Egan Case a Breakthrough for Gay Spouses

But Supreme Court Takes Right Turn in Equality Trilogy

by Bruce Ryder

Suzanne Thibaudeau and James Egan emerged as losers in a trilogy of Supreme Court of Canada decisions on equality rights released in May. Nevertheless, they can both claim moral victories since their *Charter* challenges have advanced the law reform agendas they championed. However, far more disturbing than the immediate results of these cases is the rightward ideological shift in the Court's interpretation of s. 15's guarantee of equality.

The State and the Bedrooms: The *Egan* and *Miron* Decisions

A 5–4 majority rejected Jim Egan's challenge to the exclusion of gay and lesbian couples from entitlement to spousal allowances under the *Old Age Security Act*. In the third case of the trilogy (*Thibaudeau* is not discussed further here), *Miron v. Trudel*, a 5–4 majority held that the Ontario government had discriminated against unmarried heterosexual couples by denying them the accident benefits in standard automobile insurance contracts that married couples could claim.

The fundamental point of contention in *Egan* and *Miron* was whether s. 15 prohibits the state from legislating a three-tiered hierarchy of intimate relationships, with married spouses favoured over unmarried heterosexual spouses, and both favoured over gay or lesbian spouses. The Court split into sharply differentiated liberal and conservative factions on this issue.

The conservative minority, led by Gonthier and La Forest JJ., defended the status quo, stating that "Parliament may quite properly give special support to the institution of marriage" because of "the biological and social realities that heterosexual couples have the unique ability to procreate." In their view, the laws at issue that denied benefits to either same-sex couples (*Egan*) or all unmarried couples (*Miron*) were not discriminatory since the exclusions were relevant to the state's goal of supporting marriage.

A majority of five judges rejected this circular reasoning. In their view, laws that favour a category of spouse defined by reference to marital status or sexual orientation are discriminatory. McLachlin J. wrote that the state must respect "a matter of defining importance to individuals"—namely, "the individual's freedom to live life with the mate of one's choice in the fashion of one's choice." Cory J. noted that the exclusion of same-sex couples from benefits reserved for spouses "reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples." It followed, in Iacobucci J.'s words, that "differential treatment between married and common law spouses is constitutionally suspect," as is "differential treatment of relationships based on sexual orientation." In the result, five judges invoked s. 15 to broaden the legal definition of spouse to include common law couples in *Miron*, and four judges reached the same result for same-sex couples in *Egan*.

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Sopinka J. broke ranks with his liberal colleagues in *Egan* at the second stage of *Charter* analysis—namely, the question whether the government's violation of Egan's equality rights could be justified as a reasonable limit pursuant to s. 1. In his view, discrimination against same-sex couples in old age spousal allowances was justified on the grounds that government should be given leeway to choose between disadvantaged groups in extending social benefits.

In cases not involving the allocation of scarce public funds among competing disadvantaged groups, the result may be different; since Sopinka J. joined his other four colleagues in declaring a heterosexist definition of spouse to be discriminatory, *Egan* can be summed up as a victory for fiscal conservatism and a defeat for moral conservatism.

Implications of the *Miron* and *Egan* Rulings

Most of the legal differences between married and unmarried heterosexual couples have been erased by legislative reforms over the course of the last 25 years. Some important differences remain. For example, property rights in provincial family law legislation can be invoked only by marriage partners. The reasoning in *Miron* suggests that *Charter* challenges to these remaining legal dif-

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ferences may succeed, perhaps ultimately obliterating any legal distinctions between marital status and "living in sin."

In contrast, the differences in the current legal treatment of same-sex couples and heterosexual couples are legion. With few exceptions, Canadian legislatures have chosen not to recognize gay or lesbian relationships. After *Egan*, laws and policies according unequal treatment to same-sex couples will be found to be discriminatory by human rights tribunals and courts.

For example, Chris Vogel had been seeking legal recognition of his gay relationship for over 20 years with no success. Following *Egan*, the Manitoba Court of Appeal found that the denial of spousal benefits to his same-sex-partner, under his employment benefits plan, was discriminatory treatment under provincial human rights legislation.

Meanwhile, an Ontario court held that denying same-sex couples the right to adopt children is a "blatant example of discrimination." Other ongoing court challenges, for example, to the exclusion of same-sex couples from provincial family laws and the right to marry, have also been given a significant boost by the *Egan* ruling. This is because the extension of these laws to gay and lesbian couples will not impose financial burdens on government.

Individual Fairness or Group Parity?

The May trilogy signalled a fundamental ideological shift in the Supreme Court judges' understanding of equality. Ever since the Court's first decision interpreting s. 15 (*Andrews*, 1989), Canadian equality jurisprudence has been characterized by a contest between two very different conceptions of equality. The traditional and dominant view sees the essence of equality as *individual fairness*. Discrimination results from judging people according to group stereotype or irrelevant personal characteristics rather than individual merit. The competing view sees the essence of equality as *group parity* of powers and resources. Discrimination results from actions that have the effect of perpetuating patterns of group-based disadvantage associated with personal characteristics such as gender and race.

The influence of both the individual fairness and group parity models of equality (often referred to as "formal equality" and "substantive equality," respectively) can be found in unresolved tension in the Court's pre-trilogy jurisprudence. Equality rights activists and organizations (such as LEAF) have vigorously promoted the group parity model with some success. Prior to the trilogy, Chief Justice Lamer described the "overall purpose" of s. 15 equality rights as preventing "discrimination against *groups* subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society." Likewise, Abella J. of the Ontario Court of Appeal summarized the s. 15 jurisprudence as condemning "only those distinctions which perpetuate disadvantage for an historically disadvantaged group." Although litigants have had little success in using s. 15 to challenge sources of systemic group-based disadvantages, statements like these have sustained those who believe in s. 15's nascent progressive potential.

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Substantive Equality Rejected

No more. The goal of remedying group-based disadvantage vanished in the trilogy. L'Heureux-Dubé J. was the only judge even to mention it as "an important, though not necessarily exclusive, purpose of s. 15." The other eight members of the Court appear intent on abandoning the substantive equality potential of s. 15. Now the "overarching purpose" of s. 15 is to ensure that all persons are treated according to their individual merits rather than group stereotypes.

What is the significance of identifying individual fairness, rather than group parity, as the value at the heart of Canadian anti-discrimination law? For one, it can no longer be asserted that only members of disadvantaged groups are entitled to bring s. 15 claims. Unfair treatment of either the rich or the poor appears now to be equally the concern of s. 15.

Another consequence is that controversies regarding the legitimacy of group equity programs (or affirmative action) can be expected to spill into Canadian courts. It was once thought that, by explicitly authorizing them, s. 15(2) put the constitutionality of equity programs beyond debate. This may turn out to be wishful thinking by the proponents of group parity. According to the individual fairness model, group-based remedies are exceptions to, rather than illustrative of, the constitutional guarantee of individual equality. Since exceptions to constitutional guarantees are interpreted narrowly, judges are now much more likely to circumscribe what qualifies as a valid affirmative action program.

Conclusion

The *Egan* case signals a turning point in the battle for recognition of the equality rights of same-sex cou-

ples. A Supreme Court majority now supports the view that the scores of laws that exclude gay and lesbian couples from definitions of spouse are discriminatory. The position that unequal treatment of gay and lesbian couples is not a human rights issue, so stubbornly maintained by many legislators in recent years, is no longer tenable. In the end, Egan lost his case, but Sopinka J.'s s. 1 escape hatch is temporary and limited to benefit programs. The message to legislators is clear: change the legal definitions of spouse, or have them changed in court.

The Court's rhetoric in the May decisions veered to the right by emptying of any substantive content the ideal of equality enshrined in s. 15. The open defence of hierarchy in the minority opinions in *Miron* and *Egan* represents the most conservative contribution to equality jurisprudence since *Lavell*, *Bliss*, and other infamous *Bill of Rights* decisions of the 1970s. It comes as a cruel surprise that this position could attract the support of Chief Justice Lamer and miss by a single vote becoming the majority view on equality rights in the 1990s. The questionable empirical assumptions relied on to dismiss the claim in *Thibaudeau*, and the cavalier approach to s. 1 taken by Sopinka J. in *Egan*, are further signs of a Court not interested in taking the lead in advancing equality. Equality rights activists enter s. 15's second decade with seriously diminished expectations regarding its potential to instigate judicial contributions to progressive law reform.

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Supreme Court Takes Step Forward on Equality Rights

Recent Cases Signal Protection for Individual Rather Than Group Rights

by Patrick J. Monahan

Three Supreme Court equality decisions handed down at the end of May attracted considerable media attention, most of it focusing on the winners and losers in the cases. The media scorecard showed that the losers were divorced or separated mothers (who would continue to be taxed on their child support payments), and same-sex spouses (who were denied a spousal allowance available to opposite-sex couples); the sole winner, on the other hand, was a man permitted to claim on his common-law wife's auto insurance policy. There was considerable speculation about a "shift to the right" in the High Court's approach to the Charter.

Of far greater significance than the results in the cases, however, was the reasoning used to get there. While this reasoning is not always as clear as one might have hoped (the judgments in the three cases total 400 pages and there is no single majority opinion in any of them), the Court does seem to be groping its way toward a clarification of the meaning of equality. And the Court's emerging new approach, particularly McLachlin J.'s ringing endorsement of equality rights as a protection for individual human dignity, is clearly a step in the right direction.

Confusion Reigns

For the past six years, lower courts had been struggling to make sense of the Supreme Court's first equality case, the 1989 *Andrews* decision. Despite the expansive language of s. 15 (*i.e.*, "Every individual is equal before and under the law"), *Andrews* had said that only laws that distinguish between individuals based on the characteristics specifically enumerated in s. 15 (*i.e.*, "Race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"), or on grounds analogous to those characteristics, could give rise to an equality claim. Further, the Court had stated that the law had to "discriminate" before it would violate s. 15, but the term "discrimination" was not clearly defined.

> *"Despite a surfeit of concurring and dissenting judgments in the three cases, a strong majority ... endorses the view that s. 15 protects the rights of individuals, rather than groups."*

Lower courts had been bedeviled trying to make sense of the *Andrews* decision, particularly the requirement that a law "discriminate" before there could be a s. 15 violation. The confusion was only deepened by subsequent Supreme Court decisions in the early 1990s, which seemed to suggest that s. 15 was intended to protect the rights of "disadvantaged groups" rather than individual citizens. Section 15(2) of the Charter already contained a saving provision for affirmative action programs designed to remedy the past discrimination suffered by dis-

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