

# Vriend v. Alberta: Judicial Power at the Crossroads?

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The Supreme Court's 1998 ruling in *Vriend v. Alberta* is a remarkable decision. Its distinction is not just that it addresses the controversial issue of gay rights, but that it embodies almost all the elements that constitute the court's new Charter-based power. As such, it serves as a marker for where we as a nation have been and where we might be heading with respect to the balance of power between legislatures and courts.

The friends of Charter-based judicial power—whom I designate as the "Court Party"—regard *Vriend* as the court's "moral supernova" of the nineties, a term once used in American circles to describe their Supreme Court's landmark 1954 desegregation ruling, *Brown v. Board of Education*. To its critics—of which I am one—*Vriend* is nothing more than a partisan judicial power grab, the culmination of a well-orchestrated interest group litigation campaign to persuade judges to take sides in an essentially political dispute. *Vriend* culminates a decade and a half of ever-bolder assertions of judicial policy making—to the applause of its admirers and to the dismay of its critics.

The Court Party hopes that *Vriend*, like *Brown*, marks the dawn of a new era of judicial-led social reform. Critics hope that it will become more like the *Roe v. Wade* of Canadian constitutionalism, the high-water mark of judicial activism. The American court's 1973 abortion ruling was every bit as bold as *Brown*, but—unlike *Brown*—it did not serve as the legal-moral foundation for a new generation of judge-led social reform. Instead, it mobilized a public reaction to what critics described as raw judicial law making. Court-curbing became a partisan political issue, and a succession of Republican presidents used their judicial appointments to reshape the court into a more centrist body.

In 10 years, will we look back at *Vriend* as the *Brown v. Board* or the *Roe v. Wade* of Canadian constitutional politics? Let us begin by looking at what makes *Vriend* the remarkable ruling that it is. If there is a toolbox of judicial activism, the judges left few tools unused in constructing *Vriend*.

*Vriend* is a classic example of "judge-driven" rather than "text-driven" judicial review. Not only does "sexual orientation" not appear in Charter s. 15, it was expressly excluded. When the Charter was being drafted, a parliamentary committee defeated a motion to add sexual orientation by a vote of 22-2.

Nor should it qualify as "non-enumerated analogous grounds." In the absence of any societal consensus on this issue, the evidence of a contrary framers' intent should still have precluded this so soon after the adoption of the Charter. Appeals to genetic determinism are inconclusive, and are rejected by leading gay rights advocates who argue that "sexual orientation is a matter of choice, not nature."<sup>1</sup>

*Vriend* is radical in a second sense: state inaction is treated as equivalent to state action. The court condemned Alberta not for what it did but for what it did not do—extend the scope of a regulatory program. Once state inaction is deemed to trigger a constitutional violation, the Charter is transformed from a state-limiting instrument to a state-expanding instrument. This transformation is a major goal of the "equality-seekers" wing of the Court Party, whose policy objectives of "substantive equality"—such as pay and employment equity programs—require more, not less, government. It also allows these same interests to use the Charter to fight neoliberal "downsizing" of the welfare state in the courts.

The court also pushed the envelope in its choice of remedies—"reading in." Rather than using the traditional remedy of a declaration of invalidity, the court chose to "preserve" Alberta's human rights legislation by "reading in" the words "sexual orientation." If ever there was "judicial legislation," this is surely it.

Contrary to its supporters' claims, "reading in" extends judicial activism by pre-empting a legislative response and accompanying public debate. By "fixing" the constitutional violation themselves, the judges gave the Klein government the option of doing nothing—an option they, like any elected government, accepted.

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The *Vriend* decision also rides roughshod over the principle and practice of Canadian federalism. There are 11 different human rights acts in Canada—10 provincial and 1 federal. No two are the same. This tradition of provincial diversity and autonomy ended with *Vriend*. By tying human rights acts into s. 15 of the Charter, the Supreme Court established itself as the new national overseer of provincial human rights legislation.

*Vriend* exhibits another one of the hallmarks of contemporary Charter politics: interest groups' use of the Charter to turn their causes into cases. Delwin Vriend was no more than a figurehead for a coalition of four gay rights groups who had unsuccessfully lobbied the Alberta government to add sexual orientation to its HRA. Their objective was never to get Delwin Vriend's job back, but to force the Alberta government to adopt a policy it had twice considered and rejected. All parties knew that Vriend's employer—a religiously affiliated college—was exempted from the provincial human rights legislation under the BFOQ clause.

The court ignored that *Vriend* could have no practical effect on the parties. Its concern was with policy not disputes. This was consistent with its recent rulings on standing and mootness, which have removed any meaningful requirement of a "live dispute" as a condition for accessing judicial power. In so doing, the court has effectively set itself up as a *de facto* third chamber in the legislative process.

Interest groups not only carried Delwin Vriend into the courts, they also came to his assistance in the form of interveners. There were nine interest-group interveners supporting Vriend's claim, plus two government agencies. This form of "judicial lobbying" has become a standard strategy for interest groups to try to influence Charter decisions. The presence of numerous "friends of the court" cue the judges as to who is supporting whom, and pro-

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vides additional legal arguments to support the favoured party.

Vriend's support from federal and provincial human rights commissions points to another defining characteristic of Charter litigation—the state-connection. There is a strong overlap in membership and ideology between the new rights advocacy organizations, government lawyers, human rights agencies, the law schools, and the Court Challenges Program (CCP). Many of the interveners are regular recipients of government funding from the CCP. Since costs are the single largest barrier to Charter litigation, this federal funding has been a crucial factor in their success.

"Systematic litigation"—interest-group use of strategically chosen Charter cases to advance their policy agenda—was identified by feminists in 1984. LEAF's success in implementing a "systematic litigation" strategy has inspired other groups—notably EGALE—to adopt similar strategies. *Vriend* is the most recent in a long string of EGALE legal victories.

Complementing interest group use of "systematic litigation" strategies is a less tangible but equally influential initiative—what LEAF calls the "influencing the influencers" campaign. This campaign consists of cultivating a supportive legal and judicial climate—through law reviews, books, judicial education seminars, and conferences—by promoting legal arguments that support a group's litigation efforts. For example, a

veritable flood of printers' ink was spilled advocating a "substantive" and "contextual" approach to interpreting the Charter's equality rights—a campaign that realized its objective in the court's 1989 *Andrews* decision.

LEAF's success has inspired others. A 1997 review of 22 randomly selected Canadian law review articles on the family found that not one supported the traditional family, while all supported gay rights alternatives. Such unanimity in the legal commentary provided an influential foundation for gay rights advocates' litigation efforts in *Vriend* and the precedents leading to it.

Finally, *Vriend* illustrates the Supreme Court's new role as the political vanguard of the social left. There is a growing list of policy areas where any legislative action—and now, inaction—that does not accommodate these groups' demands will be automatically challenged in court. (Costs and standing are no longer barriers.) The Supreme Court has proven itself a reliable ally of the social left. Feminists have enjoyed a success rate of over 70 percent in appeal courts, and advocacy groups for gay rights, aboriginals, and official language minorities are not far behind. (In contrast, the odd appellate court victory for conservative groups—*Lavigne* or *Tremblay*—have all been reversed on appeal.)

In sum, *Vriend* displays all the tools of Court Party praxis—both on and off

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reversal rates slightly higher than the overall average in constitutional cases. The number of cases heard from the other provinces are too small to be significant.

## THIS ISSUE

Readers will find the developments referred to above considered in more detail in the papers collected in this issue. The papers fall into three groups. Given the significance of the *Vriend* case, not only for equality issues but for the court's overall approach to the Charter, four separate pa-

pers (Robert Charney, Mary Eberts, Bruce Ryder, and Ted Morton) examine its implications. Three papers examine the Supreme Court's decision in the *Secession Reference*, followed by three papers examining the court's criminal law decisions. Finally, papers by Jamie Cameron and Roslyn Levine discuss the court's decision in *Thomson Newspapers*.

As this issue goes to press, the court has already handed down a number of major constitutional cases in 1999. All of which means that there will be more grist for the constitutional mill at next year's

*Canada Watch* conference, scheduled for April 7, 2000 in Toronto. ❖

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<sup>1</sup> The cases were: *R. v. Maracle* (involving unreasonable delay in prosecution); *R. v. Cook* (suspect arrested in United States has right to counsel); *R. v. Williams* (juror challenge for racial bias allowed); and *R. v. Smith* and *R. v. Skinner* (Crown failure to disclose violates accused's rights to full answer and defence).

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the bench. Will it inspire more of the same? Will it be the "moral supernova" that legitimates and further advances the court's new role as egalitarian social reformer? There are certainly reasons to think so. The Court Party continues to enjoy the resources that have contributed to its success to date. It has achieved near hegemonic control of Canadian law schools and legal commentary. Their graduates ensure that a growing percentage of the active bar is imbued with the spirit "Charter values." A new generation of Charter partisans—judges like Rosalie Abella, Jim MacPherson, and Lynn Smith—are being appointed to the bench. Elected governments continue to back-pedal in response to judicial policy making. Section 33 has not been used in a decade. Is it any wonder that, emboldened by their victory in *Vriend*, EGALE has launched a mega-constitutional challenge to 59 federal statutes?

There are, however, some signs of unrest in Charterland. There is growing support for both conservatism and populism in Canadian electoral politics. The success of the Reform Party nationally and the Harris and Klein governments provincially reflect growing middle-class disenchantment with the costs of the welfare state. This movement could collide with the Court Par-

ty's attempt to transform rights into entitlements, to more not less government. Recent populist measures such as referendum and recall stress more accountability in government, hardly the strong suit of unelected judges.

It has become politically acceptable to publicly criticize court decisions and judicial activism more generally. A year ago April there was a very public campaign in Alberta, which included radio, television and newspaper advertisements, to urge the Klein government to use s. 33 to overrule the *Vriend* decision. This failed, but last month the Alberta government announced that it would use s. 33 in response to any judicial attempt to impose "same-sex marriage" and that any other use of s. 33 would be decided by referendum.

The Reform Party has also begun to make judicial activism one of its staple issues. It pressed the Chretien government to invoke s. 33 in response to the B.C. child pornography ruling in January. In February, the United Alternative convention endorsed a policy condemning judicial activism and supporting the responsible use of section 33. This latter sentiment was subsequently endorsed by former provincial premiers Peter Lougheed and Allen Blakeney. Responding to the perception of the court's new power, most

newspapers in the country have endorsed parliamentary hearings for Supreme Court nominees.

Are these just temporary eruptions or the beginning of something more permanent? The key, I predict, will be the court's ability to persuade the political class that its decisions are required by the Charter. The legitimacy debate is not about "text-driven" judicial activism, but judge-driven activism. To preserve their authority, judges must persuade those on the losing side that their decision is required by the constitution, not by their personal policy preferences.

The court-curbing periods in American history all occurred in response to decisions where the Supreme Court failed to persuade—the *Dredd Scott* ruling on slavery (1856), the "substantive due process" and New Deal cases (1930s), and the *Roe v. Wade* abortion ruling (1973). The current "legitimacy" controversy in Canada is a symptom that growing numbers of Canadians are not being persuaded. ❖

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<sup>1</sup> A more complete version of my criticisms of the *Vriend* decision may be found on the website of the Alberta Civil Society Association: [www.pagusmundi.com/acsa/badlaw.htm](http://www.pagusmundi.com/acsa/badlaw.htm).