Egan v. Canada (1995) – Equality Rights and Same-Sex Spousal Benefits

On May 25, 1995, the Supreme Court of Canada released three decisions dealing with the right to equality guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*.[1] One of these cases was *Egan v. Canada*, which required the Court to decide if the opposite-sex definition of common-law "spouse" used to determine Old Age Security benefits discriminated on the basis of sexual orientation.[2]

The Old Age Security program provided that the spouse of a person receiving the Old Age Security benefit could qualify for a spousal benefit if the spouse was between the ages of 60 and 65 and the couple's combined income fell below a specified level. The definition of "spouse" included common-law heterosexual spouses, but excluded all same-sex couples.[3] James Egan and John Nesbit, who had lived together in a committed and interdependent homosexual relationship since 1948, challenged this definition. They argued that it discriminated on the basis of sexual orientation. The case required the Court to decide for the first time whether the *Charter* provides protection from discrimination on the basis of sexual orientation. The case also revealed – as did the other two cases released the same day – that the Court was deeply divided on the approach it should take to equality claims. Every claim of a breach of a *Charter* right proceeds through the same basic two-step process. First, it must be established that the *Charter* right has been infringed. Then, if such an infringement exists, the government is given the opportunity to defend the infringement as a "reasonable limit" that is "demonstrably justified in a free and democratic society."[4] Various members of the Supreme Court took different approaches at each of these two stages.

The Right Infringement Stage

Section 15(1) of the *Charter* states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[5] The Court divided into three camps, each taking a different approach on how to determine whether this right has been infringed. *Relevance Approach* Justice La Forest wrote for four judges – himself, Justices Gonthier and Major, and Chief Justice Lamer. He emphasized that not every distinction that disadvantages a particular group will amount to discrimination. Such a low standard would require the courts to review countless distinctions made in legislation and this, he said, "would bring the legitimate work of our legislative bodies to a standstill."[6]For Justice La Forest, a key element of discrimination is that a distinction is based on an *irrelevant*personal characteristic.[7] Determining whether a distinction amounts to

discrimination, according to him, therefore involves a three-step analysis:[8]

1. Does the law draw a distinction between the person claiming that his or her rights have been breached and others?
2. Does that distinction result in a disadvantage by imposing "a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others, or does not provide them with a benefit" granted to others?
3. Is the distinction based on an *irrelevant* personal characteristic which is either listed in section 15(1) or analogous to those listed?

Justice La Forest accepted that the Old Age Security benefits made a distinction between heterosexual and homosexual couples.[9] He also accepted that this distinction resulted in a disadvantage.[10] The government argued that the couple in this case did not face a disadvantage, since they received more in combined federal and provincial benefits by claiming as individuals than they would as a couple. Justice La Forest rejected this argument because there was nothing to show that this was generally the case with homosexual couples.[11] While sexual orientation is not one of the personal characteristics listed in section 15(1), Justice La Forest accepted that it is an analogous characteristic. Here he pointed out that there may be some controversy about whether sexual orientation in based on physiological or biological factors, but it is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs," so it is analogous to the listed grounds.[12] The crucial question for him, however, was whether the distinction was relevant. According to Justice La Forest, when assessing relevance it is wrong to focus narrowly on the provision that denies the benefit. Instead, the "functional values underlying the law" must be looked at.[13] In the case of the Old Age Pension benefits, he pointed out that the benefits for spouses were intended to take account of the greater financial needs of married couples.[14] Elderly married couples, according to Justice La Forest, were singled out for the benefit because of the central role that these couples play in society; heterosexual couples have the unique ability to procreate, and they are generally the people who nurture and care for children.[15] Because of this special role, Justice La Forest concluded that Parliament could provide special support to the institution of marriage.[16] While Parliament did eventually extend benefits to heterosexual couples who were not legally married, it still ensured that the benefits were provided to couples who bring forth and care for children.[17] Viewing the distinction in this context, Justice La Forest saw nothing arbitrary about providing the benefits to heterosexual couples but not to homosexual couples.[18] Having concluded that the distinction was relevant, he found that it did not amount to discrimination and so did not violate the right to equality.[19]

Distinctions, Disadvantage, and Ground Approach Four other judges took a second approach to determining whether the right to equality had been infringed. Justice Cory wrote their reasons, with Justices Sopinka, Iacobucci, and McLachlin concurring.[20] In contrast to the "relevancy approach" discussed above, Justice Cory maintained the two-step analysis that the Court had used in previous cases:[21]

1. Does the law draw a distinction, based on a personal characteristic, between the claimant and others?
2. Does the distinction result in discrimination? It is discrimination if: (a) the basis of the distinction is one of the listed grounds or one that is analogous to the listed grounds; and (b) the distinction has the effect of imposing a disadvantage, obligation, or burden that is not imposed on others, or if it withholds or limits access to benefits or advantages that are available to others.

Justice Cory pointed out that discrimination does not occur in a vacuum, but rather exists because of a difference in treatment. As a result, it is a comparative concept.[22] In other words, it can only be identified by considering the effect of the law on different groups of people. Notably absent from Justice Cory's approach is the element of "relevance" that Justice La Forest used. Applying the test in this case, Justice Cory concluded that Old Age Security discriminated on the basis of sexual orientation. Spousal benefits were provided to opposite-sex spouses between the ages of 60 and 64 when the combined income of the pensioner and the spouse fell below a certain level. The only requirements for eligibility were that the spouses had lived together for one year and that their combined income was below the specified level.[23] Since the legislation specifically defines a common-law spouse as a person of the opposite sex, homosexual common law spouses did not qualify for the spousal benefit. The law therefore made a distinction between heterosexual and homosexual common-law spouses.[24] This distinction resulted in a denial of the spousal benefit, so it denied equal benefit of the law.[25] The government argued that the law was not one of general application because the legislation was only intended to benefit either heterosexual couples who have raised children or dependent female spouses. Justice Cory rejected this argument. He pointed out that the legislation made no reference at all to children, and it applied to childless heterosexual couples as well as those who had children in other relationships. As a result, Justice Cory concluded that the legislation was not intended to benefit those who had raised children.[26] Similarly, he pointed out that the spousal benefit could be provided to husbands or wives of pensioners, and so it was not intended to benefit dependent female spouses.[27] Justice Cory also rejected the argument that the couple in this case was not denied equal benefit of the law because they were receiving more in combined federal and provincial benefits than they would if they could claim as spouses. He did so for three reasons. First, the claim of discrimination was not specific to the situation of the couple in this case. Rather, the claim was that the denial of spousal benefits discriminates against *all* homosexual couples.[28] Second, it is inappropriate to look to provincial legislation to correct the denial of benefit created by federal legislation; provincial laws vary and may be changed by the provincial legislature.[29] And third, equal benefit of the law is not restricted simply to economic benefits. The law can also confer benefits by allowing people to make a significant choice, such as the opportunity to represent themselves as spouses.[30] Justice Cory then considered whether the distinction resulted in discrimination. He pointed out that the distinction was based on a personal characteristic – sexual orientation.[31] Though the legislation did not specifically mention

sexual orientation, the opposite-sex definition of spouse made a distinction on this basis.[32] Justice Cory concluded that while sexual orientation is not one of the grounds listed in section 15(1), it is analogous to those grounds. "The fundamental consideration underlying analogous grounds analysis," he said, "is whether the basis of distinction may serve to deny the essential human dignity of the *Charter* claimant."[33] He noted that homosexuals have suffered historic disadvantage by being subjected to public harassment, verbal abuse, and hate-motivated crimes. This mistreatment imposes costs on the lives of homosexuals.[34] He pointed out that sexual orientation is more than a status possessed by a person; it is also demonstrated through conduct by the choice of a partner. Just as the *Charter* protects both religious belief and religious *practice*, it should also protect both the status and conduct associated with sexual orientation.[35] He also observed that human rights laws in a number of provinces prohibit discrimination on the basis of sexual orientation. He therefore concluded that the distinction was based on sexual orientation, and that sexual orientation is analogous to the grounds listed in section 15(1).[36] As well, since the distinction relied on stereotypical reasoning about homosexual relationships, the distinction amounted to discrimination.[37] *Justice L'Heureux-Dubé's "Subjective-Objective" Approach* Justice L'Heureux-Dubé wrote a separate judgment. While she agreed that the legislation was discriminatory, she reached that conclusion by a different analysis. She therefore enunciated a third approach to assessing when the right to equality is infringed. She began her reasons by considering the purpose of the right to equality. In her opinion, the divisions in the Court (in this judgment, as well as in the other two released on the same day) suggested that the various judges did not have the same underlying purpose in mind.[38] She pointed out that the right guarantees a certain type of equality – equality without discrimination. She also pointed out that the nine grounds listed in section 15(1) are not the guarantee of equality, but rather are specific applications and illustrations of the ambit of the section.[39] She considered a focus on these grounds to be an indirect means of defining discrimination, whereas she preferred to give independent content to the term "discrimination."[40] Justice L'Heureux-Dubé emphasized that the right to equality is a commitment to recognizing every person's equal worth as a human being. It is a commitment to not tolerate distinctions that treat certain people as second-class citizens, or otherwise offend their fundamental human dignity.[41] She pointed out that the *Charter* is not a charter of economic rights. While economic benefits and prejudices are relevant to claims of equality, this is because they are symptomatic of the types of distinctions that offend inherent human dignity.[42] She also emphasized that one of the purposes of the right to equality is the elimination of distinctions that may worsen the circumstances of people who already suffer from marginalization or have been historically disadvantaged, because those who are more vulnerable are likely to experience more severely the effects of a distinction.[43] She recognized that discriminatory effects must be evaluated from the point of view of the victim of the discrimination. She emphasized that it is unrealistic to expect that nobody in society will be made to feel devalued, denigrated or debased. The appropriate perspective, according to Justice L'Heureux-Dubé, is therefore "subjective-objective." In other words, what must be considered is "the reasonably held view of one who is possessed of similar characteristics, under similar circumstances, and who is dispassionate and fully apprised of the circumstances."[44] Justice L'Heureux-Dubé

rejected the "relevance approach" taken by Justice La Forest, calling it a "double-edged sword."[45] She pointed out that a distinction that is relevant to the purpose of a law may still have a discriminatory *effect*.[46] A relevant distinction can result in discrimination if the purpose of the legislation is itself discriminatory.[47] As well, adding "relevance" as an element of discrimination would place an additional burden on the person claiming a rights violation. To show that the distinction is irrelevant, the claimant would have to properly characterize the purpose of the legislation – but it is the government, not the rights claimant, who is in the best position to make that characterization.[48] Finally, she pointed out that "relevance" would add an internal limit on the right to equality. This limit, in her view, could be better dealt with at the second stage of analysis, when the government must justify its limitation on rights.[49] To address these problems, Justice L'Heureux-Dubé proposed a different three-part test for establishing a violation of the right to equality:

1. that there is a legislative distinction;
2. that this distinction results in a denial of one of the four equality rights on the basis of the rights claimaint's membership in an identifiable group;
3. that this distinction is "discriminatory" within the meaning of section 15.[50]

Referring to the third criterion, Justice L'Heureux-Dubé said that a distinction is discriminatory if it perpetuates or promotes the view that an individual 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."[51] This examination takes a subjective-objective perspective.[52] In assessing the effect, Justice L'Heureux-Dubé stated that courts must consider both the nature of the group affected by the distinction, and the nature of the interest that the distinction affects. The nature of the affected group must be considered, she said, because "members of advantaged groups are generally less sensitive to, and less likely to experience, discrimination than members of disadvantaged, socially vulnerable or marginalized groups."[53] Similarly, the nature of the interest that is affected must be considered because "the more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact even with respect to groups that occupy a position of advantage in society."[54] Rather than developing a rigid test for identifying a discriminatory distinction, Justice L'Heureux-Dubé preferred a pragmatic and functional approach to assess these various factors in a principled manner.[55] Applying her approach to the spousal benefit scheme, Justice L'Heureux-Dubé concluded that the exclusion of same-sex couples was discriminatory. As the other judges had pointed out, the fact that a couple could actually receive less economic benefit by claiming as a couple did not mean that they were not denied a benefit. They were denied the benefit of state recognition that accompanies being able to file for benefits *as a couple*.[56] As well, she agreed with Justice Cory that the legislation drew a distinction on the basis of sexual orientation.[57] As a result, the first two elements of her test were satisfied. Justice L'Heureux-Dubé then turned her attention to whether the distinction amounted to discrimination. In terms of the nature of the affected group, she stated that same-sex

couples are a socially vulnerable group that has suffered from stereotyping, marginalization, stigmatization, and historic disadvantage. She also pointed out that sexual orientation is an aspect of "personhood" – quite possibly biologically based, and at least a fundamental choice. All couples that qualify for the benefit are elderly and poor, so the excluded same-sex couples are "at the margins of an already marginalized group within society."[58] In terms of the nature of the affected interest, she noted that excluding same-sex couples from an important social institution results in a "metamessage … that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex. This fundamental interest is therefore severely and palpably affected by the impugned legislation."[59] Based on these two considerations, Justice L'Heureux-Dubé concluded that the distinction is discriminatory, so it violates the right to equality.[60]

Is the Discrimination Justifiable?

Once it is established that a *Charter* right has been violated, the government has the opportunity to defend the limit as reasonable and justified. Since five of the nine judges in this case – Justices L'Heureux-Dubé, McLachlin, Cory, Sopinka, and Iaccobucci – concluded that the right to equality was infringed, these judges also had to consider whether the infringement could be justified. Again, the judges divided on this issue. Justice Sopinka, writing for himself alone, held that the legislation could be justified. He emphasized that "the government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships."[61] He expressed concern that an overly aggressive approach by the courts could make governments reluctant to create new social benefit schemes, as the assessment of the costs of such programs would depend on an accurate prediction of the outcomes of *Charter* challenges.[62] He pointed out that Parliament had a history of consistently expanding the groups to whom the spousal benefit was provided, and that such an incremental approach was permissible.[63] Given that recognition of same-sex couples was a novel concept, he was not prepared to conclude that the lack of government action resulted in a *Charter* breach.[64] On the other hand, Justice Iacobucci – writing for himself and Justice Cory, with Justice McLachlin concurring – ruled that the discrimination could not be justified. He accepted that the spousal benefit was aimed at alleviating poverty in elderly households, and that this was a sufficiently important objective to limit a *Charter* right.[65] However, the legislation was underinclusive because it excluded same-sex elderly couples living in poverty.[66] The government had argued that the additional costs of extending the benefits to same-sex couples would be between $12 million and $37 million per year, and that this cost justified limiting the benefits to heterosexual couples. Justice Iacobucci ruled that even if the figures were accurate, they did not justify discriminating against same-sex couples.[67] He also rejected the argument that provincial benefits could make up for the denial of the spousal benefit, since these benefits came from different levels of government and there was no indication that the provincial benefit was intended to "fill the gap" created by the denial of the spousal benefit.[68] As well, he rejected Justice Sopinka's approach that allowed for incrementalism in government responses. Justice Iacobucci pointed out that this perspective raised the possibility that the government would always be able to uphold legislation that selectively

and discriminatorily allocates resources, which would belittle the purpose of the *Charter*.[69] Similarly, Justice L'Heureux-Dubé, writing for herself, ruled that the discrimination could not be justified. While she agreed that the objective of the legislation was pressing and substantial, she did not see the legislation as being rationally connected to that objective: "To find that this distinction is rationally connected to the objective of the legislation requires us to conclude that same-sex couples are so different from married couples that it would be unreasonable to make the same benefits available to both."[70] She pointed out that this presumption is itself discriminatory, so it cannot justify the legislation.[71] She similarly rejected the idea that the legislation impaired the right to equality as little as possible, since there was a reasonable alternative available.[72] And finally, she pointed out that the discriminatory effects of the legislation were quite severe: the right to a basic level of income for the elderly is a fundamental interest, and the denial of the benefit was a complete denial rather than a partial one.[73] In contrast, she pointed out that the only positive effect of the legislation was savings of public funds. The estimated additional cost, however, was only 2-4% of the total cost of the old age supplement program, and she emphasized that budgetary considerations will not always justify the infringement of a *Charter* right. She also called these savings "ostensible" because the government would have had to pay out this money if the affected persons had been in heterosexual relationships.[74] As well, like Justice Iacobucci, she rejected Justice Sopinka's emphasis on the novelty of the claim, saying that this approach would undermine the values the *Charter* was intended to protect.[75]

The End Result

In the end, four of the nine judges – Chief Justice Lamer and Justices La Forest, Gonthier and Major – concluded that the legislation did not discriminate because the distinction was relevant to the objective of the legislation. As a result, they ruled that the right to equality was not infringed. On the other hand, four other judges – Justices Cory, Iacobucci, McLachlin and L'Heureux-Dubé – concluded that the right to equality was infringed, and that that infringement could not be justified. The ninth judge, Justice Sopinka, concluded that the legislation did discriminate, but that the discrimination was justified given the novelty of recognizing same-sex couples and the need to allow the government to proceed incrementally in the extension of social benefits. As a result, a majority of the Court (five of the nine judges) upheld the legislation as constitutional. Adam Badari (July 22, 2010)

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[1] The other two cases were *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627. [2] *Egan v. Canada*, [1995] 2 S.C.R. 513. [3] *Ibid.* at para. 115. [4] *Canadian Charter of Rights and Freedoms*, *The Constitution Act, 1982*, being Schedule B to the*Canada Act 1982* (U.K.), 1982, c. 11, s. 1. [5] *Ibid.*, s. 15. [6] *Egan v. Canada*, *supra* note 2 at para. 7. [7] *Ibid.* at para. 8. [8] *Ibid.* at para. 9. [9] *Ibid.* at para. 10. [10] *Ibid.* at para. 11. [11] *Ibid.* at para. 12. [12] *Ibid.* at para. 5. [13] *Ibid.* at paras. 14-15. [14] *Ibid.* at paras. 17-18. [15] *Ibid.* at para. 21. [16] *Ibid.* at para. 22. [17] *Ibid.* at para. 23. [18] *Ibid.* at para. 25. [19] *Ibid.* at para. 27. [20] *Ibid.* at paras. 103, 113, 232. [21] *Ibid.* at

paras. 130-31. This approach was used previously in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143. [22] *Ibid.* at para. 132. [23] *Ibid.* at para. 141. [24] *Ibid.* at para. 149. [25] *Ibid.* at para. 151. [26] *Ibid.* at para. 143. [27] *Ibid.* at para. 144. [28] *Ibid.* at para. 153. [29] *Ibid.* at paras. 155-56. [30] *Ibid.* at paras. 158-161. [31] *Ibid.* at para. 164. [32] *Ibid.* at para. 167. [33] *Ibid.* at para. 171. [34] *Ibid.* at para. 173. [35] *Ibid.* at para. 175. [36] *Ibid.* at para. 178. [37] *Ibid.* at paras. 179-80. [38] *Ibid.* at para. 32. [39] *Ibid.* at para. 34. [40] *Ibid.* at para. 35. [41] *Ibid.* at para. 36. [42] *Ibid.* at para. 37. [43] *Ibid.* at para. 38. [44] *Ibid.* at para. 41. [45] *Ibid.* at para. 43. [46] *Ibid.* [47] *Ibid.* at para. 44. [48] *Ibid.* [49] *Ibid.* [50] *Ibid.* at para. 55. [51] *Ibid.* at para. 56. [52] *Ibid.* [53] *Ibid.* at para. 58. [54] *Ibid.* at para. 65. [55] *Ibid.* at para. 67-68. [56] *Ibid.* at para. 86. [57] *Ibid.* at para. 87. [58] *Ibid.* at para. 89. [59] *Ibid.* at para. 90. [60]*Ibid.* at para. 91. [61] *Ibid.* at para. 104. [62] *Ibid.* [63] *Ibid.* at paras. 106-08. [64] *Ibid.* at para. 111. [65] *Ibid.* at paras. 183-89. [66] *Ibid.* at paras. 190-91. [67] *Ibid.* at para. 193. [68] *Ibid.* at paras. 199-200. [69] *Ibid.* at para. 216. [70] *Ibid.* at para. 94. [71] *Ibid.* [72] *Ibid.* at para. 97. [73] *Ibid.* at para. 98. [74] *Ibid.* at para. 99. [75] *Ibid.* at para. 100.