Equality Rights and Sexual Orientation

Vriend v. Alberta[i]

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Delwin Vriend was terminated from his employment at a Christian college because of his sexual orientation. The Alberta Human Rights and Citizenship Commission refused to investigate his claim because the *Individual Rights Protection Act*[ii] (IRPA) did not include sexual orientation as a prohibited ground of discrimination. Vriend brought an action against the Alberta government for its failure to include sexual orientation in the IRPA.

In 1994, the Alberta Court of Queen's Bench ruled in Vriend v. Alberta that sexual orientation must be added to the IRPA.[iii] The Alberta Court of Appeal reversed this decision.[iv] Vriend appealed to the Supreme Court of Canada (SCC).

The SCC unanimously held that the Alberta government's omission of sexual orientation from the IRPA violated section 15(1) of the *Canadian Charter of Rights and Freedoms*[v] The Court found that the legislation drew a distinction between homosexuals and heterosexuals in that "the exclusion of the ground of sexual orientation…clearly has a disproportionate impact on [homosexuals] as opposed to heterosexuals."[vi] The omission "sends a strong and sinister message," suggesting that "discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination."[vii] The SCC found that the omission was not justified under section 1 of the *Charter*. As a result, the majority of the SCC judges concluded that the proper remedy was to read sexual orientation into the IRPA.

Impact of *Vriend*

The *Vriend* decision has had many significant consequences on the Canadian legal system. We now know that a) legislative omissions may invoke a *Charter* application; b) there can be a *Charter* application regarding private (non-governmental) activity; and c) there are specific issues courts must take into consideration when determining whether "reading in" (interpreting the Act as if the omitted portion was present) is an appropriate remedy.

(a) Legislative Omissions

A legislative omission is a non-positive act done by a government. In *Vriend*, the legislative omission was the Alberta legislature's decision not to include sexual orientation as a prohibited ground of discrimination under the IRPA.

Section 32(1)(b) states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each

province".[viii] The SCC ruled that this section is broad enough to allow the *Charter* to apply to legislative omissions.[ix] However, not all government omissions are subject to *Charter* review. The IRPA is a legislative Act; therefore it is a "matter within the authority of the legislature."[x]

One criticism of *Vriend* is that the majority of the SCC did not set out in its decision which legislative omissions will be subjected to *Charter* review.[xi]

(b) Private Activity

In 1986, the Supreme Court held that the *Charter* does not apply to the private action of private actors (*Dolphin Delivery*).[xii]

The IRPA regulates private activity, however, the SCC held that applying the *Charter* to the IRPA was not applying it to private activity. The IRPA is provincial legislation. It would be improper for legislation that regulated private activity to be immune from *Charter* review.[xiii] "Were it not the case, then the governments of Canada would be virtually immune from *Charter* scrutiny, since virtually all legislation regulates private activity."[xiv]

Many academic commentators disagree with the SCC. They suggest that the Court extended the application of the Charter to private activities, thus overruling *Dolphin Delivery*. They argue that the *Charter* compels Parliament and provincial legislatures to compel private actors to abide by Charter values in their private conduct. According to these critics, by extending the *Charter* to legislative omissions, the Supreme Court extended the *Charter* to private activities.[xv]

(c) Reading In

When courts "read in" to an Act or Regulation, they are interpreting that section of the legislation as if the omitted portion was actually present. In determining whether the remedy of reading in is appropriate, courts must take into consideration the role of the legislature and the role of the *Charter*.[xvi]

According to the accepted principle of judicial deference, courts should interfere with legislative purposes as minimally as possible. Therefore, courts must be cautious when reading in and must "be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."[xvii]

The *Charter*, like the IRPA, sets out the rights and freedoms that Canadians believe are necessary in a free and democratic society.

The SCC held that it would be appropriate to read in only when it would not interfere with the objective of the legislation.[xviii] The Court also stated that some interference with the legislative objective can never be avoided when dealing with a *Charter* challenge.[xix] "Therefore, the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had

known that its chosen measures would be found unconstitutional."[xx]

Sources

- *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- *Individual Rights Protection Act*, R.S.A. 1980, c. I-2.
- Timothy Macklem, "*Vriend v. Alberta*: Making the Private Public" (1999) 44 McGill L.J. 197.
- *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.
- *Vriend v. Alberta* (1994), 18 Alta. L.R. (3d) 286 (Alta. Q.B.).
- *Vriend v. Alberta* (1996), 37 Alta. L.R. (3d) 364 (Alta. C.A.).
- *Vriend v. Alberta* [1998] 1 S.C.R. 493.

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[i] *Vriend v. Alberta,* [1998] 1 S.C.R. 493 .
[ii] *Individual Rights Protection Act*, R.S.A. 1980, c. I-2.
[iii] *Vriend v. Alberta* (1994), 18 Alta. L.R. (3d) 286 (Q.B.).
[iv] *Vriend v. Alberta* (1996), 37 Alta. L.R. (3d) 364 (C.A.).
[v] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 .
[vi] *Vriend,* supra note i at para 82.
[vii] Ibid. at para 100.
[viii] *Charter*, supra note v at s.32(1)(b).
[ix] *Vriend*, supra note i at para 60.
[x] Ibid. at para 52.
[xi] Timothy Macklem, "*Vriend v. Alberta*: Making the Private Public" (1999) 44 McGill L.J. 197 [Macklem].
[xii] *R.W.D.S.U. v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573.
[xiii] *Vriend*, supra note i at para 65.
[xiv] Macklem, supra note xi at 218.
[xv] For example, see Macklem; Lisa Gotell, "Queering Law: Not by Vriend" (2002) 1 Can. L.J. & Soc'y 89.
[xvi] Ibid. at para 148.
[xvii] Ibid. at para 149.
[xviii] Ibid. at para 165.
[xix] Ibid. at para 166.
[xx] Ibid. at para 167.