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Laura Fraser

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RIGHTS WITHOUT MEANING: FAILING TO GIVE EFFECT TO THE PURPOSE OF SECTION 15(1)

LAURA FRASER†

The recent Supreme Court of Canada decision in *Egan v. Canada* has resulted in significant controversy and unanswered questions surrounding the status of homosexual couples. *Egan* has also raised doubts as to the status of the *Canadian Charter of Rights and Freedoms* section 15(1) analysis first announced in *Andrews v. Law Society of British Columbia* and later expanded in *R. v. Turpin*.

*Egan* was released concurrently with *Miron v. Trudel* and *Thibaudeau v. Canada*. All three cases in the trilogy dealt with alleged breaches of section 15(1). Because of the peculiar combination of Supreme Court Justices who supported the new approach, lower courts in subsequent discrimination cases have been inconsistently applying section 15(1). While most courts have followed the established *Andrews* test (endorsed McLachlin J. and three others in the trilogy), other lower courts have combined elements of the *Andrews* test with the new analysis. Others still have adopted the new analysis outright. In the resulting uncertainty, lower courts have reflected the lack of consensus on the proper approach to a section 15(1) analysis, and unfortunately may have assessed discrimination on the basis of reaching a desired outcome. These results have necessitated clear direction from the Supreme Court on section 15(1).


1 [1995] 2 S.C.R. 513 (hereinafter *Egan*).


I. THE PURPOSIVE APPROACH TO SECTION 15(1)

Andrews is the traditional starting point for a section 15(1) analysis. Where earlier cases had consistently held that any distinction made by the government was an infringement,7 Andrews introduced a measuring stick against which allegedly discriminatory laws could be gauged.8 The Court concluded that there were two criteria which had to be met in order for a Charter challenge to be successful: first, a breach of one of the four inequalities must have occurred and second, this breach of equality must have occurred with discrimination. This was taken from the section's text which reads:

15(1) Every individual is equal before the 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.

In discussing how to assess a breach of equality the court rejected the "similarly situated test" found in previous case law9 in favour of a promotion of equality approach.10 McIntyre J., writing for the majority on this issue, stated:

It is clear that the purpose of s.15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.11

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8 Ibid. at 904.
10 Supra note 3. At 163–171, McIntyre J. discusses the abstract views of equality in an attempt to determine exactly what kind of equality the Charter was attempting to protect. He rejects equality of application to similarly situated groups (at 168) in favour of the promotion of equality approach (at 171).
11 Supra note 3 at 171.
McIntyre J. further stressed the importance of the second component of section 15(1), the “discrimination” component, stating that the rights contained in this section “are granted with the direction in s.15 itself that they be without discrimination.”

He then went on to define what this means:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

The analysis undertaken by McIntyre J. in developing a section 15 analysis reflects the purposive approach to interpretation of Charter rights heralded by Dickson C.J.C. in R. v. Big M Drug Mart Ltd. as the approach which should be taken by the courts when interpreting Charter rights:

The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests [it is] meant to protect.

As Professor Hogg explains, the purposive approach involves:

[A]n attempt to ascertain the purpose of each Charter right, and then to interpret the right so as to include activity that comes within the purpose and exclude activity that does not . . . some guidance can be obtained from the language in which the right is expressed, from the implications to be drawn from the context in which the right is to be found. . . .

With respect to the “language in which the right is expressed,” L’Heureux-Dubé J. in Egan stated, “as an important starting point to evaluating the purpose of section 15(1), we need to look no

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12 Supra note 3 at 172.
13 Ibid. at 174.
15 Supra note 7 at 625.
further than its text."\(^\text{16}\) She then went on to discuss the second element expressed by Professor Hogg namely, the context in which the right is to be found.\(^\text{17}\) This interpretation of the purposive approach accords with the Supreme Court's decision in Turpin, where context was seen as a necessary consideration in any evaluation of discrimination. Wilson J. discussed this point:

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. . . . Accordingly, it is only by examining the larger context that a court can determine whether a differential treatment results in equality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.\(^\text{18}\)

While warning that "s.15 analysis may become a mechanical and sterile categorization process conducted entirely within four corners of the impugned legislation,"\(^\text{19}\) Wilson J. stressed the importance of a contextual approach to section 15, interpreted by Lessard et al. as one where "the individual . . . was situated in and only understood in reference to the larger social groupings and contexts."\(^\text{20}\) It is this consideration of context in Turpin, coupled with the original Andrews test, which subsequent jurisprudence seems to have adopted when assessing whether discrimination under section 15(1) has occurred. As Lamer C.J.C. summarizes in R. v. Swain:\(^\text{21}\)

The court must first determine whether a claimant has shown that one of the four basic equality rights has been denied. . . . This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal

\(^{16}\) Supra note 1 at 541.
\(^{17}\) Ibid. at 542.
\(^{18}\) Supra note 4 at 1331–2.
\(^{19}\) Ibid. at 1332.
characteristics. Next, the court must determine whether the denial can be said to result in 'discrimination.' This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant’s s.15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within an analogous ground, so as to ensure that the claim fits within the overall purpose of s.15—namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society. 22

In Egan this consideration of the section’s purpose and its contextual background runs afoul when four of the nine Supreme Court Justices consider, in addition, the relevance of the distinction made to the impugned legislation.

II. EGAN v. CANADA: FACTUAL BACKGROUND

James Egan and his partner John Nesbitt had been in a homosexual relationship since 1948. They were in what Cory J. described as an “intimate” and “mutually supportive” relationship, sharing bank accounts, credit cards and property. 23

Egan turned sixty-five on October 1st, 1986, and became eligible to receive old age security and a guaranteed income supplement, pursuant to provisions of the Old Age Security Act. 24

The Act also provided for a spousal allowance to be paid to the spouse of the pensioner when that spouse was between sixty and sixty-five years of age and the couple’s combined income fell below a fixed level. When Nesbitt turned sixty, he applied for this benefit, describing Egan as his spouse. His application was rejected by the Department of National Health and Welfare on the basis that Egan

22 Ibid. at 992.
23 Supra note 1 at 577.
and Nesbitt did not share a spousal relationship as contemplated in the Act. Section 2 of the Act provided:

'Spouse,' in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife. . . .

Egan and Nesbitt brought an action in the Federal Court, arguing that this definition of spouse discriminated on the basis of sexual orientation and so contravened section 15(1) of the Charter. They also sought a declaration to expand the definition to include "partners in same-sex relationships otherwise akin to conjugal relationships." The Trial Division dismissed the claim, as did the Federal Court of Appeal with the exception of Linden J.A. who, in dissent, found a section 15(1) infringement that could not be justified under section 1.

At the Supreme Court, Lamer C.J.C., La Forest, Major, and Gonthier, JJ. dismissed the appeal on the basis that section 2 of the Old Age Security Act did not infringe section 15(1), and added, without explanation, that the impugned legislation would be justified under section 1 even if it had been discriminatory. Sopinka J. also dismissed the appeal, but on the basis that section 2 infringed section 15(1) and was justified under section 1. Cory, L'Heureux-Dubé, Iacobucci, and McLachlin JJ., would have allowed the appeal finding an infringement that was not justified by section 1.

Although representing the majority in the outcome, the four justices led by La Forest J. were a minority with respect to the section 15(1) analysis. By establishing a test without regard to the wording of section 15(1) or the appropriate social and historical context, their decision represents a significant departure from previous Charter jurisprudence.

25 Supra note 1 at 578.
III. DEVIATION FROM PRECEDENT: FORGETTING THE PURPOSE OF SECTION 15

The minority led by La Forest J. based its decision on the unprecedented section 15(1) analysis released concurrently in *Miron*. Gonthier J. wrote what could be regarded as the original new test cited and applied by La Forest J. in *Egan*:

The analysis to be undertaken under s.15(1) of the Charter involves three steps. The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes 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 which it grants others . . . . It is at this second step that the direct or indirect effect of the legislation is examined.

_The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated in section 15(1) or one analogous thereto . . . . This third step comprises two aspects: determining the personal characteristic shared by a group and then assessing its relevancy having regard to the functional values underlying the legislation._ [emphasis added]^{28}

Lessard _et al._ interpret this new analysis as a strong rejection of earlier jurisprudence and in particular the previous focus on the "contextualized individual."^{29} They argue that this test bears no conceptual link to the enumerated or analogous grounds approach in *Andrews* as well as the pre-existing group context of disadvantage that approach required. I would agree, as it cannot be said that this test accords with the purposive approach, either literally or conceptually.

Literally, there is no clear mention of relevance in section 15(1) or in the definition of discrimination outlined in *Andrews* and

\[^{28} Supra \text{ note 5 at } 435-6.\]
\[^{29} Supra \text{ note 20 at } 90.\]
adopted in subsequent cases. The new analysis also disregards a contextual approach to determining legislative purpose. As noted by Lessard et al., Gonthier J. does acknowledge the importance of context in discrimination cases:

"[C]ontext is indispensable in helping to determine whether a given basis of distinction is a discriminatory ground for certain classes of cases but not for others." But as Lessard et al. state, this is "no more than an obligatory nod to past jurisprudential warnings about the aridity of decontextualized analysis." They further claim that "Justice Gonthier [in Miron] did not allow the larger social and historical pattern of Canadian society to enter into his analysis—although this is ... the context to which past judgments allude;" instead, Gonthier J. in Miron (and La Forest J. in Egan) conduct an "examination of the statute with a view to determining the functional values of the law." And, as these authors warn, this is the very context which section 15 aims to protect in the first place:

The result is that Gonthier J.'s test frames the equality issues at stake in terms of the very contexts—those of 'traditional values' and 'common sense'—that equality theory at its best must challenge. After all, it has been traditional values ... which have left us our rich legacy of discrimination .... [T]he context that shapes and constrains Gonthier J.'s analysis is precisely the context that a rigorous equality analysis demands be scrutinized.

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31 Supra note 20 at 91. See further, Gonthier J.'s analysis of the contextual approach in Miron, supra note 5 at 437–40.
32 Supra note 20 at 91.
33 Ibid. at 91. They note also that Gonthier J. actually rejects an analysis of social and historical context to enter into a determination of discrimination when it is stated [at 91] that "membership in such a disadvantaged group is not an essential precondition for bringing a claim under section 15 of the Charter." Further, "[t]o the extent that such context of disadvantage is relevant, it is only as an indication that the distinction in question drawn on the basis of an irrelevant personal characteristic."
34 Ibid. at 91.
35 Ibid. at 91.
The *Miron* test, and specifically its element of relevancy, is also out of line conceptually with a section 15(1) analysis, being more in accordance with the rational connection component of the section 1 analysis established in *R. v. Oakes*. This may be inferred from Gonthier J.'s own reasons:

> [T]he analysis under s. 15 of the *Charter* encompasses a determination as to whether the prejudicial distinction is attributable to or on the basis of an enumerated or analogous ground. Such a ground is identified as one that is commonly used to make distinctions which have little or no *rational connection* with the subject matter, generally reflecting a stereotype. [emphasis added]

There has been much discussion concerning the overlap of the *Miron* test with the section 1 analysis but this was not intended to be the focus of this comment. However, given Gonthier J.'s explanation of the role of relevancy in the section 15(1) analysis, it is clear that such a consideration accords more with a section 1 analysis than with a search for discrimination under section 15. As such, the usefulness of the purposive approach is strengthened when one considers the following comment by Professor Hogg:

> The purposive approach . . . works in perfect harmony with the stringent standard of justification under s.1. Once a right has been confined to its purpose, it seems obvious that a government ought to have to satisfy a stringent standard of justification to uphold legislation limiting the right.

By not considering the wording or context of section 15, Gonthier J., writing for the section 15(1) minority in *Egan*, failed to consider both the purpose of section 15 and the harmony that a section 15 analysis should have with section 1.

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37 *Supra* note 5 at 441.
38 In *Andrews*, *supra* note 3, McIntyre J. gave careful consideration to the interaction between sections 15(1) and 1 at 177–8 and again at 182–3. For greater discussion see also J. Keene, “Discrimination in the provision of government services and s.15 of the Charter: Making the Best of Judgments in *Egan* and *Miron*” (1995) 11 J. L. & Social Pol'y at 158–163.
39 *Supra* note 7 at 626.
IV. THE BASIS FOR RELEVANCE

The section 15(1) minorities in *Egan* and *Miron* did not elaborate on the purpose of the section as the basis for assessing relevancy, asserting throughout their reasons that they were adopting the test outlined in *Andrews*. Further support was found in an article by Professor Dale Gibson. With respect to McIntyre J.'s comments, the importance of relevancy was extracted from the following:

In other words, the admittedly unattainable ideal [of equality] should be that a law expressed to bind all should not because of *irrelevant personal differences* have a more burdensome or less beneficial impact on one than the other. [emphasis added]

Gonthier and La Forest JJ. argue that McIntyre J., in this statement, was trying to emphasize a *qualification* which the courts should keep in mind in assessing when an individual's right to equality under the *Charter* has been violated. As Gonthier J. states:

> My concern [with using relevance] has only been to clarify a qualification which must be made in the application of the analogous grounds approach, a qualification which merely calls for a heightened sensitivity to the nature of the ground in issue in any given case, and a recognition that a ground which may be the basis of discrimination in one context may be innocuous in another.

It may be argued, however, that McIntyre J. did not intend such emphasis be placed on relevance. If he had, it is likely that such a limitation to an individual's equality rights would have been discussed in greater detail as the section 15(1) test was developed. For example, McIntyre J. specifically outlines certain factors which must be considered when resolving equality questions under the *Charter*:

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40 *Supra* note 3. In *Miron*, *supra* note 5 at 442, Gonthier J. also states: "I should also emphasize that the approach to s.15 in these reasons in no way departs from this court's approach in *Andrews* . . . and in subsequent jurisprudence."


42 *Supra* note 3 at 165.

43 *Supra* note 5 at 442.
The test cannot be accepted as a fixed rule or formula for the resolution of equality arising under the Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula. [emphasis added] 44

The importance of not reducing the section 15(1) analysis to one formula has been recognized in post-Andrews jurisprudence. But it is clear from this statement and throughout McIntyre J.'s decision that relevancy was not a consideration intended to play a part in the section 15(1) analysis, especially since relevance has already been shown to play a stronger role in the section 1 analysis. 45

Gonthier J. drew further support from Professor Gibson's argument in "Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado About Next to Nothing," 46 stating that the ingredient of the relevancy of the personal characteristic went to the "essential core" of the Supreme Court's section 15(1) jurisprudence. 47 In the same article, however, Gibson also states that the discrimination analysis is one defined by "those differences which cannot be reasonably justified in the particular context" [emphasis added]. 48 Taking the term "justified" literally, it seems as though credence is further laid to the proposition that a relevancy analysis is not in accordance with the test for equality under section 15(1), but better placed under section 1 where the onus is properly on the state to "justify" why a particular distinction was made in any given context. 49

44 Supra note 3 at 168.
45 An analysis which McIntyre J. himself emphasized as one which should remain separate from the section 15(1) test when evaluating a case of discrimination under the Charter. See Andrews, supra note 3 at 177–8.
46 Supra note 41.
47 Supra note 5 at 436.
48 Supra note 41.
49 As McIntyre J. stressed in Andrews, supra note 3 at 178:

The court has described the analytical approach to the Charter in R. v. Oakes . . . and other cases, the essential feature of which is
Some lower courts in Canada have adopted and applied the new analysis from *Egan* and *Miron*, leaving the law surrounding section 15(1) uncertain. Given the different approaches to section 15(1) in these cases, many lower court decisions have either applied one of these tests or both, claiming that the decision would remain the same under each. As Charron J. states in *Rosenberg v. Canada (A.G.)*:

> [I]t is debatable whether courts of inferior jurisdiction, in a subsequent case . . . are bound by the finding made by five of the nine justices on the s.15(1) issue since only one of these five justices formed part of the ultimate majority who governed the final outcome of the case.

In the end, Charron J. adopts the two step *Andrews* analysis:

> [W]hen one considers *Egan v. Canada* in combination with *Miron v. Trudel*, it is clear that by majority ruling the Supreme Court has adopted a two-step analysis to the question of s.15 discrimination.

This result seems logical when one considers that a total of five of the nine Justices adopted the original test in both *Egan* and *Miron*. Nevertheless, other decisions have interpreted *Egan* and *Miron* as representative of the Supreme Court’s uncertainty around a section 15(1) *Charter* analysis. For example, Hutchinson J.A. in *Grigg v. British Columbia* states:

> [T]he apparent divergence in approach is yet unsettled and no real consensus emerges from a reading and analysis of the trilogy. Both *Miron* and *Egan* illustrate the difficulty lower courts must face under s.15 challenges as

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50 L’Heureux-Dube J. also presented a slightly different approach in *Egan* but her analysis has not resulted in any substantial departure from precedent. See *Thibaudeau v. Canada*, supra note 6 at 640.


52 *Supra* note 2 at 620.

53 Aside from the slight departure in L’Heureux-Dubé J.’s decision.
either majority approach could be utilized to arrive at a desired result. [emphasis added]54

This analysis can be validated in light of those cases which denied an equality claim under the Charter on the basis that the distinction made by Parliament was relevant to the purpose the impugned legislation was trying to achieve. See for example, Tinkham v. Canada55 and Little Sisters Book and Art Emporium v. Canada56 where the new analysis in Egan was cited as the “principle majority judgment” to deny equality claims to complainants.57

Other courts under section 15 have simply been confused by the new analysis and have opted to follow the traditional approach. For example, in Human Rights Commission (Nfld.) et al. v. Newfoundland (Minister of Employment and Labour Relations), Barry J. stated:

On the issue of whether this Court must consider if the distinction made by Parliament is relevant to the functional values underlying the law, with respect, I am unable to understand the point made by Gonthier J. in Miron . . . that, even where a distinction is based on an irrelevant personal characteristic, it may still be rationally connected to a pressing and substantial governmental objective. I prefer the view . . . that relevance should come into the analysis of whether there is a justification under section 1 for the distinction drawn by the law. Otherwise the courts will be returning to the ‘reasonableness’ theory of discrimination rejected in Andrews . . . .58

Barry J.’s comments were cited by Epstein J. of the Ontario General Division Court in M v. H where she further added that the determination of relevancy is “more appropriately dealt with in the s.1 analysis.”59

57 Ibid. at 279 as per Smith J. See further, Olson v. Canada (1996), 107 F.T.R. 81 and N.B. (Minister of Health & Community Services) v. G. (J.) (1996), 131 D.L.R. (4th) 273 (N.B.Q.B.), where the new test in Egan and Miron was directly applied to deny the plaintiff’s claims.
59 (1996), 27 O.R. (3d) 593 at 604 (Gen. Div.).
As in Rosenberg, much of the lower court jurisprudence has held that the two part Andrews analysis is the proper measuring stick with which to gauge a case of discrimination under section 15(1) and further verifies that this test properly gives effect to the purposes underlying the section. In Mohammed v. Metro Toronto, for example, the Ontario Court of Appeal stated:

Ultimately, therefore, the question which must be addressed under [the enumerated and analogous grounds] approach is whether the distinction has a prejudicial effect on the individual or group in light of s.15's fundamental purpose... I agree with the comments of McLachlin and Cory in Miron... and Egan... that the concept of relevance is more properly considered under s.1.

It should be noted, however, that these decisions also qualify their approach by stating that the result would have been the same in each case had either section 15(1) analysis been used.

In light of these decisions it is difficult to determine where the law will go with respect to the appropriate analysis under section 15(1) of the Charter. It is clear, however, that the law is unsettled and will continue to be until the Supreme Court of Canada has had an opportunity to rectify these interpretations of its decisions in Egan and Miron.

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