment. This does not create or involve any distinction or any issue of equal protection of the law - and the effect is not a distinction which results from an underinclusive law exemplified in such cases as *Eldridge* and *Vriend*.

[37] I think that it is important to keep in mind that the *Employment Equity Act, 1993* was enacted under the protection of s. 15(2) of the *Charter*. This provision shields it from the challenge that it is underinclusive in that it does not include the discriminatory grounds of age, religion, or sexual orientation within its protection. It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structure should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright repeal without s. 1 justification. If such were the case, it could have an inhibiting effect on legislatures

enacting tentative, experimental legislation in areas of complex social and economic relations.

[38] The following passage in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 993, albeit concerned with a different issue (s. 1 justification under the *Charter*) is descriptive of the kinds of consideration involved in this problem:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices.

[39] Finally, I refer to a passage in the reasons of Sharpe J. in *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287 (Gen. Div.) at 301, a case concerned with the constitutionality of a statute which repealed a statute enacted a year earlier which had put an end to the exclusion of agricultural workers from Ontario's statutory labour relations regime:

> In my view, if the Legislature is free to decide whether or not to act in the first place, it cannot be the case that once it has acted in a manner that enhances or encourages the exercise of a

> *Charter* right, it deprives itself of the right to change policies and repeal the protective scheme.

I should note that Sharpe J., after making this statement, referred to the decision of Dilks J. in the present case.

[40] I shall now consider s. 1(5) in the 1995 Act, quoted at the outset of these reasons, which requires the destruction of information and goes beyond merely repealing the 1993 Act. The appellants submit that it has the effect of withholding or limiting access to employment opportunities for the four designated groups which are available to other members of society. The respondent stresses that the provision relates "exclusively" to information collected and compiled to comply with the 1993 Act and was included to protect employees' privacy rights and prevent potential misuse of personal information that had been collected to comply with the repealed legislation and is, accordingly, no longer required. (Cf. the approaches in privacy legislation on the use of personal information by government after the governmental purpose for which its collection was authorized by law had ceased to exist: *Freedom of Information and Privacy Act*, R.S.O. 1990, c. F.31, ss. 38(2) and 40(4) and the *Privacy Act*, R.S.C. 1985, c. P-21, ss. 6(3) and 7(a).) The provision, however, was framed so that it would not interfere with employees in the federal contract or voluntary accommodation and equality programmes.

[41] This is a troublesome provision. It is clearly consistent with, and consequent upon, the repeal of the 1993 Act but it also is concerned with information that would be valuable in carrying out voluntary programmes. In any event, I do not think that s. 1(5) is unconstitutional or that it renders the balance of the 1995 Act unconstitutional. Accepting that there was no constitutional obligation to enact s. 10 of the *Employment Equity Act, 1993* (the information gathering provision), I do not think that undoing its consequences is unconstitutional.

3. *Does s. 15 create positive duty on government to enact employment equity legislation?*

[42] On the fundamental question whether s. 15 of the *Charter* imposes a positive obligation on legislatures to enact legislation giving effect to the rights referred to in that provision, La Forest J., for the Supreme Court of Canada, said the following in *Eldridge v. British Columbia (Attorney General), supra*, at 678:

> It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau, supra*, at para. 37 (*per* L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order.

[43] I interpret this as holding that the Supreme Court of Canada has left open the possibility, in some cases, that s. 15(1) may oblige the state to take positive actions to ameliorate the symptoms of systemic or general inequality.

[44] Because, for reasons set forth in paragraphs 72 and 73 of this judgment relating to provisions in the *Human Rights Code*, I need not come to a determinate conclusion on whether s. 15(1) of the *Charter* imposes a positive duty on legislatures to enact legislation to combat systemic discrimination in employment, I shall not do so. My present view, however, is that no such obligation is imposed. In setting forth my reasons for this view, I shall consider the wording of the *Charter*, relevant interpretative factors, and what has been said on this question in judgments and in extra-judicial literature.

[45] The context for considering the question includes other provisions in the *Charter*. There are some sections which clearly appear to require some government action. I refer to those which confer the right to vote (s. 3), the right to an interpreter in court (s. 14), the right, in certain circumstances, to government services in English or French (s. 20), and the right to minority language instruction and educational facilities (s. 23). The wording of

s. 15, when compared to the wording of these sections, falls considerably short of indicating a positive duty on governments to take action.

[46] Further, the particular wording in s. 15(1), which confers the right to the equal protection and equal benefit of the law, envisages, as I have already indicated in the preceding part of these reasons, a comparative situation against which to judge the effect of the impugned law. This wording indicates that the purpose of s. 15 is to require that when laws are enacted they do not incorporate distinctions that discriminate on *Charter* grounds. With this in mind, it is difficult to read s. 15 as imposing a general obligation to advance equality values.

[47] If it is thought that the term "the right" in s. 15(1) implies a correlative positive duty on governments to give effect to the right in the form of legislation, there are three answers. The first is indicated in what I have just said - that the right is not a generalized one to have equality interests advanced. The second relates to the fundamental scheme of the *Charter* under which "the right" is vindicated by s. 52(1) which provides, in the present context, that any law which is inconsistent with s. 15(1) "is, to the extent of the inconsistency, of no force or effect". Third, as far as the immediate context of s. 15(1) is concerned, the obligation purportedly imposed by s. 15(1) to enact employment equity legislation would be

inconsistent with s. 15(2) which may be said both to shield and encourage legislation of this kind (see the Abella Report at p. 14). I have already indicated that, but for s. 15(2), the *Employment Equity Act, 1993* might be vulnerable to constitutional challenge by reason of its under-inclusive nature. Because s. 15(2), although concerned with pro-active legislation like the employment equity legislation in this case, clearly does not impose an obligation to enact such legislation, it does not seem sensible to read s. 15(1) as requiring the very result s. 15(2) is designed to foster.

[48] Finally, if it is thought that s. 15(1) imposes an obligation to enact employment equity legislation, what is the nature and scope of the obligation? A court is not competent to answer this question in a satisfactory way. It is a question that is not justiciable. Legislatures require substantial freedom in designing the substantive content, procedural mechanisms, and enforcement remedies in legislation of this kind. They are the appropriate branch of government to make these decisions, not courts working from the general terms of s. 15(1).

[49] In this vein, what would be the constitutional minimum content of employment equity legislation? Would it be all of the measures in the 1993 legislation, which contained some 59 sections? If not, what is the minimum? Considerations of this nature are further

indications that it would not be sensible to interpret s.15(1) as imposing an obligation to enact laws the constitutional adequacy of which would be subject to judicial review under the *Charter*.

[50] I turn now to the case law on the question of the constitutional duty to enact legislation that stands in addition to the *obiter* statement of La Forest J. in *Eldridge*.

[51] Possibly along the same lines as his statement in *Eldridge*, is the following observation of La Forest J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 193:

> I am not prepared to accept at this point that the only significance to be attached to the opening words that refer more generally to equality is that the protection afforded by the section is restricted to discrimination through the application of law. It is possible to read s. 15 in this way and I have no doubt that on any view redress against that kind of discrimination will constitute the bulk of the courts' work under the provision. Moreover, from the manner in which it was drafted, I also have no doubt that it was so intended. However, it can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them, particularly having regard to the fact that s. 32 already limits the application of the *Charter* to legislation and governmental activity. It may also be thought to be out of keeping with the broad and generous approach given to other *Charter* rights, not the least of which is s. 7 ,

which like s. 15 is of a generalized character.

[52] While La Forest J. does not indicate what other "significance" may be attached to the opening words of s. 15 it might be inferred that he had something like his *Eldridge* comments in mind.

[53] *Obiter* observations of Wilson J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 412 are to the same effect as those of La Forest J.:

> It has been argued by the respondents as well as by some of the interveners that this limit upon the reach of the Code does not offend the Charter because the province was under no obligation to provide any protection against discrimination in the first place. They say that absent such an obligation there is no room for constitutional scrutiny of the state's failure to go far enough in legislating human rights protection. It is not self-evident to me that government could not be found to be in breach of the Charter for failing to act. Whether the Constitution is implicated when the state fails to do something is a question which has plagued the American courts for many years. Indeed, Laurence Tribe has commented that it is precisely when the state has not acted that the court is called upon to make the most difficult determinations regarding the scope of the Constitution: see *Constitutional Choices* at p. 246 *et seq*. Since this is not an instance where the province has completely failed to act, we are happily relieved from deciding such a difficult question on these appeals, and I refrain from doing so.

[54] I shall now set forth judicial statements indicating that s. 15 does not impose a positive duty on governments to act. The view of L'Heureux Dubé J. in *Thibaudeau*, referred to by La Forest J. in *Eldridge*, is not the only one. I shall quote it in due course.

[55] In *Andrews, supra*, [1989] 1 S.C.R. 143 at 163 McIntyre J., for the majority, including Wilson J. on this point, delineated the scope of *Charter* scrutiny and emphasized the fundamental distinction between the application of human rights legislation and the *Charter*:

> Section 15(1) of the *Charter* provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.

[56] At p. 171 McIntyre J. repeated:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of law.

[57] At p. 175, with respect to the meaning of "discrimination" in s. 15, he said:

> The Court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the *Charter*. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the difference between the *Charter* and the Human Rights Acts must, however, be considered. *To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities.* [Emphasis added.]

[58] In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 261-263 La Forest J. said for himself, Dickson C.J.C., and Gonthier J., after quoting s. 32 of the *Charter*:

> These words give a strong message that the *Charter* is confined to government action. This Court has repeatedly drawn attention to the fact that the *Charter* is essentially an instrument for checking the powers of government over the individual. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, Dickson J. (as he then was observed: "It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action."
>
> ....
>
> ... Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is

> true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.
>
> ....
>
> Opening up private activities to judicial review could impose an impossible burden on the courts. Both government and the courts have recognized the need to limit judicial review by means, for example, of privative clauses and deference to specialized tribunals, techniques that would be unavailable in a *Charter* context. As well, as I noted earlier, government may, in many cases, establish more flexible means to deal with individual rights. Thus Human Rights Commissions have more flexible techniques for dealing with discriminatory practices without unduly constraining the exercise of other democratic rights that are extremely hard to balance; see McLellan and Elman, *ibid.*, and Tarnopolsky (now Mr. Justice Tarnopolsky), "The Equality Rights int he Canadian Charter of Rights and Freedoms" (1983), 61 *Can. Bar Rev.* 242, at p. 256.

[59] While subjecting private activities directly to review under the *Charter* is not the same thing as interpreting s. 15(1) as imposing a duty on legislatures to enact legislation to govern private activities, the considerations referred to in the third passage are applicable to both. Legislatures have flexibility and a wide range of choices. Courts, acting under the *Charter*, have no guidance in making their determinations of what the *Charter* requires of legislatures.

[60] At p. 318 of *McKinney* La Forest J. also said:

> The *Charter*, we saw earlier, was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in a private sector to the legislative branch. This invites a measure of deference for legislative choice.

[61] In *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, in a case concerned with whether s. 56(1)(b) of the *Income Tax Act*, which required a separated or divorced parent to include, in computing income, amounts received as alimony for the maintenance of children, infringed s. 15(1) of the *Charter*, L'Heureux-Dubé, in a dissenting judgment - but not on the point dealt with - said at p. 655:

> ... Although s. 15 of the *Charter* does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality. Such a scheme, in my view, would constitute a source of further inequality.

[62] In this court's decision in *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 as part of its reasoning in support of a limited form of judicial review of programs under s. 15(2) of the *Charter* this court said at p. 755:

> Governments have no constitutional obligation to remedy all conditions of disadvantage in our society.

[63] The general issue was addressed by O'Leary J. in *Service Employees International Union, Local 204 v. Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 (Gen. Div.) at 526:

> ... The unfortunate state of women prior to the *Pay Equity Act, 1987* as the objects of systemic gender wage inequity was created by the marketplace and stereotypical attitudes, not by government. It was not because of any action by government that they were in the plight they were in. The *Charter* does not place a positive obligation on government to eliminate such inequity. Rather, the government must not create inequity.

[64] Finally, I refer to the reasons given by MacPherson J. dismissing a motion for an interlocutory injunction in the present case before the hearing of the main application. The injunction sought was to suspend the operation of the *Job Quotas Repeal Act, 1995* pending the determination of the application. In dismissing the motion MacPherson J. said:

> The purpose of the *Charter* is to ensure that governments comply with the *Charter* when they make laws. The *Charter* does not go further and require that governments enact laws to remedy societal problems, including problems of inequality and discrimination. One can hope that governments will regard this as part of their mission; however, the *Charter* does not impose this mission at the high level of constitutional obligation -

> Section 32 of the *Charter* states that the *Charter* applies to governments. Governments speak through laws, regulations and practices. In Ontario, the current legislature has decided not to speak in the domain of employment equity. It has decided to leave this, at least for the time being, to the realm of private activity. Although many people including the Applicants, may regret and oppose this decision, the legislature is entitled to make it. (December 29, 1995, unreported)

[65] I note that in arriving at this conclusion MacPherson J. was of the view that no "serious constitutional issue" was raised. This latter conclusion was relevant to the first requirement to be satisfied before an interlocutory injunction could be granted.

[66] The judicial statements clearly preponderate against concluding that s. 15(1) imposes a positive obligation on legislatures to enact employment equity legislation.

[67] The extra-judicial writing on the subject is to the same effect. In Professor Gibson's *The Law of the Charter: Equality Rights* (1990), the subject is dealt with at pp. 335-37 under the title "A Right to Affirmative Action". The articles pro and con on the question of whether s. 15(1) imposes a positive obligation on legislatures are helpfully listed in footnotes on page 335. Professor Gibson's views are on the minority side. I shall not analyze them in any detail. I say, with great respect for his thought-provoking points, that

I do not think that the terms of the *Charter*, which I have discussed above, are reasonably capable of supporting his interpretation.

[68] At the conclusion of his analysis, at p. 337, Professor Gibson observed:

> Courts are not the most appropriate institutions to design affirmative action programs. There are usually too many variables involved, too much supervision required, and too many financial implications, to suit the judicial process.

I agree with these observations.

[69] The observations are followed by:

> The courts can issue declaratory judgments, however, indicating to the public whether or not their governments are taking adequate steps to relieve society's unfortunates of the burdens of disadvantage. Courts may also have the power to make generalized orders (e.g., "Take all reasonable steps to ensure that by 1995 women in the civil service are represented in all management ranks and all salary levels to an extent proportionate to their overall representation in the service."), leaving to politicians and administrators the appropriate ways and means of achieving that goal. That kind of collaboration between the judicial and political worlds would represent the ideal form of decision-making in a democracy like ours.

I am doubtful whether the tasks described in these statements lie within the proper and effective judicial domain in this country. As I have said, they involve the resolution of issues that are not justiciable.

[70] Professor Pilkington in "The Canadian Charter of Rights and Freedoms: Impact on Economic Policy and Economic Liberty Regarding Women in Employment" (1988), 17 Man. L.J. 267 deals with the question as follows at pp. 271-72:

> Section 15(1) of the *Charter* guarantees procedural equality in the application of the law (equality before the law) and substantive equality in the provisions of the law (equality under the law, equal protection of the law and equal benefit of the law). Theoretically, it is possible that this guarantee could be very broadly read as requiring that everyone "benefit equally from the existence of a given legal regime," thus imposing an affirmative obligation on legislatures, governments, and courts to cure inequalities. In its widest conceivable scope, then, section 15(1) could be interpreted as mandating a socio-economic revolution. It goes without saying that there is no evidence in the legislative history of the *Charter* that this result was intended; nor would this interpretation be textually sound. Section 15(1) guarantees only that the law will operate without discrimination. It does not require that the law be used to put everyone in an equal position. The express allowance of affirmative action in section 15(2) would not be necessary if section 15(1) imposed a constitutional obligation to enhance equality and eradicate inequality.

[71] Finally, in a research paper prepared for the Abella Commission entitled "The Constitutional Dimensions of Promoting Equity in Employment" (in *Research Studies of the Commission on Equality in Employment* (1985), 247 at p. 259 under the title "Systemic Discrimination", Professor Marc Gold expresses the view that "the general position is likely to be that the *Charter* does *not* impose such positive duties on government". The basic reason for this is that "a considerable measure of legislative flexibility over matters of social policy ought to be tolerated."

[72] Before concluding this part of my reasons, I shall consider the issue on the assumption that the *Charter* does impose a positive duty on legislatures to enact legislation to combat systemic discrimination in employment. As I have noted earlier in these reasons, the *Human Rights Code*, R.S.O. 1990, c. H.19 has done so in ss. 5, 9, 11 and 14, and, also, contains an offence-creation provision (s. 44) relating to discrimination that infringes the right to equal treatment in employment and other fields.

[73] Assuming that there is a positive duty, does this legislation satisfy it? My reasons in the preceding part of this judgment, in support of the conclusion that the differences between the *Human Rights Code* and the 1993 Act are not of a constitutional dimension, are directly relevant to this question. It follows from these reasons that it must be the case

that, if the *Charter* imposes a positive duty on legislatures to enact legislation to combat systemic discrimination in employment, the *Human Rights Code* satisfies this duty.

4. ***Did Dilks J. err in failing to find that the Government of Ontario misrepresented the* Employment Equity Act, 1993, *as entailing job quotas, creating reverse discrimination and being contrary to merit, and that these misrepresentations resulted in a violation of s. 15 of the Charter?***

[74] I need not deal with the factual aspect of this submission. It raises debatable issues, some of them semantic and others matters of degree. In any event, assuming the factual allegations to be correct, I do not see where they take the appellants. The only relief sought in this proceeding are declarations that the 1995 Act is unconstitutional and that the 1993 Act, and the repealed employment equity provisions in the *Education Act*, the *Police Services Act,* and the *Human Rights Code* are in full force and effect. The allegations have no bearing on determining the validity of the 1995 Act.

5. & 6. ***Justification under section 1 of the Charter and the appropriate remedy***

[75] Because the appellants have not shown any constitutional infringement, these issues do not arise. I mention that the respondent did not advance an alternative position under s. 1 in the event that the appellants were successful in showing a constitutional infringement.

DISPOSITION

[76] I would dismiss the appeal without costs.

J.W. Morden A.C.J.O.

I agree. [illegible]

Released: December 7, 1998
J.W. Morden A.C.J.O.

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DAVID DANESHVAR	**and -**	**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF HEALTH, and the HONOURABLE CHRISTINE ELLIOTT, MINISTER OF HEALTH for the PROVINCE OF ONTARIO**	**Court File No.: 223/21**
Applicant		Respondents	

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceedings Commenced at Toronto

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