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.

Bruce Ryder is an Associate Professor at Osgoode Hall Law School, York University.

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-

Continued, see "Supreme Court Takes Step Forward" on page 112.

"Supreme Court Takes Step Forward" continued from page 111.
advantaged groups. Yet, some post-*Andrews* decisions claimed that the guarantee of equality itself was linked to the goal of remedying past disadvantage, as opposed to being a general guarantee that the state could not discriminate against any of its citizens.

The irony was that in determining whether someone was a member of a "disadvantaged group," courts were drawn into making the same kinds of stereotypical and unsubstantiated value judgments that the guarantee of equality was originally designed to prohibit. For example, in the *Miron* case (involving the claim by a man for accident benefits under his common-law spouse's auto insurance policy), the Ontario Court of Appeal had dismissed the s. 15 claim on the basis that unmarried couples were not members of a "disadvantaged group" who had suffered "social, political and legal disadvantage in our society." Yet, how the Court came to this judgment is simply baffling, since there was no explanation offered as to how to determine whether or not a particular group is "disadvantaged." And, in any event, what possible difference could it make that common law spouses were or were not a "disadvantaged group" if this particular law was discriminatory and unjustified? The Court seemed to be saying that unjustified and discriminatory laws are acceptable, as long as they are directed at "non-disadvantaged groups." This threatened to make a mockery of s. 15, and stand the concept of equality on its head.

Back to Basics

The recent trilogy of equality cases goes some considerable distance to clarifying the confusion that had been spawned by the *Andrews* case. Despite a surfeit of concurring and dissenting judgments in the three cases, a strong majority (eight of nine judges) endorses the view that s. 15 protects the rights of individuals, rather than groups. Moreover, eight of nine judges also agree that s. 15 claims can be brought by any citizen, not just by members of "disadvantaged groups."

The clearest and most compelling endorsement of this view is set out in the well-reasoned judgment of Madam Justice McLachlin in the *Miron* case. McLachlin J. returns to first principles, and attempts to identify the larger purpose of s. 15. This larger purpose, she says, is simply the protection of individual human dignity and freedom. Human dignity and freedom is violated whenever individuals are denied opportunities based on the "stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance." In other words, equality is violated when you deny someone a benefit, not because you have determined that this particular person is unworthy, but simply because you presume that someone with certain kinds of characteristics (*i.e.*, their race, gender, sexual orientation) is unworthy. Madam Justice McLachlin states that laws that distinguish between people based on the grounds specified in s. 15 will almost always be a product of stereotypical value judgments, and will be found to be in violation of s. 15.

> *"[The Court's analysis] marks a reaffirmation of the basic values that have formed the underpinning for human rights triumphs around the world over the past thirty years—namely, that every person has a right to be treated based on his or her own merits and not on the basis of group characteristics."*

In my view, this hard-hitting analysis turns the Court's equality jurisprudence in precisely the right direction. It marks a reaffirmation of the basic values that have formed the underpinning for human rights triumphs around the world over the past thirty years—namely, that every person has a right to be treated based on his or her own merits and not on the basis of group characteristics. McLachlin's approach also puts an end to the idea that only certain groups have a right to bring equality claims, an invidious suggestion that, if ever accepted, would be certain to bring both the Court and s. 15 into public disrepute.

McLachlin J. was joined by the three Ontario members of the Court (Iacobucci, Cory, and Sopinka JJ.) in affirming this "back to basics" approach to equality. But her principled and well-reasoned analysis represents an important breakthrough in s. 15 jurisprudence and, hopefully, will serve as the anchor for the Court's equality analysis in the years ahead.

Patrick J. Monahan is an Associate Professor of Law at Osgoode Hall Law School.

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Write or fax us at:

Canada Watch
Osgoode Hall Law School
Room 454
4700 Keele Street
North York, Ontario
M3J 1P3

Tel: (416) 736-5515
Fax: (416) 736-5546