CANADA'S JUDGE BORK: HAS THE COUNTER-REVOLUTION BEGUN?

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"It makes more sense to trust a dog with my dinner than trust the Supreme Court with the slavery question!"

Horace Greeley, 1855[1]

The first shots in the *Charter* counter-revolution have been fired. Predictably, they come from the land of political heresy. Just as the taxpayers' revolt began in Alberta, so now has the attack on Canada's new imperial judiciary. The first was led by Alberta's premier. The attack on judicial law-making now comes from a justice of the Alberta Court of Appeals: Justice John Wesley McClung.

The occasion was the Court's ruling in *Vriend* v. *Alberta*, a gay rights challenge to Alberta's human rights act (HRA).[2] Like the federal HRA (prior to May, 1996), the Alberta statute does not include sexual orientation as one of the prohibited grounds of discrimination. This is not by accident. Proposals to add sexual orientation to the act have been considered and repeatedly rejected by the last three Alberta governments. Delwin Vriend was a lab assistant who was fired from his job at a religiously-affiliated college when it was disclosed that he was gay. When his wrongful discrimination claim was dismissed for lack of jurisdiction, he went to court to challenge Alberta's refusal to add sexual orientation. His lawyers (and lawyers for the usual coterie of publicly -funded gay activists and government human rights commissions) argued that the Alberta HRA's failure to protect homosexuals from discrimination violated the section 15 equality rights provisions of the *Charter*.

Had Vriend initiated his challenge in 1982, the year the *Charter* was adopted, his chances for success would have been slim indeed. Not only was sexual orientation not listed as a prohibited ground of discrimination in section 15, but the legislative history showed that repeated attempts (by MP Svend Robinson) to add sexual orientation had been rejected by Parliament. It seemed unlikely that any Canadian court would amend a constitutional clause by adding meaning that the framers had explicitly rejected. To do so would have jeopardized the legitimacy of the courts' (then) new role as *Charter* interpreters.

Vriend's claim would have faced another major obstacle. The *Charter* applies to "state action." That is, it protects citizens from governments, not citizens from other citizens. HRAs apply to "private action," by prohibiting discrimination in private sector employment, credit, housing, and so forth. That is, HRAs expand the scope of government and restrict freedom of association — another *Charter* right. Vriend's claim amounts to asking the courts to use the *Charter* — a state-limiting instrument — to order the expansion of government. Such a *non sequitur* was unlikely to receive a friendly reception in Canadian courtrooms in 1982.

But this was before the *Charter* revolution — a revolution launched not in 1982 by the *Charter*, but by the Supreme Court's activist interpretation of the *Charter* beginning in 1984. By the time Delwin Vriend launched his challenge, the *Charter* landscape had changed dramatically — and favourably — for Vriend.

In the sunday closing[3] and abortion cases[4] (as well as in dozens of lesser criminal code / legal rights issues), the Supreme Court signalled that it was now more than willing to strike down public policies that it had previously upheld. In its 1986 ruling in the *B.C. Motor Vehicle Reference*,[5] the Court announced that it would not consider itself bound by framers' intent and proceeded to transform section 7 of the *Charter* from a (narrow) procedural to a (broad)

substantive criteria of "fairness" — the precise opposite of what the framers had intended. In the landmark case of *Mahé* v. *Alberta*,[6] the Supreme Court showed a similar disregard for the framers' intent when it interpreted section 23 to include a right for francophone minorities to "manage and control" their own educational facilities.

Of immediate relevance to Vriend's case was the pivotal 1989 *Andrews* case.[7] In *Andrews*, the Court revolutionized the scope of equality rights, declaring that section 15 prohibits not only laws that intentionally discriminate, but also laws that have a "discriminatory effect" on any of the enumerated minority groups. The Court further opened the section 15 door for "non-enumerated" groups if they could show they were "analogous" to the enumerated groups in the sense of being a "historically disadvantaged group."

Predictably, gay rights activists were quick to walk through this open door. In a 1992 challenge to the federal HRA (*Haig* and *Birch*),[8] the Ontario Court of Appeal ruled that section 15 of the *Charter of Rights* prohibits state discrimination against gays. The Court accepted the claim that homosexuals are a historically disadvantaged minority, and therefore qualify for section 15 protection on the "analogous grounds" test. The failure of the federal human rights act to protect homosexuals was found to violate the *Charter*. In 1995, the Supreme Court of Canada (in *Egan*)[9] also accepted the claim that sexual orientation is deserving of section 15 protection on the analogous grounds rationale.

To *Charter* insiders, these results were not surprising. Despite having clear legislative history on their side, the federal government's lawyers refused to play their strongest card — "framers' intent" — and conceded the gay rights lobby's "analogous grounds" claims. Instead, the Crown lawyers rested their entire case on section 1 "reasonable limitations" arguments — a much weaker card, since at this stage the burden of proof shifts from the rights-claimant to the government. Predictably, Ottawa lost both cases. Significantly, Minister of Justice, Kim Campbell, who had just failed to persuade her caucus to add sexual orientation to the federal HRA, chose not to appeal her government's loss in *Haig* and *Birch*, thus leaving in place an important gay rights precedent that could be used by activists in other jurisdictions such as Alberta.

In 1994, the pretence of a government defence was dispensed with altogether by the then NDP Attorney-General of Ontario, Marion Boyd. After losing a free-vote in the Ontario legislature to amend Ontario's *Family Law Act* (FLA) by redefining "spouse" to include homosexuals, Boyd intervened to support a gay and lesbian court challenge to the unamended FLA.[10]

Against this new judicially-created background, Delwin Vriend's claim went from being a *Charter* long-shot to a favourite. When Court of Queens Bench Judge Anne Russell ruled in his favour in 1993, the decision caused a local furor in Alberta but did not surprise *Charter* experts.[11] To *Charter* watchers, it was fairly clear that the fix was in on section 15 and the gay rights issue.

Several weeks before the Alberta Court of Appeal was to rule in *Vriend*, Ontario District Court Judge Gloria Epstein accepted Marion Boyd's claims and declared the Ontario FLA violated section 15 equality rights of gays.[12] Using the novel judicial remedy of "reading in," Judge Epstein then did from the bench what the NDP government had failed to achieve in the Ontario legislature: she amended the Ontario FLA to include homosexual couples in the meaning of "spouse." With Judge Epstein's ruling now added to the earlier judicial endorsements of section 15 protection for homosexuals, the gay rights-*Charter* juggernaut seemed unstoppable.

Enter Justice John Wesley McClung. Not only did the Alberta Court of Appeal reject Vriend's claim, but McClung J.A. delivered a blistering denunciation of the judicial distortions and usurpations that have driven the gay-rights litigation parade.

The first third of Justice McClung's judgment is devoted to the narrower legal issue of discrimination. Conceding, as he must (given the *Egan* precedent), that section 15 now protects homosexuals from acts of government discrimination, McClung J.A. declared that what was challenged in *Vriend* was a government's refusal to act. Since the *Charter* was intended to apply only to government action — not inaction — there could be no *Charter* violation: "Legislative inactivity is hardly law."[13]

When the *Charter* is applied to the Alberta HRA, McClung J.A. continued, there is no evidence of discrimination against gays. Alberta's HRA is "even handed." Nowhere does it mention or distinguish between homosexuals and heterosexuals. All the rights

it creates are available equally to both gays and straights. "Alberta has not promoted, nor has it prohibited," declared the Judge.[14] Faced with divided public opinion about the urgency and nature of an issue of "private conduct," Justice McClung observed, the Alberta government has chosen to leave it to "private resolution...[and] the exercise of private choice."[15] For a non-elected judge to force Alberta to do otherwise — to force it to act where its elected government has chosen not to act — "would undermine theorems [of separation of powers] that support Canadian constitutional practice." It would also, he correctly notes, be "a debacle for the autonomy of [all] provincial law-making," since courts would then sit as permanent censors of each province's HRA.[16]

At this point, Justice McClung had said all that was legally required to dispose of the case. Since he had found no violation, there was no need to discuss remedies. Instead, he used his discussion of remedy as a pretext to launch the first sustained critique from the bench of the new *Charter*-based jurocracy.

The remedy of choice among *Charter* activists — both on and off the bench — has become "reading in" or "reading up," a technique whereby a judge adds new meaning to the statute in order to remedy the alleged *Charter* infraction. This is what Justice Russell did in *Vriend*: she read "sexual orientation" into Alberta's HRA. Similarly, Justice Epstein added the concept of homosexual spouse to Ontario's FLA. Justice McClung does not mince words on this "remedy": "Reading up is pure legislation, however it is rationalized."[17] As such, he declares, it is "an undesirable arrogation of legislative power by the court ... an extravagant exercise for any [superior court] judge."[18]

This blunt denunciation of "reading in" would by itself merit notice. But McClung J.A. does not stop at the issue of remedy. He proceeds to the authorities who issue these remedies. Since the adoption of the *Charter*, Justice McClung declares, "judges insist on mechanically invading the legislative arena because human rights may be violated...the nobility of the occasion now expiates the old judicial sin of repealing and even amending legislation under the cloak of merely interpreting it."[19] In an explicit reference to the gay rights precedents of *Egan* and *M.* v. *H.*, McClung J.A. observes that the well established and traditional heterosexual definition of "spouse" has been "judge-pummelled in bursts of adaptation that would have gladdened Procrustes."[20] This trend, McClung J.A. warns, must be stopped, and he conjures up "the spectre of constitutionally-hyperactive judges in the future pronouncing [on] all our emerging... laws...according to their own values; judicial appetites, too, grow with the eating."[21]

Having dealt with "crusading...ideologically determined judges,"[22] Justice McClung proceeds to take on their constituencies: "the rights euphoric, cost-scoffing left...the creeping barrage of the special-interest constituencies that now seem to have conscripted the *Charter*."[23] "In Canada," McClung J.A. dryly observes, "we are told that the *Charter* is not everyone's system. It belongs to Canada's minorities and therefore the courts must invoke legislative powers because they are the guardians of minority rights." Wrong, replies Justice McClung. "Why... should this be so...when all Canadians must pay for the *Charter*'s disappointments (e.g. *R.* v. *Askov*)... the expense of the litigation...and the cost of the army of judges, lawyers and public servants who carry it out?"[24]

Justice McClung is especially critical of the legal hypocrisy implicit in *Vriend* and the other gay-rights cases. He rejects the legalistic packaging intended to minimize the larger policy issues that are at stake. These cases are not just about whether "sexual orientation" should be added to a list of prohibited grounds of discrimination. Justice McClung goes out of his way to point out that they are also about "the validation of homosexual relations, including sodomy, as a protected and fundamental right, thereby, 'rebutting a millennia of moral teaching.'"[25] (Significantly, McClung J.A.'s quotation is from the American Supreme Court's ruling in *Bowers* v. *Hardwick*, upholding Georgia's anti-sodomy statute against a gay discrimination claim.)[26]

Justice McClung even conscripts noted gay author Andrew Sullivan (a former editor of The New Republic) to support the reasonableness of Alberta's refusal to add sexual orientation to its HRA: "many people...in a liberal society...may be content to leave [homosexuals] alone," Sullivan has written, but "they draw the line at being told that they cannot avoid their company in the workplace or in renting housing to them."[27] Decriminalization of homosexual acts — achieved in Canada in 1969 — is consistent with the liberal principle of expanding individual liberty by leaving alone private conduct that does not harm others. This is not the same as adding sexual orientation to a HRA, a state action that actually restricts individual liberty (of association). While

some might consider this a net gain, Justice McClung's point is that surely it is not "required" by the *Charter*.

Finally, McClung J.A. raises the spectre that the inclusion of sexual orientation could prove to be a "trojan horse"[28] in that there can be no guarantee that it will be limited to protecting "'traditional' homosexual practices," and "never be raised as a permissive shield sheltering other practices... commonly regarded as deviance." To dramatize this point, he notes that "the Dahmer, Bernardo and Clifford Robert Olsen prosecutions have recently heightened public concern about violently aberrant sexual configurations and how they find expression against their victims."[29]

Justice McClung concludes with a call to action: "We cannot look on with indifference and allow the superior courts of this country to descend into collegial bodies that meet regularly to promulgate 'desirable' legislation."[30] In a noble attempt at judicial statesmanship, McClung J.A. attempts to resuscitate our "constitutional heritage" by recalling the 700 years of political struggle and sacrifice required to construct, plank by plank, the institutions of parliamentary democracy and responsible government. A country that forgets its past endangers its future: "When unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved."[31]

Justice McClung has sent out a warning that Parliamentary democracy as Canadians know it is being eroded. He leaves little doubt where the problem lies in his multiple references to "crusading ...ideologically determined...constitutionally hyper-active...rights restive...legisceptical Canadian judges." Yet his concern is not just with protecting responsible government, but another important pillar of our "constitutional inheritance." "Only judicial independence will suffer," he warns, "if we continue to push the constitutional envelope as we have over the past 20 years .... An overridden public will in time demand, and will earn, direct input into the selection of their judges as they do with their legislative representatives. These forces are already gathering."[32] (This reference is to a recently-introduced private member's bill in the Alberta Legislature that would institute elections for choosing provincial [section 92] judges). In other words, if we want to avoid American-style interest-group battles over judicial appointments, Canadian judges must cease and desist from their new *Charter* imperialism.

Alas, this warning comes too late. Judicial innocence, like its other versions, once lost is gone forever. The new partisans of judicial power are not about to hand over the keys to the courthouse. They cannot be removed, but only replaced. And if their activist legacy is to be curtailed, the selection process for their replacements will have to be self-consciously political — à la Presidents Roosevelt in the 1930s and Reagan in the 1980s — precisely what McClung J.A. warns against. Ironically, in penning his judgment in *Vriend*, Justice McClung nominated himself as Canada's first "Judge Bork."

In Canada, however, there is an alternative to court-packing: the section 33 notwithstanding clause. This was the great compromise of November, 1981 that made the Trudeau *Charter* project acceptable to seven of the eight provincial opponents of unchecked judicial power. Under section 33, if a court makes a decision that a government views as either wrong, unacceptable or both, it can override that judicial "mistake." Of course, it must then face the electoral consequences of its decision.

As Peter Russell has pointed out, section 33 represents an improvement over the American alternative of "court-packing."[33] The American "sledge-hammer" approach entails remaking the entire court in a new ideological mould — one that typically endures for at least a generation. The Canadian "scalpel" approach enables a government to excise a court's "mistake," while respecting its membership and the principle of judicial independence.

In *Vriend*, the next step is an appeal to the Supreme Court of Canada. It seems unlikely that the Lamer-wing of the Court will take kindly to Justice McClung's ruling, much less his *obiter dicta* regarding "crusading, ideologically-driven judges." Fellow Albertan Justice John Major might prove to be more sympathetic, and several of the other Quebec judges might be swayed by the federalism-provincial rights dimension of the case. But a majority in support of Justice McClung seems unlikely.

A reversal would send the ball back into Alberta's court — not the judicial courts but the court of public opinion. Would the Klein government use section 33 to override a Supreme Court decision in favour of Vriend and his gay rights allies? Certainly there has already been talk of it. Indeed, Justice

McClung mentions it in his judgment. And why not? Section 33 is as much a part of the *Charter* as section 15. Democracy and responsible government remain as central to Canadian political tradition as equality. And, for the reasons given by Justice McClung, if ever there was a judicial decision that deserved section 33, this would be it.

There would also be a second reason for Alberta to use section 33: to demonstrate its support for Justice McClung's symbolic act of intellectual independence and judicial self-restraint. Justice McClung has broken the conspiracy of judicial silence, a silence that has protected the growth of judicial activism under the *Charter*. This was a courageous act, and hopefully it will encourage other dissident judges to break rank with our new imperial judiciary. As an iconoclast, however, Justice McClung will pay a price. His impiety will earn him the lasting enmity of the new judicial mandarins and those who propagate the new political religion of rights. If Justice McClung is slapped down on appeal by the Supreme Court and the Alberta government does not come to his defense, this lesson will not be lost on other judges, present and aspiring. Rather than marking the beginning of the *Charter* counter-revolution, Justice McClung's judgment in *Vriend* is more likely to become a forgotten footnote in the history of Canada's *Charter*-march to that (ever-receding) horizon of rights utopia.❑

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1. Justice McClung in *Vriend* v. *Alberta*, (1996) 132 D.L.R. (4th) 595 at 619, quoting Horace Greeley commenting on the *Dredd Scott* case (*Scott* v. *Sandford*, 19 How. 393 [1856]).

2. Individual Rights Protection Act, S.A. 1980, c.I-2 [hereinafter HRA].

3. *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295.

4. *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30; *R.* v. *Morgentaler*, [1993] 3 S.C.R. 463.

5. *Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c.288*, [1985] 2 S.C.R. 486.

6. [1990] 1 S.C.R. 342.

7. *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

8. *Haig* v. *Canada (Minister of Justice)* (1992), 9 O.R. (3d) 495 (C.A.).

9. *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

10. *M.* v. *H.*, [1996] O.J. No. 365.

11. [1994] 6 W.W.R. 414 (Q.B.).

12. *M.* v. *H.*, *supra* note 10.

13. *Supra* note 1 at 607.

14. *Ibid.* at 603.

15. *Ibid.* at 602-03.

16. *Ibid.* at 606.

17. *Ibid.* at 617.

18. *Ibid.* at 611.

19. *Ibid.* at 608.

20. *Ibid.* at 614.

21. *Ibid.* at 607.

22. *Ibid.* at 616.

23. *Ibid.* at 606-07, 613.

24. *Ibid.* at 614. *R.* v. *Askov*, [1990] 2 S.C.R. 1199 was the Supreme Court decision that forced the Crown to drop charges in over 40,000 criminal cases.

25. *Ibid.* at 609.

26. 106 S.Ct. 2841 (1986).

27. *Supra* note 1 at 609, quoting Sullivan, *Virtually Normal* (New York: Alfred Knopf, 1995).

28. *Ibid.* at 616.

29. *Ibid.* at 611.

30. *Ibid.* at 614.

31. *Ibid.* at 618.

32. *Ibid.* at 619.

33. Peter H. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta Law Review 2 at 293-309.