Outing Prejudice

BY BRUCE RYDER

Bruce Ryder is an associate professor at Osgoode Hall Law School, York University.

In 1998, the Supreme Court issued two forceful rulings countering the view that "majority rules" is an exhaustive statement of the principles that ought to guide the resolution of controversial constitutional issues. The first salvo came in the *Vriend*[1] ruling, which responded directly to an Alberta variant of populist majoritarianism. The second came in the *Secession Reference*,[2] where the court took on the Québécois version. What these two opinions on very different issues have in common is the eloquent defence of the view that Canadian constitutional democracy rests on a web of principles much richer than simple majoritarianism. Forced to defend their positions on the terrain of reasoned argument, rather than by reliance on thinly disguised bigotry or impassioned slogans, the legal frailties of the populist majoritarian positions were effectively exposed by the Supreme Court. The court crafted opinions that read like civics lessons directed at its critics, especially the populist majoritarians who decry as illegitimate activism the judicial imposition of constitutional limits on the exercise of legislative or executive power.

The Quebec government refused to participate in the *Secession Reference* hearings on the grounds that constitutional law had nothing to do with Quebec's potential accession to sovereignty. Rather, Quebec's future political status was a question to be decided by a majority of voters and the National Assembly unconstrained by constitutional obligations. In response, the court's opinion affirmed that "the essence of constitutional democracy" is more than "a system of simple majority rule."[3] The power of any majority is constrained by the principles of constitutionalism, federalism, and the rights of minorities. The court went on to indicate that without advance agreement on a clear referendum question, what constitutes a clear majority, and the process to be followed after a referendum vote in favour of secession, other Canadian governments have no duty to negotiate secession. Any future Quebec government that seeks a mandate to secede has thus been rendered accountable not just to a majority of Quebeckers, but also to other actors with a stake in existing constitutional arrangements.

The courts should be applauded when they do not bow to the pressures created by this cynical ploy.

The Alberta government's strategy in the *Vriend* case was similar to Quebec's position on the *Secession Reference*. The government argued that the legislative assembly's decision to leave discrimination on the basis of sexual orientation in the closet, unacknowledged and legally invisible, was a decision that did not have to be accounted for in constitutional litigation. It was a question to be decided by the legislative assembly who were accountable only to a majority of voters in the province. In response, the court noted that the Charter had introduced a "new social contract" and "a redefinition of our democracy."[4] Canadian constitutional democracy means more than majority rule; it requires "that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make." Where that has not occurred, judicial intervention "is warranted to correct a democratic process that has acted improperly."[5]

The court's decision in *Vriend* was notable for its clear refusal to countenance the Alberta government's attempts to leave anti-gay prejudice securely tucked away in a legal closet. It did so by developing a strong analysis of "adverse effects" discrimination at the s. 15 stage of analysis, and by insisting that the government present a compelling rationale for its failure to provide any protection against discrimination to gays and lesbians at the s. 1 stage of analysis.

SILENCE AS DISCRIMINATION

Only by studiously ignoring social reality as experienced by a minority of Albertan citizens could the government submit that its failure to add the words "sexual orientation" to its anti-discrimination legislation was a "neutral silence" to which the Charter did not apply. By examining this submission "in the context of the social reality of discrimination against gays and lesbians,"[6] Cory J. was able to demonstrate that the legislature was claiming a right to remain neutral in the face of evidence of discrimination against gays and lesbians, even thought it had not remained neutral about the other most common and socially destructive forms of discrimination. Section 15 of the Charter, however, is decidedly not "neutral" about discrimination. Moreover, case law prior to *Vriend* had made clear that s. 15, like most other Charter rights and freedoms, imposes a mix of positive and negative obligations on the state, and thus can be violated by either state action or inaction that imposes differential treatment on a disadvantaged group. Justice Cory pointed out that the omission of sexual orientation imposed differential treatment between gays and lesbians and other protected groups, and, more fundamentally, between gays and lesbians and heterosexuals, since the latter group has "no complaints to make concerning sexual orientation."[7] Moreover, he wrote, Alberta's failure to act had sent out "a strong and sinister

message"; "it is tantamount to condoning or even encouraging discriminations against lesbians and gay men."[8]

SILENCE AND SECTION 1

The Alberta government had no more success in attempting to rely on silence as a cover for anti-gay prejudice at the section 1 stage of the Charter analysis than it had under s. 15. The most important aspect of Iacobucci J.'s s. 1 analysis was his insistence that a law that violates Charter rights cannot be upheld unless the government can demonstrate that the objective of the law as a whole *and* the objective of the particular infringing provision are *both* "pressing and substantial."[9] The courts have not always been consistent in insisting that the infringing measure itself be a focus of examination in the s. 1 analysis. As a result, a government's reliance on prejudicial reasoning can be left unexamined and governments permitted to defend the indefensible. The *Egan* ruling is a case in point. The majority of the court did not demand that the government demonstrate how a complete denial of old age spousal allowances to same-sex couples was related to a non-discriminatory state objective.

The *Vriend* ruling, in contrast, pursues the implications of equality principles into the s. 1 analysis in a manner that bodes ill for state-sanctioned prejudice of all kinds. The court noted that the Alberta human rights legislation itself has a pressing and substantial objective—the protection of all persons from discrimination. However, the Alberta government offered the court no submissions on the objective of the infringing measure—namely, the omission of sexual orientation. Choosing silence before the court was no doubt less incriminating than presenting rationales that inevitably would have promoted the view that gays and lesbians are less worthy of concern and respect. Governments, however, have no s. 1 right of silence. They have the burden of presenting reasoned justifications for Charter violations. The conclusion was unavoidable that there was no "discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights."[10]

When the misrepresentations and faulty logic are stripped away, the defenders of the Alberta government in the *Vriend* saga are revealed as proponents of the bigoted view that society is better off if private employers, landlords, and service providers are permitted by law to discriminate against persons who are, or are perceived to be, gay or lesbian.

If the focus of the s. 1 analysis is kept on the infringing measure in future decisions involving legislation that completely fails to recognize the rights of gays and lesbians, those exclusions will similarly be doomed by governments' inability to present anything other than discriminatory rationales for them. For example, courts will have no difficulty finding that the overall objectives of statutes dealing with the rights and responsibilities of family members are pressing and substantial. However, typically the exclusion of same-sex couples from these statutes has no discernible objective and is indeed counter to the achievement of the legislative goals.

ILLEGITIMATE JUDICIAL ACTIVISM?

Justice Cory built a persuasive case in *Vriend* that Alberta was seeking to defend inaction that "demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canadian society."[11] There are, of course, some who believe that governments should be free to perpetrate this view without Charter impediments, and thus they take issue with the recognition of sexual orientation as an analogous ground of discrimination by the court in *Egan* and *Vriend*. The defenders of discrimination against gays and lesbians have argued that the Supreme Court has engaged in illegitimate judicial activism by ignoring the deliberate decision by the drafters of the Charter to omit the words "sexual orientation" from the text of s. 15.[12]

It is true, as La Forest J. argued in the *Provincial Judges Reference*, that courts lack democratic legitimacy when they "attempt to limit the power of legislatures without recourse to express textual authority. ... To assert otherwise is to subvert the democratic foundation of judicial review."[13] The Supreme Court opinions in the *Provincial Judges Reference* and the *Secession Reference* relied on this kind of illegitimate interpretive methodology, inventing legal obligations that had no grounding in any provision of the constitutional text. But at issue here is a text, s. 15, that does not expressly exclude any ground of discrimination and leaves open the possibility of recognition of unlisted grounds. Let us assume, for the purposes of argument, the controversial assertion that the intention of the drafters should determine the interpretation of ambiguous constitutional texts, and let us further assume that we can overcome the practical difficulties of identifying the relevant drafters and their clear intention on controversial issues. Then can we not conclude that the rejection of amendments that would have added

Outing prejudice, page 76

Outing prejudice continued from page 75

marital status and sexual orientation to the text of s. 15 by the parliamentary committee studying the draft Charter in 1981[14] ought to have determined its judicial interpretation? The answer is no, because committee members were aware that the list of grounds of discrimination prohibited by s. 15 was open-ended. It was not an exhaustive list; the task of identifying other prohibited grounds of discrimination was deliberately left to the courts.[15]

The *Vriend* ruling, then, is not one in which Supreme Court judges have imperilled their legitimacy by infidelity to legislative intent or constitutional text. The legislative intent was to leave to the courts to decide whether sexual orientation is, like the listed grounds and other analogous grounds, one of "the most common" and "most socially destructive and historically practised bases of discrimination."[16] Thus, the court can hardly be faulted for undertaking in *Egan* and *Vriend* precisely the task that the framers intended them to undertake with s. 15.

PREJUDICE VERSUS EQUALITY

When the misrepresentations and faulty logic are stripped away, the defenders of the Alberta government in the *Vriend* saga are revealed as proponents of the bigoted view that society is better off if private employers, landlords, and service providers are permitted by law to discriminate against persons who are, or are perceived to be, gay or lesbian. Bigotry was evident, for example, in Justice McClung's statement that he could not accept that it is an illegitimate "legislative response for the Province of Alberta to step back from the validation of homosexual relations, including sodomy, as a protected and fundamental right, thereby 'rebutting a millennia of moral teaching.'"[17] Similarly, Ted Morton has argued that good government policy allows individuals to be fired from their jobs and denied accommodation or access to services solely because of their actual or suspected sexual orientation in order to respect "the freedom of choice and association of those of us who think homosexuality is unnatural and unhealthy."[18] That is, the right to act on bigotry should trump the right to equality. When prejudice emerged loudly from the closet in response to *Vriend*, Premier Klein was fortified in his decision to let the ruling stand. He remarked that "we have people out there writing letters that quite frankly make your stomach turn."[19] Under intense pressure to invoke the notwithstanding clause in s. 33 of the Charter, Klein opted instead to take a public stand in favour of the court's ruling. He stated that "it's morally wrong to discriminate on the basis of sexual orientation" and his government took steps to educate Albertans about the meaning and impact of *Vriend*.[20]

A poll commissioned by the Alberta government found that 57 percent of Albertans believe same-sex couples should have the same rights as common law heterosexual couples. The legislative process in Alberta has in fact not even responded to the wishes of the majority, never mind the gay and lesbian minority.

However, the Klein government, like all other Canadian governments apart from Quebec and British Columbia, has yet to demonstrate any intention of exercising moral leadership in removing legal discrimination against same-sex couples. A bill passed by the Alberta legislature on May 19, 1999 confers spousal support rights and obligations on unmarried heterosexual couples, but not same-sex couples.[21] The *M. v. H.* ruling released the following day quickly confirmed the unconstitutionality of that omission.[22]

Earlier in 1999, a poll commissioned by the Alberta government found that 57 percent of Albertans believe same-sex couples should have the same rights as common law heterosexual couples.[23] The legislative process in Alberta has in fact not even responded to the wishes of the majority, never mind the gay and lesbian minority. The growing public support of the equality rights of same-sex couples makes it unlikely that the Klein government will use the notwithstanding clause in the wake of the *M. v. H.* ruling to "erect fences" around Alberta legislation conferring rights and responsibilities on family members. This is particularly so since the same poll indicated that 69 percent of Albertans believe that the notwithstanding clause should be invoked only after a clear vote of support in a referendum—a position the Klein government is considering enacting into law.[24]

It may be that the government of Alberta, like its counterparts in Ottawa and other provinces, will be content to leave the burden of achieving legal equality for same-sex spouses to lesbian and gay litigants and the courts. We may continue to endure the spectacle of legislators who ignore what they fear are unpopular constitutional responsibilities and then condemn the courts for failing to do the same. The courts should be applauded when they do not bow to the pressures created by this cynical ploy. If legislators do not take on their share of responsibility for eliminating legal discrimination, they will

Outing prejudice, page 80

Incredible expanding Code continued from page 79

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.

Outing prejudice continued from page 76

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.