

# The incredible expanding Code: *Vriend v. Alberta*

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## Two aspects of the *Vriend* decision are troubling: first, its apparent expansion of Charter equality jurisprudence and, second, its potential implication for the administration of human rights legislation across Canada.

The public controversy following the release of the Supreme Court of Canada's decision in the *Vriend* case seemed to centre on the court's choice of remedy. The court granted an immediate declaration reading "sexual orientation" into Alberta's *Individual Rights Protection Act* (IRPA), thereby extending the scope of the Act to prohibit private sector discrimination against gays and lesbians. The Alberta government had sought a temporary suspension of the declaration to permit the Alberta legislature to consider the court's decision and come up with its own legislative response. In his otherwise concurring opinion, Justice Major would have granted such a suspension for a period of one year to give the Alberta legislature the "opportunity to bring the impugned provisions into line with its constitutional obligations."

I am not troubled by the court's choice of remedy. It strikes me that if the court's decision that the absence of "sexual orientation" from the IRPA infringed s. 15(1) of the Charter is correct, then the inclusion of "sexual orientation" is the only appropriate remedy and the court was right to so order. I could never understand why the Alberta government was so keen to have the court put the issue back on the legislative agenda. If the Alberta government knew of some other means to amend the IRPA to meet its constitutional obligations, it has been free to follow such an alternative course for over a year now. The fact that it has not pursued any alternatives suggests that there aren't any.

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In deciding that the absence of sexual orientation from the IRPA does cre-

ate a distinction (the first step in s. 15(1) analysis), the court concluded that "the distinction is simultaneously drawn along two different lines":

The first is the distinction between homosexuals, on the one hand, and other disadvantaged groups which are protected under the Act, on the other. ...

The second distinction ... is between homosexuals and heterosexuals.

The first distinction is something new to equality jurisprudence. Formerly, equality jurisprudence had always been based on what I would describe as symmetrical distinctions. Distinctions could be based

on sex (men/women), race (whites/non-whites), age (over 65/under 65), etc. The included and excluded groups were mutually exclusive. The notion that distinctions between disadvantaged groups can meet the first step of the s. 15(1) analysis is difficult to reconcile with the wording and purpose of s. 15.

For example, pay equity for women draws a distinction between women who are protected under the Act and "other disadvantaged groups" who are not protected. Pay equity does not attempt to remedy systemic inequities arising out of other grounds of discrimination like race or disability. Pay equity legislation does not, however, discriminate on the basis of race or disability since all women (the included group) are protected regardless of race or disability. Protecting women from systemic sex discrimination does not discriminate against racial minorities because women and racial minorities are not mutually exclusive groups. The law simply does not draw distinctions on the basis of any ground of discrimination enumerated in s. 15(1).

There is a real danger to extending s. 15(1) to prohibit asymmetrical distinctions *between* the enumerated grounds. If legislatures think they cannot provide benefits like pay equity to some disadvantaged groups without including every disadvantaged group covered by every enumerated and conceivably analogous ground, social policy reform is more likely to be impeded than advanced.

If the IRPA is to be found to infringe s. 15 of the Charter, it must be on the basis of the second, symmetrical distinction between homosexuals and heterosexuals identified by the court. Indeed, the court did recognize that this distinction was "the more fundamental" one, and it is unfortunate that it did not restrict its analysis to this basis.

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The second troubling aspect of the *Vriend* decision is its potential implication for the administration of human rights legislation. In *Andrews v. Law Society*, the Supreme Court of Canada recognized that a fundamental distinction between human rights legislation and the Charter is that "Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden." Section 15(1) of the Charter is not so limited.

Open-textured provisions like Charter s. 15 are often found in constitutional documents because constitutions are difficult to amend and must adapt by means of judicial interpretation. In contrast, such open-textured provisions are generally not appropriate in the context of an administrative scheme that can be amended by the legislature and must be written so as to give the administrative agency and the affected parties reasonable notice of their statutory rights and obligations.

There is serious concern that the *Vriend* decision may be interpreted as requiring human rights legislation to "mirror" Charter s. 1(1) by being open ended in order to prohibit any ground of discrimination that a court might hold is analogous to those listed in Charter s. 15(1).

While the unlimited expansion of human rights legislation may have some surface appeal, it is problematic. The history of human rights legislation shows an evolving expansion of the prohibited grounds of discrimination. Successive amendments expanded the prohibited grounds on the basis of the legislature's assessment as to those in the greatest need of its protection and benefit.

At each amendment the legislature had to consider the effect of including additional prohibited grounds in the legislation, including whether the Human Rights Commission has sufficient staff and resources to administer and enforce an expanded Code, and whether such an expansion could weaken human rights by spreading the commission's ef-

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orts too thinly. Expansion of the grounds of discrimination could undermine the ability of the commission to deal effectively with the prohibited grounds of discrimination in its current mandate.

This factor was recognized by the Ontario Human Rights Commission in its 1977 report *Life Together: A Report of Human Rights in Ontario*. The commission stated (at 55-56):

But simply to include more prohibited grounds in the legislation is not enough. The Commission has neither enough staff nor enough funds to administer and enforce the present Act, much less an expanded Code. Even if more adequate resources were provided, there would remain the problem of diffusion. That is, the Commission's efforts to protect human rights could be weakened by spreading these efforts too thinly. If the Code is broadened too much, there is danger that the Commission would be required by law to handle complaints under so many categories of discrimination that it might not be able to deal effectively

with even the most serious problem areas, for example racial discrimination. In some southern jurisdictions in the United States, people with racist views have been known to favour the addition of new grounds to human rights legislation for this very reason. Each new area of responsibility added to the workload of their Commission reduced its ability to protect human rights, particularly when staff and financial resources were not provided to help cope with these added responsibilities. ...

The Ontario Human Rights Commission is concerned that its ability to deal with major problems of discrimination should not be reduced by an undue expansion of the Code, or by an extension of responsibilities that is not accompanied by the provision of adequate resources.

Like the proverbial straw that broke the camel's back, it will be difficult for any government to demonstrate under Charter s. 1 that adding "just one more" analogous ground will over burden the administrative scheme.

The problem of an "open-ended" Code is particularly acute given the fact that the identity of the "analogous grounds" under Charter s. 15 are unknown and may change from time to time. The category of analogous grounds is an open-ended concept dependent not only on the context of the law, which is subject to challenge, but also on the context of the place of the affected group in the entire social, political, and legal fabric of our society. In considering whether a certain distinction is based on an analogous ground of discrimination, the Supreme Court has been careful not to close the category of analogous grounds. Even in cases where the court has held that a particular distinction is not based on an analogous ground of discrimination, it has often noted that the same classification might still be an analogous ground in a different context.

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Requiring Human Rights Codes to mirror Charter s. 15 would create a situation of perpetual uncertainty; neither the Human Rights Commission nor persons to whom the Code may apply would know whether conduct was proscribed by the Code until after a judicial determination. Since the Supreme Court of Canada decided in *Bell v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 that human rights commissions have no jurisdictions to consider Charter issues, this would turn the administrative scheme on its head by requiring a judicial determination before the administrative process could proceed.

The Supreme Court appeared to appreciate that open-ended human rights legislation was not necessarily desirable, and dismissed concerns that the consequence of its decision may be that human rights legislation will be forced to mirror the Charter as "too simplistic." The court stated (at para. 106):

It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the Charter in all cases ... However, the notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the Charter would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other

cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the Charter, deference may be shown to this choice, so long as the tests for justification under s.1, including rational connection, are satisfied.

While I take some comfort in these words, the court has not articulated a principled basis for distinguishing between those analogous grounds that must be added from those that need not. This places human rights commissions across the country in the position of not knowing either what the analogous grounds may be or whether any particular omission will be constitutional. ❀

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continue to invite the "judicial activism" many of them purport to abhor. ❀

- 1 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
- 2 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.
- 3 *Ibid.*, at paras. 75-76.
- 4 *Supra* note 1, at paras. 134-135.
- 5 *Ibid.*, at para. 176.
- 6 *Ibid.*, at para. 100.
- 7 *Ibid.*, at para. 82.
- 8 *Ibid.*, at para. 100.
- 9 *Ibid.*, at paras. 109-111.
- 10 *Ibid.*, at para 116.
- 11 *Ibid.*, at para. 102.
- 12 See Ted Morton, "Vriend: A Misinterpretation of the Charter," <http://www.pagusmundi.com/acsa/badlaw.htm>. Justice McClung, in his opinion in *Vriend* at the Alberta Court of Appeal, insinuated that the

- addition of sexual orientation to s. 15 by the judges was illegitimate since it had been "emphatically rejected by Parliament's agency, the Commons Justice Committee." *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, at 617.
- 13 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 316 and 319.
- 14 *Minutes and Proceedings of the Special Joint Committee on the Constitution*, 1980-81, 29 January 1981, at 48:34.
- 15 As Justice Minister Chrétien explained, "there are other grounds of discrimination that will be defined by the courts ... we do not think it should be a list that can go on forever." *Ibid.*, at 48:33.
- 16 *Per* McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

- 17 *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, at 609.
- 18 Ted Morton, "Vriend: The Negative Policy Consequences," <http://www.pagusmundi.com/acsa/badpolicy.htm>.
- 19 *Alberta Report*, April 20, 1998, at 14.
- 20 *Ibid.*, at 17.
- 21 See Bill 12, the *Domestic Relations Amendment Act, 1999*, which received Royal Assent on May 19, 1999. The Bill was introduced in response to a ruling of the Alberta Court of Appeal that the Act discriminates on the basis of marital status: *Taylor v. Rossu* (1998), 161 D.L.R. (4th) 266.
- 22 *M. v. H.*, [1999] S.C.J. no. 23.
- 23 "Polls Put Lie to Myth that Albertans Intolerant," *National Post*, 30 March 1999.
- 24 "Klein hopes to give voters a veto on the constitution," *National Post*, 18 March 1999.