THE DIFFERENCE DILEMMA: THE SUPREME COURT AND EQUALITY RIGHTS IN 1997

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An examination of the Supreme Court of Canada's 1997 statistics relating to *Charter* section 15 decisions may lead to a completely false conclusion. Three section 15 decisions, each unanimous in result, each penned by a single author. The appearance is that of a united Court with a consistent methodology.

The facade of unanimity achieved in 1997 was based on the result only. The Court had managed to distill four tests into three, but was still divided 4-4-1 on the appropriate section 15(1) analysis. There was still no majority, let alone unanimity.

One year earlier, the Court had been splintered four ways in its section 15 analysis, and the lack of any clear majority resulted in uncertainty and confusion in lower courts. The legal community looked forward to the day when a single analysis might be adopted by a clear majority. Given the divisions only one year earlier, a unanimous judgment seemed an impossible dream.

The statistics do not, however, reveal the true story. The facade of unanimity achieved in 1997 was based on the result only. The Court had managed to distill four tests into three, but was still divided 4-4-1 on the appropriate section 15(1) analysis. There was still no majority, let alone unanimity. Yet the fact that a unanimous result was achieved in all three cases must raise the question of whether the philosophical divisions which characterized the Court's decisions the previous year are really all that significant or even relevant.

THE EATON CASE

The first section 15 case, *Eaton* v. *Brant County Board of Education*, concerned the provision of special education for mentally disabled children in the public school system. It was one of those rare cases in which a unanimous Supreme Court of Canada reversed the decision of a unanimous Court of Appeal, which had itself reversed the decision of a unanimous Divisional Court.

The case concerned a 12-year-old girl with cerebral palsy, who was unable to speak, or to use sign language meaningfully. She had no established alternative communication system. When she began kindergarten in the public school system, she was placed on a trial basis in her neighborhood school. A full-time educational assistant, whose principal function was to attend to her special needs, was assigned to her classroom. A number of concerns arose as to the appropriateness of her continued placement in a regular classroom, and the teachers and assistants concluded, after three years of experience, that the placement was not in her best interest and might well harm her. Her parents did not agree with this assessment.

Through a series of administrative hearings and appeals, the determination was made that she should be placed in a special education class. The parents applied for judicial review to the Divisional Court, which dismissed the application. The Court of Appeal allowed a subsequent appeal and set aside the tribunal order. The issue was whether the placement of a child in a special education program contrary to her parents' wishes infringed section 15(1) of the *Charter*. The Court of Appeal had concluded that the *Charter* mandated a presumption in favour of integration, and that the tribunal had erred in failing to take this presumption into account when assessing the proper place for this student.

[T]he purpose of section 15(1) of the Charter *is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to a ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.*

In the Supreme Court of Canada, Mr. Justice Sopinka began by acknowledging that "there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of section 15 of the *Charter*". In this case, however, the issue could be resolved "on the basis of principles in respect of which there was no disagreement". The Court stated: "The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have a particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons".

This emphasizes that the purpose of section 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to a ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society, as has been the case with disabled persons.

While concern for the elimination of discrimination based on stereotypical attitudes and assumptions relating to the effect of disability on ability is one of the objectives of section 15(1), the Court noted that the "other equally important objective seeks to take into account the true characteristics of this group" to enable them to participate in and enjoy all of society's benefits.

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The Court stated: "It is the failure to make reasonable accommodation, to fine tune society so that its structures and assumptions do not result in a relegation and banishment of disabled persons from participation, which results in discrimination against them ... The discrimination inquiry which uses 'the attribution of stereotypical characteristics' reasoning as commonly understood is simply inappropriate here ... It is recognition of the actual characteristics, and reasonable accommodation of these characteristics, which is the central purpose of section 15(1) in relation to disability".

Accordingly, the Court held that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. To say that the government should not make stereotypical assumptions on the basis of race or sex means that the government should not take into account an individual's race or sex when determining their entitlement to government benefits. But the obligation to accommodate disability means that the government must take into account an individual's actual disability in order to enable that individual to access government benefits. The Court explained this by reference to the "difference dilemma": "whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. Also while integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides".

[In Eaton*], the Court rejected the Court of Appeal's conclusion that section 15 mandates a presumption in favour of integration, a presumption that can be displaced by the parent's consent to a segregated placement.*

Unlike the Court of Appeal, the Supreme Court was satisfied that the tribunal had given thorough and careful consideration to the placement that would be in the child's best interests from the standpoint of receiving the benefits that education provides. It found that the tribunal had considered her special needs and her three years experience in a regular class and that it "strove to fashion a placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers" without "segregating her in the theoretically integrated setting".

Having satisfied itself that the tribunal had considered which placement was superior and concluded that the best possible placement was in a special class, the Court held that such a determination could not amount to discrimination within the meaning of section 15 of the *Charter* because "it seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child". The Court rejected the Court of Appeal's conclusion that section 15 mandates a presumption in favour of integration, a presumption that can be displaced by the parent's consent to a segregated placement. The issue to be considered in this context is the best interest of the child, "unencumbered by a presumption".

In hearing this case, the Supreme Court heard argument from intervenors representing advocacy groups for the disabled on both sides of the integration question. Some argued that integration was virtually always the correct approach, while others supported the position that disabled individuals (or their parents acting in their best interests) should have the choice of either integrated or special facilities. The Court's conclusion recognized that the answer lay in the individual assessment of each person's particular disability to determine what facilities would best accommodate their special needs. This will often be a difficult task, as the tribunal must consider the evidence of the professional educators and the parents, who may not see eye to eye on the issue of the best interest of the child.

THE BENNER CASE

The second case, *Benner* v. *Secretary of State of Canada*, concerned the rights of children born outside of Canada before February 15, 1977. The *Citizenship Act* provided that persons born abroad before that date would be granted citizenship on application if born of a Canadian father but would be required to undergo a security check and to swear an oath if born of a Canadian mother. The issue was whether the treatment accorded to children born abroad to Canadian mothers before February 15, 1977 by the *Citizenship Act* infringed section 15(1) of the *Charter* because it discriminated on the basis of sex.

In analyzing the section 15 issue Mr. Justice Iacobucci, writing on behalf of the Court, began with a consideration of the various approaches to section 15 which had developed in the cases decided previously. The first approach set out in Mr. Justice Iacobucci's decision was that adopted by McLachlin and Sopinka JJ. in *Miron* v. *Trudel*, which set out the following test for discrimination under section 15(1): "The analysis under section 15(1) involves two steps. First, the complainant must show a denial of 'equal protection' or 'equal benefit' of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in section 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of section

15(1) is established".

Once we depart from the text of the Charter, *we are left to wonder how an unelected court can discern as vague a concept as "societal significance" without imposing their personal beliefs.*

This test is substantially similar to the test outlined by Cory and Iacobucci JJ. in *Egan* v. *Canada*, which was decided at the same time as *Miron* v. *Trudel*. The primary difference between the two approaches is Justice McLachlin's requirement that the unequal treatment be based on the "stereotypical application of presumed group or personal characteristics". Cory and Iacobucci JJ. do not make explicit reference to this requirement, although it is probably not a significant difference since both tests have always lead to the same result.

The second approach to section 15 focuses on the "relevance" of a distinction to the purpose of the legislation. This approach, favoured by Lamer C.J.C. and La Forest, Gonthier, and Major JJ., requires an analysis of the "nature of the personal characteristic and its relevancy to the functional values underlying the law" in order to make a finding of "discrimination". It is not enough that the denial of equality be based on an enumerated or analogous ground, since the same ground may be discriminatory in some cases but not in others depending on the context. The ground of distinction must also be irrelevant to the values underlying the legislation or section 15(1) will not be violated.

A third approach to section 15 analysis is found in the reasons of L'Heureux-Dubé J. in *Miron*. According to this third methodology, once a distinction has been shown to result in the denial of one of the four equality rights on the basis of membership in an identifiable group, the distinction must then be shown to be discriminatory. This will require determining that it is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration". Making this determination will require consideration of both the group adversely affected by the distinction and the nature of the interest adversely affected by it. The interaction of the group's social vulnerability, in light of the social and historical context, and the constitutional and societal significance of the interest will determine whether the impact of the distinction constitutes discrimination.

This third approach taken by L'Heureux-Dubé seems to be very similar to the approach taken by McLachlin and Cory JJ. in their analysis. L'Heureux-Dubé appears to accept their analysis but retains the flexibility to expand section 15 of the *Charter* beyond the enumerated and analogous grounds in circumstances where, in her view, the interest adversely affected by the legislation has "societal significance". The source for determining whether a particular interest has "societal significance" is left unstated in her analysis. Perhaps that source may be the text of the *Charter* itself, although it seems unnecessary to supplement other *Charter* rights by incorporating them into the section 15 analysis. Once we depart from the text of the *Charter*, we are left to wonder how an unelected court can discern as vague a concept as "societal significance" without imposing their personal beliefs.

[In Benner, *the Court observed that] the* Citizenship Act *continued to establish "two classes of persons born abroad wishing to become citizens: those whose Canadian parent was male and those whose Canadian parent was female ... This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen".*

While the Court could not agree to a single approach to section 15 of the *Charter*, the Court was unanimous that, "no matter which test is applied", the law in issue infringed section 15 of the *Charter*. If "relevance" was a factor to be considered, the Court concluded that the gender of a citizenship applicant's Canadian parent has nothing to do with the values underlying the *Citizenship Act* and is irrelevant to the quality of one's candidacy for Canadian citizenship.

If L'Heureux-Dubé J.'s approach were taken, the Court concluded that "the effects of these distinctions can be extremely severe", and "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship".

If the Court required a showing that the unequal treatment was "based on the stereotypical application of presumed group or personal characteristics", the Court concluded that the *Act* maintained the stereotype that citizenship was inherited from the father and that women were incapable of passing their citizenship to their children unless there was no legitimate father from whom the child could acquire citizenship.

The Court concluded that the law infringed section 15 of the *Charter* because it denied access to benefits of citizenship on the basis of the gender of the applicant's Canadian parent. While the applicant's own gender was not a factor, the legislature could not circumvent the requirements of section 15 by superimposing the discrimination against the parent on the child. The *Citizenship Act* continued to establish "two classes of persons born abroad wishing to become citizens: those whose Canadian parent was male and those whose Canadian parent was female ... This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen".

ELDRIDGE V. B.C.

The third equality case, *Eldridge* v. *British Columbia*, like the *Eaton* case, was a disability case. And if the *Eaton*

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case was met with less than full enthusiasm from the advocates for the disabled, *Eldridge* was universally hailed as a major triumph.

While the result in the Eldridge case is certainly significant in terms of section 15 analysis, the most significant aspect of this case may well prove to be its extension of the definition of "government action" to include private entities like hospitals which are implementing a specific government policy or program.

The *Eldridge* case concerned the provision of medical services in British Columbia. Each of the appellants was born deaf and their preferred means of communication was sign language. Their complaint was that the provincial health insurance plan did not cover language interpretation for the deaf. As such, they were unable to communicate with their doctors and other health care providers. The issue was whether the health insurance plan discriminated on the basis of disability contrary to section 15 of the *Charter* because it did not cover language interpretation for the deaf.

The Court concluded that, while the legislation establishing the health insurance scheme did not itself infringe section 15 of the *Charter*, the failure of hospitals to provide such services did. The failure of the legislation to provide expressly for sign-language interpretation as a medically required service was not an infringement of section 15 because hospitals were provided with broad discretion to provide medical service delivery. The obligation fell on the hospitals, as the vehicle chosen by the legislature to provide access to medical services, and to ensure that such services were distributed in a manner consistent with the requirements of section 15. This obligation included the provision of sign-language interpretation services for deaf patients.

Once again the Court went through the motions of repeating the three approaches to section 15, and concluded that "the same result is reached regardless of which of these approaches is applied". As in the *Eaton* case, the Court stressed that "the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. Rather, 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 against them".

While the result in the *Eldridge* case is certainly significant in terms of section 15 analysis, the most significant aspect of this case may well prove to be its extension of the definition of "government action" to include private entities like hospitals which are implementing a specific government policy or program. In previous decisions, a majority of the Court had concluded that hospitals were not government actors within the meaning of section 32 of the *Charter*, and accordingly their mandatory retirement policies were not subject to section 15 (*Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483).

In *Eldridge*, the Court concluded that "a private entity may be subject to the *Charter* in respect of certain inherently governmental actions". The rationale for this conclusion was that governments "should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities".

The Court distinguished between "government" entities, which are subject to the *Charter* regardless of the nature of the activity in which they are engaged, and "private" entities which may attract *Charter* scrutiny with respect to a particular activity that can be described as governmental. In the latter case, one must "scrutinize the quality of the act at issue, rather than the quality of the actor". Hospitals would not be subject to the *Charter* when implementing a mandatory retirement scheme for hospital staff, since this is a matter of "internal hospital management". In contrast, the purpose of the *Hospital Insurance Act* is to provide particular services to the public. Although the benefits of that service are delivered and administered from private institutions it is government, not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive the service. Accordingly, the Court concluded "the structure of the *Hospital Insurance Act* reveals, therefore, that in providing medically necessary services, hospitals carry out a specific governmental objective ... Hospitals are merely vehicles the legislature has chosen to deliver this program". The Court concluded that although "the system has retained some of the trappings of the private insurance model from which it derived, it has come to resemble more closely a government service than an insurance scheme".

CONCLUSION

Based on the results of the 1997 term, it appears that the differences between the three approaches to equality revealed in the Supreme Court cases in 1995 may not be as significant as cases like *Miron* and *Egan* suggested. *Miron* and *Egan* both considered the definition of the word "spouse" and whether it should be extended to include common-law spouses (*Miron*) and same-sex partners (*Egan*). The divisions on the Court in those cases may stem more from specific and fundamental views regarding the definition of "spouse" than from any real difference in general philosophical approach to equality. If this is correct, we would expect to see an evolution toward a single approach. Given the change in the composition of the Court in 1998, it will be interesting to see whether these differences continue, or whether a clear majority develops in favour of a single analysis.

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