Is racism defence futile in wake of Pieters? Featured

Monday, 16 September 2013 08:01 | Written By Yamri Taddese

As the Peel Law Association decides it won't seek leave to appeal from the Supreme Court of Canada following a racial discrimination ruling against it, lawyers on both sides of the matter agree on one thing: early resolution is better than prolonged litigation in cases like *Peel Law Association v. Pieters*.

"Coming out of the decision in the Court of Appeal, I think my tip for anyone eager to defend a human rights case is don't do it. You're better off . . . finding an early resolution," said Mark Freiman, counsel for the Peel Law Association, during a panel discussion on the case hosted by the Canadian Bar Association last week.

"And that's a hard thing for me to say because as despicable as racism is, as unacceptable as it is to be treated differently on account of race or on account of gender, on account of the other prohibited grounds in the Ontario Human Rights Code or the Canadian Human Rights Act, it is equally reprehensible to be called a racist."

Advising someone to resolve a case despite the implications, including accepting a racist label, is a difficult part of that equation, said Freiman, who noted that invoking multiple levels of appeal "is just too expensive."

Geri Sanson, left, and Selwyn Pieters spoke about Peel Law Association v. Pieters at an event last week.

Lawyers Selwyn Pieters and Brian Noble took their racial discrimination case to the Human Rights Tribunal of Ontario and later to court after the black lawyers and their articling student were asked to show their identification at the lawyers' lounge at the Brampton, Ont., courthouse. No other person in the room was asked for identification, although it later emerged that two people in the room weren't lawyers.

Initially, the tribunal made a finding of racial discrimination, but the Divisional Court quashed that ruling. In June, the appeal court reversed the Divisional Court's ruling and upheld the earlier finding of racial discrimination.

Geri Sanson, who represented Pieters and Noble, agreed that early resolution would have been a more "practical" way to deal with a racial discrimination case.
"When I look at it from my practical lawyer hat, I look at it and to me it screamed out to a resolution at an early stage," she said.

"This could have been, and in my mind should have been, a win-win situation."

But when it comes to the implications, Sanson said the Court of Appeal's decision was extremely significant.

"It's absolutely a landmark," she said. "Lawyering while black is alive and well in Ontario and across Canada."

Sanson also spoke about the difficulty of bringing a discrimination case on the basis of racism. "The reaction to racism, unlike any other ground of discrimination in my practice and experience . . . it's a reaction that we get in a way that you don't see with other grounds," she said.

"We seem to have a much greater appreciation of other grounds of discrimination [such as] disability even though [racism] is still very widespread in terms of discrimination. I think when it comes to race, our first reaction is: 'Absolutely not possible,'" she added.

While the Court of Appeal's decision challenged that thinking, it was also a "hands-off" notice to the Divisional Court when it comes to matters already decided by the tribunal, Sanson said.

The Divisional Court is supposed to intervene only in exceptional circumstances after the tribunal has made a finding, added Sanson, who noted the "re-examination and redetermination of the facts" at the Divisional Court level was wrong.

For Freiman, the only person on the panel who spoke from the perspective of the respondent, the Court of Appeal's decision has made it nearly impossible to win a judicial review in such matters.

"It is my belief that it's almost impossible, I might even say impossible, to win a judicial review. It is impossible on facts and it is impossible in law after this particular case," he said.

Freiman, who acts on both sides of human rights complaints, said he agrees with the fact that racism pervades society and that people sometimes act on that basis without being aware of it.

What he doesn't agree with is the notion that the existence of racism in society in general means it was a factor in a specific incident.

"It is always easier to prove a case if you are allowed to assume that which is to be proved. That's the real meaning of begging the question," he said.

"If you begin with the proposition that we live in a society pervaded by racism . . . can you on that basis draw the conclusion that in a specific case, there was a racist motivation? The reason I ask is because in our case, there wasn't a scintilla of evidence," he added, drawing smirks from the panel that included Pieters.

For his part, Pieters said that after the incident at the Brampton courthouse in 2008, he didn't want to go back there and only recently returned.

"For many years after that, I refused to take cases that would take me to Brampton court," he said. "I simply did not want to be in Brampton court."

Pieters added that the Court of Appeal's decision has implications for the legal profession and the law on discrimination.

It's now easier to bring a claim like his, he said, "and more difficult for those who engage in discrimination and profiling to shield themselves with official policies and procedures whether or not they are aware of their own discriminating behaviour."

For more, see "Court rules law association did not discriminate" and "Lawyer's racial profiling case argued at appeal court."