

A NEW ERA OF EQUALITY ACTIVISM?

BY BRUCE RYDER

The dismal success rate of *Charter* claimants before the Supreme Court in 1996 (11%), led many to pronounce the end of an era of *Charter* judicial activism. After the striking turnaround evident in the 1997 statistics, it is now clear that predictions of the demise of *Charter* activism were premature.

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In any case, neither activism nor restraint is in itself a good thing. What matters most is the quality of the top Court's reasoning. In 1997, the quantitative leap in the *Charter* success rate happened to be matched by an equally impressive improvement in the quality of *Charter* doctrine. Nowhere was this improvement more evident than in last year's trilogy of equality rulings, *Eaton v. Brant Co. Board of Education*, *Benner v. Canada*, and *Eldridge v. British Columbia*. Together, these decisions have created new hope that equality jurisprudence may in fact make a difference after all.

THE EVOLUTION OF S. 15

Prior to 1997, most equality cases that reached the Supreme Court failed, many of them on questionable grounds. From 1992 and 1996, equality claimants were successful in only 3 of 14 cases (21.5%). In 1997, 2 out of 3 claims succeeded. More importantly, this year's judgments corrected some deficiencies in the earlier jurisprudence, easing concerns in particular about ominous developments in the 1995 trilogy of *Egan v. Canada*, *Miron v. Trudel*, and *Thibaudeau v. Canada*.

In contrast to the approach taken to most other *Charter* rights and freedoms, the Supreme Court did not say before 1997 that the section 15(1) equality rights should be given a large and liberal interpretation. This omission, conspicuous by its absence, was an indication of the ideologically charged uncertainty the Court felt about the scope of the guarantee.

The Court's confidence in relation to equality rights has grown in recent decisions, such that, in *Eldridge*, La Forest J. could finally state the obvious on behalf of a unanimous Court: "S. 15(1), like other *Charter* rights, is to be generously and purposively interpreted." Another indication of the uncertainty that had pervaded *Charter* equality jurisprudence was the difficulty the Court had in agreeing on section 15's purposes. Given that the Court has said that the interpretation of *Charter* provisions should be guided by their purposes, this was no small matter.

From 1989 to 1993, the Court insisted that the "overall purpose of s. 15 is to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society". In the 1995 trilogy, this group-based conception of section 15's purpose disappeared from sight without any explanation. Justice McLachlin offered a competing view of section 15's purpose that places the individual rather than the group at the centre of equality analysis. Her version of section 15's purpose emphasizes the need to treat individuals fairly, that is, according to their true merits rather than false group stereotypes. It draws strength from section 15(1)'s guarantee of legal equality to "[e]very individual". It has difficulty, however, accounting for the emphasis on overcoming group disadvantage in section 15(2). Moreover, it is a purpose that is of limited assistance in helping us determine when laws based on real differences—such as physical disabilities, or biological differences such as pregnancy—are discriminatory.

Justice McLachlin's understanding of section 15's purpose does work well when evaluating laws that draw distinctions on their face that are premised on false or inaccurate ideas about groups. In *Benner*, the first equality decision released by the Court in 1997, the provision at issue was one in the *Citizenship Act* that made it more difficult for children to acquire citizenship if they were born outside Canada and only their mothers had Canadian citizenship. Children born abroad who had a Canadian father acquired citizenship automatically. In a unanimous judgment written

by Iacobucci J., the Court struck down the provision, finding it was premised not on real differences but on the stereotype that "men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen."

Most discrimination cases, however, are not so easy. It is relatively rare for our laws openly to draw distinctions on the basis of a prohibited ground of discrimination. It follows that the ability of the *Charter* to confront issues of inequality will depend to a large extent on the judges' ability to grapple with issues of adverse-effects discrimination.

Prior to 1997, there was little reason to be hopeful. A majority of the Court had given short shrift to strong adverse-effects arguments presented in *Symes*, *Rodriguez*, *Thibaudeau*, and *Adler*.

A NEW APPROACH

In 1997, the Court developed a strong and clear conception of adverse effects discrimination. In *Eaton*, the Court held that the placement of Emily Eaton, a 12-year-old girl with cerebral palsy, in a special education class for children with disabilities, did not constitute discrimination. Justice Sopinka, writing for the Court, found the "stereotypical application of group characteristics" formulation of discrimination incomplete. Instead, he noted, "it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination." The government was under an obligation to take into account the distinct needs

of the disabled to avoid adverse-effects discrimination, in this context the potential denial of equal ability to benefit from educational services. Given the nature of Emily's disabilities, the Court held that her placement in a special education class was not discriminatory.

The Court took the sensible step of recognizing that section 15 is best understood as an attempt both to treat individuals fairly and to overcome group-based disadvantage.

The concept of adverse-effects discrimination, when joined with section 15's promise of equal benefit of the law, produced a powerful judgment in the *Eldridge* case. The Court held, in another unanimous judgment, that the B.C. government's failure to provide funding for interpretive services in the health care system, while neutral on its face, had a disproportionate negative impact on the basis of physical disability. The deaf were denied the "equal benefit of the law", since equal access to health care depended on effective communication. Justice La Forest noted that adverse-effects analysis in the context of benefit schemes requires government to "take special measures to ensure that disadvantaged groups are able to benefit equally from government services."

In both *Eaton* and *Eldridge*, the Court restored its emphasis on section 15's purpose of overcoming group-based disadvantage, a point that had gone missing in 1995.

The Court took the sensible step of recognizing that section 15 is best understood as an attempt both to treat individuals fairly and to overcome group-based disadvantage. The Court seemed to assume prior to 1997 that it had to choose one or the other of these goals.

In *Eldridge*, La Forest J. wrote that section 15(1) serves these "two distinct but related purposes." Both purposes find strong support in Canadian legal and political traditions, and both are supported by the text of the *Charter*. Section 15(1) reflects a commitment to treating individuals in accordance with individual merit and capacities rather than on the basis of ascribed group stereotypes. Section 15(2) reflects a commitment to promoting equality of outcomes for members of groups suffering from historical and continuing patterns of disadvantage. In most cases, the twin purposes of section 15 will supplement or complement each other in the analysis of the issue of discrimination. When they do not, as in the case of some equity (or affirmative action) programs, section 15(2) makes clear that the goal of overcoming group disadvantage should prevail over a claim of "reverse discrimination" by an individual.

FINDING COMMON GROUND


Another positive aspect of the 1997 equality decisions is that all three were unanimous rulings. In contrast, the 1995 trilogy revealed a Court having large difficulties speaking in one voice on the meaning of equality. Three distinct approaches were articulated. Apart from the uncertainties produced by this state of affairs, a disturbing new twist to equality doctrine was added by a group of four judges led by Gonthier J. and La Forest J.

In their view, a finding of discrimination requires that the personal characteristic in question be irrelevant to the functional values underlying the law. Thus, in his dissent in *Miron*, Gonthier J. wrote that since marital status is relevant to defining the attributes of marriage, legislation denying automobile accident benefits to unmarried couples is not discriminatory. Justice La Forest adopted this approach in his plurality judgment in *Egan*, where he stated that a distinction drawn by legislation is not discriminatory if it expresses a fundamental reality or value. In his view, since sexual orientation is relevant to the fundamental social and biological realities underlying marriage, it followed that the denial of an old age spousal allowance to same-sex couples was not discriminatory.

The problem with Gonthier and La Forest JJ.'s approach is that, despite their protests to the contrary, they were willing to accept as legitimate discriminatory versions of the government's purposes in *Miron* and *Egan* (favouring married over unmarried heterosexual couples, and favouring heterosexual couples over same-sex couples, respectively). Their approach is no more coherent than saying that laws that burden women are not discriminatory since they are relevant to defining the prerogatives of men. Unless the object is to improve the conditions of a disadvantaged group, government must be prevented by section 15 from using a prohibited ground of discrimination to favour one group over another, even if such discrimination has been socially accepted as a "fundamental reality or value".

The circular logic adopted by Gonthier and La Forest JJ. did not reappear in the 1997 trilogy. As a result, the Court

was able to issue three unanimous decisions. The judges are still adhering to the different tests they articulated in 1995. There are signs, however, that they are expressing similar ideas in different verbal formulations and that they will find a way of merging their respective insights. For example, once the taint of circular logic flowing from the acceptance of a discriminatory objective is removed from the Gonthier/La Forest approach, there is no need to banish the question of a classification's relevance from the section 15 analysis. Since sameness or identity of treatment is not synonymous with equality, and since treating people differently is frequently what equality requires, we need some way of determining when differential treatment on the basis of a prohibited ground is discriminatory. If a law or other government action is based on a personal characteristic that is irrelevant to non-discriminatory legislative goals (Gonthier and La Forest JJ. in *Miron* and *Egan*), or if it is based on the attribution of false or stereotypical group attributes (McLachlin J. in *Miron*), or if it exacerbates the position of disadvantaged groups (Sopinka J. in *Eaton*, La Forest J. in *Eldridge*), then there is good reason to believe that such a law is discriminatory.

In the 1997 equality decisions, these approaches complemented and supplemented each other, producing a more coherent and more powerful vision of equality than had existed in the prior jurisprudence. 

Bruce Ryder is a Professor of Law at Osgoode Hall Law School, York University.