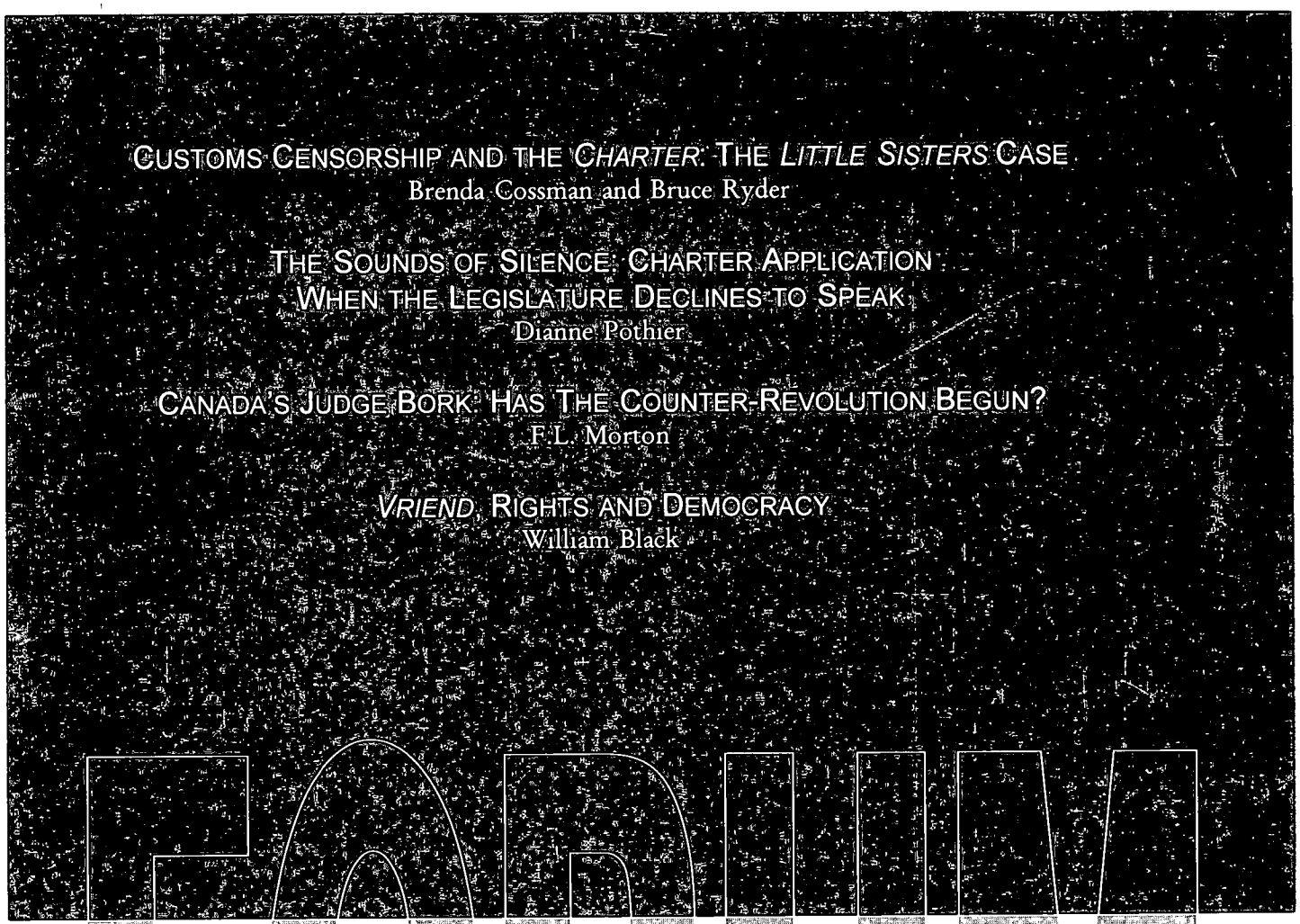

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CUSTOMS CENSORSHIP AND THE *CHARTER*: THE *LITTLE SISTERS* CASE

Brenda Cossman and Bruce Ryder

INTRODUCTION

Little Sisters Book and Art Emporium is Vancouver's only bookstore specializing in gay and lesbian literature; it also has served as a focus of social and political activities of the local gay and lesbian communities since its inception in 1983. Canada Customs is the arm of the federal government empowered to prohibit the entry of obscene imported publications into the country, a power originally enacted in 1847.[1] It is hard to think of two better institutional representatives of the urban diversity of contemporary Canada and the country's fusty Victorian roots, respectively. For the past decade, they have been embroiled in dramatic and escalating legal battles — appropriately dubbed "*Little Sister* v. *Big Brother*" by the *Globe and Mail*.[2] It appeared at times that only one party might survive. Little Sisters has been at risk of financial collapse in the face of persistent detentions and seizures of its imported material. Customs censorship practices, in turn, appeared to be treading on constitutional thin ice. In its court challenge, Little Sisters argued that the provisions of the *Customs Act* and *Customs Tariff* that together empower officials to stop obscene representations at the border[3] constitute unreasonable restrictions on freedom of expression and equality rights protected by section 2(b) and section 15 of the *Charter*. Customs censorship practices, finally lifted from over a century of administrative darkness and exposed to the glare of a two month court proceeding in the fall of 1994,[4] appeared vulnerable to constitutional invalidation.

However, in a long-awaited judgment released in January 1996,[5] Justice Kenneth Smith of the British Columbia Supreme Court crafted a ruling that, in true Canadian fashion, found a middle ground. He managed to vindicate, and sought to preserve, both Little Sisters and Customs by affirming the importance to the life of the nation of both homosexual literature and the existing legislative regime of border censorship.

It took Justice Smith a full thirteen months to ponder the evidence presented at trial and to prepare his decision. The care he took is evident in the thorough and meticulous presentation of the evidence and legal argument, and in the respect he accorded to all participants in the proceedings. He noted the cultural and political significance of Little Sisters as "a nerve-centre for the homosexual community."[6] A refreshing sensitivity to the importance of lesbian and gay sexual expression is similarly evident in his affirmation of testimony by Little Sisters' witnesses that:[7]

> ... sexual text and imagery produced for homosexuals serves as an affirmation of their sexuality and as a socializing force; that it normalizes the sexual practices that the larger society has historically considered to be deviant; and that it organizes homosexuals as a group and enhances their political power.

Moreover, Little Sisters' long-standing complaints regarding the vagaries of Customs censorship were vindicated by many of Smith J.'s factual findings. In particular, he found that since its inception in 1983, Little Sisters has suffered at the hands of Customs;[8] that gay and lesbian bookstores and publications are particularly vulnerable to the "arbitrary consequences" of Customs censorship far out of proportion to their relative share of imported material;[9] that "there are many examples of inconsist-

encies in Customs' treatment of publications";[10] that delays of months or even years in making determinations are not uncommon;[11] that a great many "qualitatively questionable" determinations are made, including the detention of a "disturbing amount of homosexual art and literature that is arguably not obscene";[12] that Customs continued to ban any depiction of anal penetration until the eve of the trial in 1994 despite the lack of legal authority to do so and despite the advice tendered by Department of Justice lawyers in 1992 that Customs was acting illegally;[13] that there is no mechanism in Customs' procedures for receiving evidence of a book's merits and thus many books are ruled obscene without adequate evidence;[14] that Customs officers are inadequately trained, many receiving only a few hours of instruction on obscenity law;[15] that highly publicized works like Madonna's *Sex* and Bret Easton Ellis' *American Psycho* are given the benefit of the doubt;[16] that Customs officers "do not have sufficient time available to consistently do a proper job" and thus take "short cuts" by "such expedients as thumbing through books";[17] and that few initial determinations of obscenity are appealed, and of the few that are, few succeed.[18] In conclusion, Justice Smith wrote with some understatement, there are "grave systemic problems in the customs administration."[19]

Surprisingly, this litany of disturbing factual findings did not spell the demise of the challenged legislation. Justice Smith held that the prohibition on imported obscenity did not discriminate against gay men and lesbians and, therefore, section 15 of the *Charter* was not implicated. It was, of course, beyond doubt that the prohibition of obscene representations at the border violated freedom of expression protected by section 2(b) of the *Charter*. This issue was conceded by the Crown. However, Smith J. went on to uphold the legislation as a reasonable limit under section 1 of the *Charter*. The constitutional validity of the legislation was sustained in large part by Smith J.'s attribution of the sole responsibility for the serious violations identified in his judgment to the flawed administration of the legislation by Customs officials rather than to the legislation itself. In the result, he held that the legislation was consistent with the *Charter*, and thus Little Sisters was not entitled to the declaration of invalidity it sought under section 52 of the *Constitution Act, 1982*. Justice Smith held that the proper remedy when an otherwise valid law has been administered in a manner that violates rights or freedoms is to issue a declaration under section 24 of the *Charter*. He therefore issued a declaration that "from time to time during the period covered by the evidence at trial some customs officers have acted arbitrarily and have thereby infringed sections 2(b) and 15(1)".[20]

A month after Smith J.'s initial ruling, Little Sisters returned to court seeking an injunction to restrain Customs from detaining imported material destined for the bookstore until the systemic problems identified in the judgment had been remedied. Justice Smith declined to issue such an injunction, finding that Customs had already revised its procedures "to require more careful consideration by qualified officers of possibly-obscene books."[21] In his view, these were "reasonable first steps and should achieve the objective until a more comprehensive administrative scheme can be put in place."[22] However, he did issue a more limited injunction restraining Customs officials from subjecting Little Sisters to a policy of heightened scrutiny at the Vancouver Mail Centre "until the federal Crown satisfies this Court that the discretion of customs officers in that office is guided by appropriate standards."[23]

We have no quarrel with the declaration and the injunction issued by Smith J. — these remedies were amply justified on the evidence presented. With all due respect, however, it is our view that the judge erred in absolving the *Customs Act* and *Customs Tariff* of responsibility for the grave systemic problems that led to the violation of the claimants' *Charter* rights. In our view, these effects are closely tied to the deficiencies in the procedures set out in the *Customs Act* for the determination of whether imported publications are obscene, and thus a declaration of invalidity ought to have issued in relation to the impugned provisions.

The *Little Sisters* case raises complex issues that, as Smith J. noted, "are of great importance not only to the plaintiffs but to all Canadians."[24] The case is on its way to the British Columbia Court of Appeal, and, in all likelihood, will end up before the Supreme Court of Canada. We cannot possibly do justice to the issues raised here. We will restrict ourselves to brief comments on four aspects of Justice Smith's opinion that we find unsatisfying. The first is his conclusion that the effects of the legislation do not amount to discrimination against gay men and lesbians in violation of section 15 of the *Charter*. The second is his reliance on the reasoning of the Supreme Court in the *Butler* case to support the conclusion that homosexual representations pose a risk of harm to society and, therefore, can be suppressed without violating the *Charter*. The third is his

choice of a standard of review under section 1 of the *Charter* that was highly deferential to the government on the question of whether the Customs legislation constitutes the least restrictive means of regulating imported obscenity. In our view, a rigourous standard of review under section 1 is appropriate where legislation in its effects has a disproportionate impact on expression central to the cultural identity and political vitality of a disadvantaged minority. Finally, we want to challenge what we see as a crucial flaw in Smith J.'s reasoning, namely, his view that the violation of the plaintiffs' rights cannot be linked to the procedural deficiencies in the *Customs Act* itself.

EQUALITY RIGHTS

To establish a section 15 violation, a claimant must first show that the purpose or effect of the impugned legislation is to impose a burden on the basis of an enumerated or analogous ground of discrimination. Then the claimant must demonstrate that the unequal treatment is discriminatory, meaning that it is the result of the stereotypical application of presumed group or personal characteristics.[25] While the prohibition on imported obscene representations does not have as its purpose the imposition of disproportionate burdens on gay men and lesbians, this is one of its effects. Justice Smith reached this conclusion by a circuitous and controversial route. After making some astute observations regarding the cultural and political significance of homosexual representations to gay men and lesbians, he wrote:[26]

> Because sexual practices are so integral to homosexual culture, any law proscribing representations of sexual practices will necessarily affect homosexuals to a greater extent than it will other groups in society, to whom representations of sexual practices are much less significant and for whom such representations play a relatively marginal role in art and literature.

For this reason, he concluded that the legal category of obscenity, even when properly interpreted, will inevitably capture a disproportionate amount of homosexual expression. Hence, the plaintiffs "and other homosexuals" had been "adversely affected" by the law as a result of their sexual orientation.[27]

However, the Court went on to conclude that this unequal treatment did not amount to discrimination. Unfortunately relying on the minority approach to section 15 in recent Supreme Court cases,[28] Smith J. noted that a distinction based on an analogous ground will only be discriminatory if it is irrelevant "to the functional values of the legislation." In his view the unequal treatment which gays and lesbians experience as a result of the prohibition on obscenity does not arise from "the stereotypical application of presumed group or personal characteristics." According to the Court, the "characteristic is a real one" that is relevant to the legislative values: "Sexuality is relevant because obscenity is defined in terms of sexual practices." Justice Smith reiterated his view that the disproportionate effect of obscenity law on gays and lesbians is inevitable because of the extent to which their very identities are constructed in and through sexual practices. He concluded that "homosexual obscenity is proscribed because it is obscene, not because it is homosexual. The disadvantageous effect on homosexuals is unavoidable...."[29] In his view, the distinction thus could not be seen to be discriminatory within the meaning of section 15.

In our view, there are a number of problems with Smith J.'s section 15 reasoning. Even if we accept his premise that artistic expression produced for homosexual audiences is permeated to a greater degree than heterosexual expression is by sexual themes, his conclusion regarding the disproportionate impact of obscenity law does not necessarily follow. Obscenity, after all, embraces only a subset of sexual representations. Depictions of non-violent adult sexuality are obscene only if they are degrading or dehumanizing and pose a substantial risk of harm to society. Thus, Smith J.'s conclusion that there exists a disproportionate share of homosexual obscenity is correct under existing Canadian obscenity law only if sexual violence, child sexuality, or sexual degradation are more commonly and unduly exploited as the dominant characteristics of expression produced for homosexual audiences than they are for others. No evidence was presented at trial to sustain such a controversial proposition; we know of no studies that could support it. Furthermore, Justice Smith noted that Little Sisters has a policy of not stocking material that depicts paedophilia, violence towards women, or misogyny,[30] and there was no indication in the judgment that this policy had been neglected. In sum, the premise that homosexual expression generally, and material imported by Little Sisters specifically, contains a disproportionate share of obscenity strikes us as implausible and certainly not sustainable on the evidence presented.

Further, in finding that the unequal burden on gays and lesbians was not discriminatory, Smith J.

conveniently shifted the focus away from the possibility that the state is targeting the representations of a marginalized sexual group. He saw the law's suppression of gay and lesbian sexual imagery as not a question of discrimination, but simply one of obscenity: publications are censored because they are obscene. The issue that is completely obscured in this reasoning is whether the material is considered to be obscene simply because it is gay or lesbian.

Justice Smith's conclusions here may be related to continuing problems with the obscenity standard, and particularly, with the meaning of degrading and dehumanizing. In *Butler*, the Supreme Court held that materials would be degrading if they were perceived to cause harm in the form of anti-social behaviour.[31] Although the Ontario Court of Appeal has subsequently held that some proof of harm is required,[32] the nature of that proof remains elusive.[33] The continuing reliance on notional community standards in deciding whether it is reasonable to apprehend harm means that sexually explicit material continues to be assessed in terms of whether judges believe that the community reasonably believes that the materials cause harm. In the context of gay and lesbian materials, social prejudices can and do continue to inform these community standards, so that the community can be said to believe these images *do* cause harm.[34] And the fact that no expert evidence is required to prove the community standard of tolerance only further heightens the vulnerablity of gay and lesbian sexual imagery to being suppressed as obscene.

Justice Smith's decision did not challenge these problematic aspects of the community standards test. Despite his recognition of the importance of sexual expression to the gay and lesbian community, Smith J. was willing to assume that a greater share of gay and lesbian sexual material can be validly suppressed as obscene. This conclusion would satisfy those who believe that gay and lesbian sexual material is, by definition, more degrading and dehumanizing than heterosexual pornography. Although Smith J. would reject such prejudicial views, his reliance on unsubstantiated assumptions nevertheless allowed some of their implications to inadvertently creep back into the decision.

In our view, a section 15 violation was made out on the evidence without following the questionable chain of reasoning pursued by Justice Smith. Elsewhere in the judgment, Smith J. found that the arbitrary consequences of Customs censorship are borne disproportionately by gay and lesbian bookstores and publications, and that a disturbingly large amount of homosexual art and literature that is arguably not obscene is detained.[35] These findings provide strong support for the conclusion that the legislation had a disparate impact on gays and lesbians resulting from the stereotypical application of group characteristics. However, Smith J. considered these findings to be irrelevant to the question of whether the legislation violated equality rights. In his view, the arbitrary burdensome effects were a product not of the legislation but of its flawed administration by Customs officials, a distinction we find untenable for reasons to be discussed in the penultimate section below.

BUTLER AND HOMOSEXUAL REPRESENTATIONS

Justice Smith held that the government was correct to concede that the legislation violated section 2(b) of the *Charter*. He went on to find that this violation was a reasonable limit under section 1. In so holding, he relied heavily on the reasoning of the Supreme Court of Canada in the *Butler* decision, where the criminal prohibition on obscenity was similarly upheld as a reasonable limit on *Charter* rights.

Little Sisters attempted to distinguish *Butler* on the grounds that its reasoning should be limited to heterosexual obscenity. In discussing the risk of "harm to society" created by obscene representations in *Butler*, Sopinka J. repeatedly emphasized the alleged degradation of women in heterosexual pornography.[36] Little Sisters argued that the risk of such harm could not and should not be said to arise from lesbian and gay sexual representations.[37] Justice Smith did not agree. First, in his view, the pornographic materials at issue in *Butler did* include homosexual representations. While the Supreme Court did not directly comment on these representations, Smith J. argued that it is "implicit" in the *Butler* decision that they can be suppressed as obscene without violating the *Charter*.[38] The fact that these so-called homosexual representations were set within sexually explicit material directed primarily to a heterosexual audience was not discussed. Rather, the judge's view appeared to be that the depiction of same-sex sexual relations made the material homosexual.[39] Secondly, Smith J. followed the dominant view, expressed by Wilson J. in *Towne Cinema*,[40] that the community standards test does not

permit the courts to take into account the specific audience to which allegedly obscene material is directed. Rather, it is a single national community standard of tolerance that is determinative. This approach effectively ignores the specificity of gay and lesbian sexual representations. The point is not simply that the audience is different, but that the entire framework of production, distribution, and consumption of gay and lesbian sexually explicit material is fundamentally different; the meaning and importance of the materials cannot be measured according to a heterosexual framework, least of all one based on harm towards women.[41]

In the end, Smith J. held that implicit in the *Butler* decision was a finding of sufficient grounds to suspect a causal relationship between pornography produced for homosexual audiences and harm to society. He thus found it unnecessary to his decision to canvass the social science evidence on point. Nevertheless, he went on to do so. In assessing this evidence, he relied on the Supreme Court's view in *Butler* that the absence of proof of a direct causal link between pornography and harm to society is not fatal; it is enough to demonstrate a "reasoned apprehension of harm."[42] Applying this standard to the issue of gay and lesbian sexual expression, Smith J. found that it was enough that there was one expert who believed that this material presents a risk of harm, even though that expert's conclusions on this point were not supported by the other expert evidence presented at trial.[43] Despite Smith J.'s earlier recognition of the importance of sexual representations to the lesbian and gay community, here the unique nature of these representations was glossed over. Gay and lesbian pornography was simply assumed to cause the same harm to society — harm that need not be proven and, in fact, harm that need not even be clearly articulated. Justice Smith did not describe the precise nature of the harm, apart from commenting that the exposure to this material "may cause the kinds of changes in attitudes, emotions and behaviours identified in *Butler* as harmful to society."[44]

SECTION 1 STANDARD OF REVIEW

In upholding the challenged Customs legislation under section 1, Justice Smith applied an extraordinarily lax standard of review, particularly at the minimal impairment stage of the *Oakes*[45] analysis. He acknowledged that the "means chosen here by Parliament are not the least drastic means available of achieving the objective."[46] In his view, however, Supreme Court precedents that have watered down this aspect of the *Oakes* test have absolved the Crown of the responsibility "to establish that it has chosen the least drastic means available to achieve that objective."[47] In fact, the Crown made no attempt to explain why Parliament had rejected other systems of border censorship that might have a less serious impact on freedom of expression and equality rights.[48] Indeed, no such evidence could be forthcoming, since the adequacy of the existing system of Customs censorship has never been the subject of a serious examination in the House of Commons or in any other government forum prior to the *Little Sisters* case. Even as the legal landscape has been transformed over the decades by the increasing complexity of obscenity law and the advent of the *Charter of Rights and Freedoms*, Parliament has not undertaken a review of the wisdom of leaving determinations of the legality of publications with individual agents of the Department of National Revenue.[49] Similar legal developments in other democratic societies have prompted heated debates and attempts to reform Customs censorship to better secure fundamental freedoms.[50] In sharp contrast, an examination of the history of Customs censorship in Canada reveals a remarkable record of legislative complacency.[51]

Justice Smith's conclusion that Customs legislation imposes reasonable limits on freedom of expression was grounded, in part, on the view, expressed by Sopinka J. in *Butler*, that "obscenity is a base form of expression, far from the core values underlying free expression."[52] It is now well-established in Supreme Court jurisprudence that the rigour of the standard of justification to which governments will be held under section 1 will vary in direct relation to the degree to which the expression at issue enhances the purposes of section 2(b).[53] We would add that the degree to which expression is closely related to the purposes of other *Charter* provisions should also be taken into account in the selection of the appropriate standard of review.

The connection and interaction between equality rights and freedom of expression is a distinct and important feature of the *Little Sisters* litigation. For the gay and lesbian community, the violation of these rights are fundamentally intersecting. The concept of intersectionality and interactive discrimination has examined the ways in which individuals and groups may be subject to multiple and inseparable forms of discrimination.[54] Although these concepts were

initially developed in relation to the unique forms of discrimination experienced by women of colour which could not be adequately described as either sex or race discrimination, the concepts have since begun to be extended to the ways in which other groups similarly experience multiple and inseparable forms of discrimination. For example, in the context of the legal struggle for recognition of gay and lesbian relationships, the intervenors in the *Mossop* case at the Supreme Court tried to illustrate the way in which discrimination on the basis of familial status and sexual orientation were intricately connected for gay men and lesbians.[55] The concept of interactive discrimination has thus begun to focus on the different and unique ways in which particular groups experience multiple forms of discrimination.

In our view, this analysis needs to be extended beyond discrimination and equality rights to include the ways in which different rights violations also intersect and interact to produce distinct forms of disadvantage.[56] In the context of censorship of sexually explicit materials, the rights violations that are experienced by the gay and lesbian community cannot be adequately described by separating the violation of their equality rights and the violation of their freedom of expression. Rather, the way in which this censorship violates both of these rights is fundamentally interconnected. More specifically, the way in which the gay and lesbian community experiences the violation of their freedom of expression is not just like the way the heterosexual community experiences the violation of this freedom. The violation of the freedom of expression has a disparate impact on the gay and lesbian community because of the importance of sexual expression to the political identity of that community. It can be further argued that the nature of the violation of freedom of expression is discriminatory because of the way in which the obscenity law is applied to gay and lesbian materials. The unsubstantiated belief that there is a disproportionate amount of homosexual obscenity is informed by the underlying assumption that gay and lesbian sexual imagery is in and of itself disproportionately degrading. In the language of section 15 jurisprudence, the conclusion is one that is reached by the stereotypical application of presumed group characteristics, that is, the prevailing belief that gay and lesbian sexuality is itself degrading.

The evidence in the Little Sisters case established that one of the effects of the application of the *Customs Tariff* and the *Customs Act* was to catch, not just "base" forms of expression, but also a great deal of homosexual expression closely related to the purposes of both section 2(b) and section 15. As Smith J. acknowledged, erotica produced for homosexuals furthers the values of "seeking and attaining truth, participating in social and political decision-making, and cultivating the diversity of forms of individual self-fulfilment and human flourishing in a tolerant and welcoming environment."[57] Similarly, by affirming homosexuality, by overcoming the stigma attached to sexual practices that the larger society has labelled deviant and depraved, and by helping form a political and cultural identity, sexual expression for gay men and lesbians is intimately tied to the purposes of section 15. It assists in promoting human dignity and freedom and in overcoming historical disadvantage by challenging attitudes that are the product of stereotype and prejudice.

A government scheme of administrative censorship that has a disparate impact on expression of crucial importance to the identity and political vitality of a stigmatized and historically disadvantaged minority ought to be a matter of serious concern in a free and democratic society. Unfortunately, the connections between equality and expressive interests were not made in Smith J.'s section 1 analysis. Instead of recognizing the equality dimension of the freedom of expression violation, he approached the question exclusively from the point of view of section 2(b) jurisprudence. As discussed above, Smith J. was content to simply follow the reasoning of the Supreme Court in the *Butler* decision, and to conclude that the harm caused by pornography, whether heterosexual or homosexual, was sufficient to justify the limitation on freedom of expression. As a result, the intersectionality of the rights violations for the gay and lesbian community — the way in which the denial of freedom of expression discriminates on the basis of sexual orientation, which is really the crux of the *Little Sisters* case — was left unexplored in the section 1 analysis.

THE PROCEDURAL DEFICIENCIES OF THE *CUSTOMS ACT*

Justice Smith's conclusion that the challenged provisions of the *Customs Act* and the *Customs Tariff* were constitutionally justifiable limits on freedom of expression was supported in large part by his view that the egregious problems revealed by the evidence were not caused by the law, but rather were the result of the faulty application of the law by Customs officials.[58] With all due respect, we believe he was

mistaken in not concluding that the arbitrary and unequal impact of Customs' determinations are closely tied to the procedural deficiencies of the *Customs Act*.

For example, it is no great surprise that many qualitatively questionable determinations are made given that section 58 of the *Customs Act* empowers an officer, defined simply as a person employed in the administration of the Act, to determine the tariff classification of all imported goods, including whether publications should be prohibited as obscene. The statute makes no attempt to ensure that the designated officers have any relevant training or opportunity to develop expertise. The same is true of the officers empowered to render decisions on requests for re-determination, namely "Tariff and Values Administrators" at the first level of internal appeal (sections 59, 60), and the Deputy Minister of National Revenue at the second level (section 63). Whether these decision-makers will have any training, experience or expertise in relation to obscenity law is a matter the statute leaves to pure chance.

Consider further the matter of delays in making final determinations. Lengthy delays are a common experience, as Smith J. noted.[59] This is a particularly serious concern in the case of imported periodicals, the contents of which quickly become stale-dated. For example, when Little Sisters sought to appeal the prohibition of the gay magazine "The Advocate", their position was not vindicated until 16 months after the initial determination.[60] In the most recent of the rare occasions that an importer has had the persistence to appeal a Customs prohibition all the way to court, the *Glad Day* case, a court ruling was not obtained until two and one half years after the initial ruling.[61] The structure of the appeals process in the *Customs Act* fosters such lengthy delays. Importers can appeal to court (sections 67, 71) but only after they have pursued requests for re-determination under section 60 and section 63. The statute places no time constraints on the rendering of decisions on requests for re-determination: it contains only a vague and unenforceable exhortation to the officials in question to render decisions "with all due dispatch" (section 60(3); section 63(3)).[62] It would be a simple matter to design a more streamlined and expedited re-determination process. Specific time constraints could be added. Two levels of internal appeal are entirely unnecessary, especially since they are rarely successful and often amount to little more than *pro forma* ratifications of initial determinations. The statute makes no assurance of an escalation in the quality of the "hearing"[63] or the competence of the decision-makers as one proceeds up the Customs hierarchy.

Furthermore, the statute does not require the section 58, section 60 or section 63 decision-makers to receive any evidence. No procedures for introducing evidence are set out, and none have been implemented by Customs. There is no requirement that a record be compiled or that reasons be given and, as a result, these things do not occur. Importers are not even informed of which parts of a periodical or book have been found to run afoul of obscenity law. All of these deficiencies render the appeal rights set out in the legislation illusory. The notion that the routine adjudication of the boundary between constitutionally-protected expression and obscenity by Customs officials is supervised by legal norms is a formal mirage rather than a practical reality.

Apart from the right to appeal the Deputy Minister's re-determination to court,[64] no special procedures are established by the Act for the determination of whether or not publications are to be classified as prohibited. The legislative policy of the Canadian government appears to be that such determinations are to be treated as raising legal issues no different in difficulty or importance than those raised by the determination of the correct tariff on other goods. The elementary point that other tariff classifications have nothing to do with freedom of expression appears to have been overlooked in the drafting of the legislation. The conclusion is inescapable, in our view, that the enforcement of Tariff Code 9956(a) through the procedures set out in the *Customs Act* cannot reasonably be characterized as a legislative scheme that minimally impairs *Charter* rights.

As obscenity law has become more complicated over time, the procedural deficiencies of the *Customs Act* have become increasingly anachronistic. Whatever the merits of giving censorship powers to Customs officers in the Victorian times when the law was first enacted, it is absurd to ask inadequately trained and qualified officers, without the benefit of even a rudimentary hearing, to determine whether publications fall within current understandings of the obscene. In the old days, in fact until the 1950s, smut was smut; all sexual representations were considered obscene. Whatever else can be said of it, at least this definition had the merit of simplicity. When Revenue Minister McCann said in Parliament in 1949 that

"you do not have to be a great literary critic to tell the difference between decency and filth,"[65] he was not mischaracterizing the obscenity law of the time, however wrong we may now think he was.

The law is much more complicated now. The 1959 amendments to the *Criminal Code* require judges to assess obscene works as a whole to determine whether they unduly exploit sexual themes as their dominant characteristic. Since the early 1960s, the courts have held that the presence of artistic merit, to be determined with the assistance of expert evidence, will rebut any finding of undue exploitation.[66] And since the 1992 *Butler* decision, non-violent depictions of adult sexuality are generally legal; they are obscene only if they can be said to be "degrading or dehumanizing" *and* if the Crown can prove that they pose a substantial risk of harm to society.[67] The tasks of determining artistic merit and substantial risk of harm to society, as well as the meaning of the notoriously vague concepts of degrading and dehumanizing, befuddle even our most intelligent judges who have had the benefit of days of expert testimony. Legislation that asks Customs officers to make the same determinations on a routine basis with no assistance places everyone, including those officers, in an absurd situation.

CONCLUSION

In our view, the evidence and the law point clearly to the conclusion that the combined effect of the *Customs Act* and the *Customs Tarriff* violate sections 2(b) and 15 of the *Charter* in the case of the administration of the Tariff Code prohibition on obscene representations. Justice Smith 's findings on the importance of sexual expression to the gay and lesbian community, and on the disproportionate impact of Customs censorship on gay and lesbian materials, ought to have led to the conclusion that the legislation in its effects violates section 15. On the question of whether the violation of section 2(b) was a reasonable limit, we believe that Smith J. ought to have exercised greater caution in assuming that the reasoning in *Butler* could be extended, without hestitation or problematization, to gay and lesbian sexual imagery. Justice Smith acknowledged that many of the publications suppressed by Customs are integral to the cultural and political identity of a disadvantaged and stigmatized sexual minority. Thus their distribution fosters goals that lie at the heart of the *Charter*'s protection of expression and equality interests in sections 2(b) and 15, respectively. For this reason, we believe that Smith J. erred in not holding the government to a rigourous standard of justification at the section 1 stage of the analysis. We have also taken issue with Smith J.'s failure to implicate the procedural deficiencies of the *Customs Act* in the *Charter* violations identified by the evidence. In our view, at the very least, a system of administrative censorship cannot constitute a minimal impairment of *Charter* rights if it makes little or no attempt to ensure that decisions will be made expeditiously by expert decision-makers who have the ability to receive evidence of a publication's merits. The *Customs Act* fails this test. So long as Tariff Code 9956(a) is enforced through its procedures, the problems identified in the *Little Sisters* case are likely to persist.❑

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Endnotes

1. The 1847 *Customs Act* prohibited the importation of "Books and drawings of an immoral or indecent character". Province of Canada Statutes, 10 & 11 Vic., c.31 at p. 1427. This prohibition was reproduced in legislation passed in the first session of Parliament in 1867. *An Act imposing Duties of Customs*, S.C. 1867, 31 Vict., c.7, Schedule E. The prohibition remained in place until 1985, when the Federal Court of Appeal struck down the words "immoral or indecent" on the grounds that they constituted an overly vague restriction on freedom of expression guaranteed by the *Charter*: *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*, [1985] 1 F.C. 85 (C.A.). Within three weeks Parliament had passed an amendment to fill the gap and fully restore Customs censorship powers at the border; the vague prohibition on the immoral and indecent was replaced with an apparently clear prohibition on the obscene. S.C. 1985, c.12.
2. Chris Dafoe, "Little Sister v. Big Brother" *Globe and Mail* (8 October 1994) C1.
3. Code 9956(a) of Schedule VII and s.114 of the *Customs Tariff*, R.S.C. 1985, c.41 (3rd Supp.), and ss.58 and 71 of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.).
4. A full account of the proceedings can be found in Janine Fuller and Stuart Blackley, *Restricted Entry: Censorship on Trial* (Vancouver: Press Gang, 1995).
5. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, (1996) 131 D.L.R. (4th) 486 (B.C.S.C.).
6. *Ibid.*, para. 90, at 513.
7. *Ibid.*, para. 128, at 522.
8. *Ibid.*, paras. 95-100, at 514-16.
9. *Ibid.*, paras. 105 and 251, at 517 and 553.

10. *Ibid.*, para. 109, at 518.
11. *Ibid.*, paras. 112-13, at 519.
12. *Ibid.*, paras. 115 and 252, at 519 and 554.
13. *Ibid.*, para. 267, at 557.
14. *Ibid.*, para. 116, at 519.
15. *Ibid.*, paras. 38-41 and 116, at 501-02 and 519.
16. *Ibid.*, para. 117, at 519-20.
17. *Ibid.*, paras. 81 and 113-15, at 511 and 519.
18. *Ibid.*, para. 82, at 512.
19. *Ibid.*, para. 250, at 553.
20. *Ibid.*, para. 281, at 560.
21. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 670 (B.C.S.C.), 29 March 1996.
22. *Ibid.* at para. 11.
23. *Ibid.* at para. 13. The evidence at trial demonstrated that Little Sisters was subject to a policy of "heightened inspection" at the Vancouver Mail Centre and that the implementation of such policies was at the discretion of local officials. *Supra* note 5, paras. 52 and 270, at 504 and 557.
24. This was one of the reasons Smith J. gave for making an order of increased costs against the federal Crown: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 671 (B.C.S.C.), 29 March 1996, at para. 15.
25. This methodology had the support of four members of the Supreme Court of Canada in *Egan v. Canada*, [1995] 2 S.C.R. 513 (per Cory J.) and *Miron v. Trudel*, [1995] 2 S.C.R. 418 (per McLachlin J.). Four other members of the Court would have added as a further precondition to a finding of discrimination a requirement that the personal characteristic at issue be irrelevant to the functional values underlying the challenged legislation: *Miron* per Gonthier J.; *Egan* per La Forest J. This attempt to graft a requirement of irrelevance on to the s.15 test was the minority view, one that was sharply rejected by the other five members of the Court. Unfortunately, Smith J.'s s.15 analysis was muddied by his reliance on the Gonthier/La Forest minority view as stating the law. *Supra*, note 5, paras. 133-36, at 523-24.
26. *Supra*, note 5, para. 128, at 522.
27. *Ibid.*, para. 130, at 523.
28. *Supra*, note 25.
29. *Supra*, note 5, para. 136, at 524.
30. *Ibid.*, para 91, at 514.
31. *R. v. Butler*, [1992] 1 S.C.R. 452.
32. *R. v. Hawkins*, (1993) 86 C.C.C. (3d) 246 (Ont. C.A.), rev'd on other grounds, [1993] 2 S.C.R. 157.
33. For a more detailed discussion of the problems with the *Butler* test for obscenity, see Cossman, Bell, Gotell and Ross, *Bad Attitude/s on Trial: Feminism, Pornography and the Butler Decision* (Toronto: University of Toronto, 1996 forthcoming)
34. A blatant pre-*Butler* example of judicial reliance on discriminatory community standards can be found in *Re Priape Enrg. v. Deputy Minister of National Revenue*, (1979) 52 C.C.C. (2d) 44 (Que. S.C.) at 49 ("..the community standard of contemporary Canada is less tolerant with regard to overt homosexual acts than with regard to similar acts committed between persons of opposite sexes... I have to take account of these differences in community standards of tolerance.")
35. *Supra*, notes 9 and 12.
36. *Supra*, note 31, at 479, 497, 500, 504, 508-09.
37. For a further discussion of the reasons why the *Butler* ruling should be limited to the context of heterosexual representations, see Brenda Cossman, "Feminist Fashion or Sexual Morality in Drag?" in Cossman et al., *supra* note 33.
38. *Supra* note 5, para. 186, at 537.
39. On the specific nature of lesbian sexual representations, and the tendency of courts to deny this specificity, see Becki Ross, "'It is Merely Designed for Sexual Arousal' Interrogating the Indefensibility of Lesbian Smut", in Cossman et al., *supra*, note 33.
40. *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494, at 521.
41. For further discussion, see Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 55-90.
42. *Butler, supra* note 31 at 484.
43. *Little Sisters, supra* note 5, para. 195, at 539-40 (relying on the published findings of Professor Neil Malamuth).
44. *Ibid.*, para. 195, at 540.
45. *R. v. Oakes*, [1986] 1 S.C.R. 103.
46. *Supra* note 5, para. 213 at 543-44.
47. *Ibid.*, para. 210 at 543.
48. *Ibid.*, para. 214 at 544.
49. Remarkably, Parliament did not seize the opportunity presented by the *Luscher* ruling (*supra* note 1) in 1985 to reconsider the powers of administrative censorship conferred by the combined operation of the *Customs Act* and the *Customs Tariff*. Given that the *Customs Act* was not designed with a concern for safeguarding freedom of expression in mind, such a reconsideration seems long overdue in the *Charter* era.
50. In the United States, the reform of Customs censorship began in 1930: see the debates in 71 Congressional Record 4432-39, 4445-72 (October 1929) and 72 Congressional Record 5414-31, 5487-5520 (March 1930). Useful accounts of subsequent developments can be found in Zechariah Chafee Jr., *Government and Mass Communications* (Chicago: Chicago University Press, 1965) at 242-275 and *U.S. v. 37 Photographs*, 402 U.S. 1400 (1971). An account of the New Zealand experience leading to the establishment of a specialized tribunal established in 1963 can be found in Stuart Perry, *The Indecent Publications Tribunal: A Social*

Experiment (Christchurch: Whitcomb and Tombs, 1965). The Australian experience of attempting to curtail the excesses of Customs censorship by employing a variety of expert tribunals is recounted in Peter Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (Sydney: Angus & Robertson, 1974). Even the experience of one society that was neither free nor democratic, apartheid-era South Africa, puts the procedures followed by Canada Customs in a dim light. A full account of the work of the Publications Appeal Board, established by the *Publications Act, 1974*, can be found in J.C.W. van Rooyen, *Censorship in South Africa* (Cape Town: Juta & Co. Ltd., 1987). The Act is currently the subject of a challenge before the Constitutional Court of South Africa.

51. Since the early 1920s, complaints about the arbitrariness and inaccuracy of Customs agents' application of the law have been raised: see Hector Charlesworth, "The Customs Department's Book Censorship" *Saturday Night* (19 April 1924) at 5; J. Ross McLean, "Bad Books in Canada" *Saturday Night* (6 April 1935) at 10; Morris L. Ernst and William Seagle, *To the Pure... A Study of Obscenity and the Censor* (New York: Viking, 1928) at 297; James T. Farrell, "Canada Bans Another Book" *Canadian Forum* (November 1946) at 176; Joseph Griffin, "James T. Farrell vs. The Dominion of Canada: A Case of Censorship" (1988) 68 Dalhousie Review 163; Blair Fraser, "Our Hush-Hush Censorship: How Books are Banned" *Maclean's Magazine* (15 December 1949) at 24. When these complaints have been raised in the House of Commons, they have received cursory responses from successive Ministers of National Revenue: see, e.g., House of Commons Debates, March 12, 1935, p.1652-53; February 20, 1948, p.1437-39; December 6, 1949, p.2815-17; February 28, 1957, p.1727.

52. *Butler, supra* note 31 at 488; *Little Sisters, supra* note 5, para. 235, at 550-51.

53. The most recent decision to follow this approach is *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40. In addition to *Ross* and *Butler*, see also *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

54. See Peggy Smith, "Separate Identities: Black Women, Work and Title VII" (1991) 14 Harv. Women's L.J. 21. Smith uses the term "interactive discrimination" to describe the ways in which the discrimination that Black women experience cannot be divided into separate forms of discrimination based on sex and race. For further discussions of intersectionality, see Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women" (1991) 43 Stanford L. Rev. 1241; Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25.

55. See Jody Freeman, "Defining Family in *Mossop v. DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation" (1994) 44 U.T.L.J. 41.

56. This concept is an intrinsic part of international human rights discourse, where the indivisibility of all human rights has been repeatedly emphasized. See in particular the Tehran Declaration, 1968, which stressed that civil and political rights, and social and economic rights, are inseparable and indivisible.

57. *Little Sisters, supra* note 5, para. 223 at 546.

58. *Ibid.*, para. 182 at 536; para. 198 at 540; para. 223 at 546.

59. *Supra* note 11.

60. *Supra* note 5, paras. 96-97 at 515.

61. *Glad Day Bookshop Inc. v. Deputy M.N.R.*, (1992) 90 D.L.R. (4th) 527 (Ont. Ct.. Gen. Div.).

62. Justice Smith's statement that the "time periods within which the customs officers must exercise their powers are reasonable and are specified in the legislation" (*supra* note 5, para. 242, at 552) is true only of the initial determination under s.58, which must be made within 30 days of a detention.

63. We use this term loosely since the statutory re-determination process gives importers no rights to know the case against a publication, to make submissions, or even to review the detained material.

64. It is at this third level of appeal (ss.67, 71) that the *Customs Act* makes its only concession to the distinct nature of the responsibilities imposed on Customs officers by Tariff Code 9956. While the tariff classification of other goods must be appealed from the Deputy Minister to the Canadian International Trade Tribunal (formerly the Tariff Board), importers of publications classified as prohibited pursuant to Tariff Code 9956 by-pass the Tribunal and go to court if they appeal the Deputy Minister's decision. This provision was introduced following suggestions made by the Tariff Board after hearing its first, and as it turned out, last appeal of a decision to prohibit the importation of a publication in the "Peyton Place" case: *Dell Publishing Co. Inc. v. Deputy Minister of National Revenue for Customs and Excise*, (1958) 2 T.B.R. 154. The majority commented as follows: "We cannot bring ourselves to believe that either the officers of the Department of National Revenue, Customs and Excise, or ourselves are qualified to make the kind of decision involved in classifying books under tariff item 1201 [now 9956]. Essentially, this is a decision that a book would constitute an offence under the Criminal Code if publicly sold or publicly offered for sale in Canada. Such decisions, we believe, should be made by courts with appropriate jurisdiction in criminal matters." National Archives of Canada, Tariff Board, RG79, vol. 276, file 471. Later that year, an amendment was passed relieving the Tariff Board, but not Customs officers, of the task of passing judgment on prohibited publications: S.C. 1958, c.26, s.3.

65. House of Commons Debates, December 6, 1949, p.2815.

66. *R. v. Brodie*, [1962] S.C.R. 681 per Judson J. ("Lady Chatterley's Lover" held to be not obscene); *R.* v. *Coles Co.* (1965), 49 D.L.R. (2d) 34 (Ont. C.A.) ("Fanny Hill" held to be not obscene).

67. *Butler, supra*, note 31; *R. v. Hawkins, supra*, note 32.

THE SOUNDS OF SILENCE: *CHARTER* APPLICATION WHEN THE LEGISLATURE DECLINES TO SPEAK

Dianne Pothier

On first impression, the title of the Simon and Garfunkle classic hit "The Sounds of Silence"[1] may seem like an oxymoron. But it does not take too much reflection to realize that silence can indeed be very expressive and therefore quite telling. While that can be true in any number of contexts, for the specific purposes of this article, I will examine only one: legislative silence. What is the legal significance of the legislature declining to speak on one particular aspect of a legal issue otherwise addressed in legislation? More specifically, can the *Charter* be engaged to challenge what the legislature has not said?

Early in the life of the *Charter* it was recognized that a very basic question involved the scope of the *Charter*'s application. Academics tended to pose the conceptual questions in terms of whether the *Charter* applied in the private sphere.[2] When the Supreme Court of Canada entered the fray, it too framed the debate is such terms. In *Retail, Wholesale and Dept. Store Union, Local 580, et al.* v. *Dolphin Delivery*[3] the Supreme Court of Canada held that the *Charter* did not apply to a common law cause of action involving only private litigants. Justice McIntyre, speaking on this point for all seven judges sitting on the case, concluded:[4]

> It is my view that section 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government.

This approach, though much criticized,[5] was re-affirmed by the Supreme Court of Canada in *McKinney et al.* v. *University of Guelph et al.*[6] The framing of the issue as a matter of identifying actors subject to the *Charter* rather than laws subject to the *Charter*[7] has deflected attention away from the nature of the law-making process. A few commentators did, however, recognize at an early stage that the focus on actors obscured two important and interrelated issues — the complex questions of how to handle a *failure to act* or to deal with law that is *permissive* rather than coercive.[8] Where the basis for a challenge is legislative silence, the issue is not the identity of the actor but rather the fact that the actor is not acting. While this was not foreshadowed as an issue in *Dolphin Delivery*, the case-by-case approach by which our law unfolds meant the issue would eventually have to be addressed. The time has finally come.

The question of the *Charter*'s application in the context of legislative silence has recently arisen in the decisions of two Courts of Appeal dealing with section 15 equality challenges. In *Vriend* v. *Alberta*,[9] the majority of the Alberta Court of Appeal found that the *Charter* could not be used to challenge the failure of Alberta's human rights legislation, the *Individual Rights Protection Act*,[10] to include sexual orientation as a prohibited ground of discrimination.[11] In *Eldridge* v. *British Columbia (Attorney General)*,[12] the British Columbia Court of Appeal held that the *Charter* could not be used to challenge the failure of the British Columbia government to fund sign language interpretation for deaf patients as part of state-funded medical care. In both *Vriend* and *Eldridge* the plaintiff(s)' arguments did not get off the ground for the majority of the respective Courts because of the 'failure to act' issue.

Legislative silence can be used as a bar to a claim in several ways, all of which were used in some fashion or other in *Vriend* and *Eldridge*. The *Charter* can be held not to apply at all on the basis of section 32. Assuming the section 32 hurdle can itself be surmounted, arguments parallel to those relating to *Charter* application can be used as threshold section

15 arguments; legislative silence can be the basis of finding no "law" within the meaning of section 15, or the non-action can give rise to a conclusion of no "distinction" within the meaning of the section 15 jurisprudence. Even if a *prima facie* violation of section 15 can be found, failure to act can be used as the basis for a section 1 argument of deference to legislative incrementalism.[13] Finally, failure to act, as a matter of underinclusiveness, can be relevant to the appropriate remedy.[14] This article will, however, look only at the threshold questions of whether a claim against legislative silence can get off the ground at all, namely the section 32 hurdle and section 15 "law" and "distinction" issues.[15] I want to ask, in other words, does legislative silence make a *Charter* claim dead in the water?

The *Dolphin Delivery* case, in saying that the *Charter* did not apply to the common law in the absence of a governmental actor, made it clear that there could not be a wholesale challenge to a legislature's complete failure to intervene. One of the ways of characterizing the issue in *Dolphin Delivery* is to say that the *Charter* application issue arose because of the federal Parliament's failure to legislate about picketing in the labour context. But *Dolphin Delivery* left open the possibility of a more focussed challenge against a more selective 'failure to intervene.' Indeed, one of the cases expressly relied on in *Dolphin Delivery*, *Blainey* v. *Ontario Hockey Association*,[16] although not so analysed either by the Ontario Court of Appeal or the Supreme Court of Canada, can be looked at as an example of a failure to intervene. *Blainey* involved a challenge to the provision of the Ontario *Human Rights Code, 1981*[17] which provided an exemption for sports activities from the general prohibition against sex discrimination. *Blainey* concerned a failure to act in the sense that it was permissive legislation. People subject to the act were not *required* by section 19(2) to practice sex discrimination in sports activities; they were only told that it was permissible to do so on the basis that this was beyond the scope of what the legislature had decided to regulate. That is the legislative determination which was held to have violated section 15 in *Blainey*. It was not exactly a case of legislative silence, because the non-regulation was accomplished by an express exclusion, but the ultimate result is that a decision not to regulate a small part of an activity generally subject to legislative dictate was cited by the Supreme Court of Canada as the paradigm example of the kind of case to which the *Charter* applies. Whether a decision not to regulate is accomplished by an express exclusion or by legislative silence should not be the determining factor, a point reinforced by the Supreme Court of Canada's insistence in *Schachter* that form should not be allowed to prevail over substance.[18] The substantive issue is the determination of when a decision not to regulate can be vulnerable to challenge.

Underinclusive legislation can typically be characterized as a failure to intervene, but that has not been the basis of the analysis in cases such as *McKinney*,[19] *Egan*,[20] or *Miron* v. *Trudel*.[21] *McKinney* involved the failure of human rights legislation to extend protection against age discrimination to those over 65; *Egan* involved the failure to extend spousal benefits to same sex couples; *Miron* involved the failure of insurance legislation to extend spousal coverage to heterosexual common law couples. In all three cases there was, in form as well as substance, a failure to act that was accomplished by legislative silence; those over 65 in *McKinney*, same sex couples in *Egan*, and common law couples in *Miron* were excluded simply by omission. Although in both *McKinney* and *Egan* the claims ultimately failed in the view of the majority of the Supreme Court of Canada, it was not on any threshold determination that the *Charter* could not be engaged. In none of the cases of *Blainey*, *McKinney*, *Egan*, or *Miron* was this even identified as a serious issue. Although all of these cases could be described as a failure to intervene, they were all so clearly cases of deliberate legislative choices as to make a suggestion of no governmental action or law a counter-intuitive conclusion. In this context, where do *Vriend* and *Eldridge* fit?

VRIEND: SECTION 32

The three-judge panel split three ways in *Vriend*. Justice McClung, as part of the majority, found that the *Charter* did not apply at all because legislative silence — the omission of sexual orientation from the *Individual Rights Protection Act* — meant there was no governmental actor within the meaning of section 32 of the *Charter*. Justice O'Leary, the other member of the majority, assumed that there was no section 32 problem, but held that legislative silence in respect of sexual orientation meant there was no "distinction" that could give rise to discrimination within the meaning of section 15. Justice Hunt, in dissent, found not only that the *Charter* applied but also that there was a section 15 violation that was not saved by section 1; she would have ordered a suspended remedy of invalidation.

For both Justices O'Leary and Hunt, it was obvious that the *Charter* applied within the meaning of section 32 because the claim challenged a piece of legislation.[22] For Justice McClung, however, the fact that the claim related to what the legislation did not say was decisive against the *Charter*'s application.

In part, Justice McClung's conclusion seems to reflect a distaste for the *Charter* in general. His (inaccurate) repeated references to it as a "federal" charter is obviously said with derision. The fact that his reliance on *Oakes*[23] is a reference to an 1801 English case is an indication that Justice McClung longs for an era of Parliamentary supremacy, (recalling the words of Paul Simon, "in restless dreams I walked alone"[24]). Some of Justice McClung's comments seem more appropriate to a 1981 constitutional conference, with only grudging acknowledgement that the argument against a *Charter* was lost:[25]

> If provincial legislation does not go far enough, instead of too far, for the *Charter of Rights*, surely the provincial legislature should not be ordered to specifically perform some later federal mandate on the subject. Must it pass and proclaim as a consequence of not legislating to begin with? Surely not. *Such a new judicial mandamus, lordly directed to autonomous, co-equal branches of government (legislatures), as if they were some inferior tribunal, releases fresh and limitless concepts which undermine the compartmental theorems that support present Canadian constitutional practice.*
>
> The Order Paper of the Alberta Legislature is not to be dictated, even incidentally, by federally-appointed judges brandishing the *Charter*. While any legislative product touching governmental activity is, of course, now subject to *Charter* scrutiny under its ss. 32 and 52, the practice of judicially upgrading that product should be strictly disciplined.

The issue of legislative silence does, however, mean there is more at issue than simple disdain for the *Charter*. Justice McClung relies on the fact that "Alberta has simply not exercised its 'authority' (in the way one group of citizens demands), with respect to a 'matter'..."[26] The technical answer to that, it seems to me, is that section 32 does not require a legislature to "exercise" authority; it applies to the legislature "*in respect of* all matters within the authority of the legislature" [emphasis added]. Section 32 is worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority, as in respect of minority language education rights in section 23.[27] That still begs the question of whether there is any positive obligation in section 15, a point to which I will return below.

At the section 32 stage, the issue is whether the legislature is involved at all. Justice McClung tries to make the case that it is not, by posing a question clearly calling for a negative answer:[28]

> Is it constitutionally inexcusable for the Alberta government to decline to choose between the platforms of the divinely-driven right and the rights-euphoric, cost-scoffing left, by refusing to order people of either sexual base to listen to government as to when they must forget that sexuality and contract together?

Quite apart from the fact that Justice McClung's own language is quite partial here, can it honestly be said that the Alberta legislature has "decline[d] to choose"? The reality is that the Alberta legislature has very deliberately chosen to ignore the lobbying efforts by and on behalf of gays and lesbians, a point that McClung J.A. himself goes out of his way to make elsewhere in his judgment, notably when arguing (in the alternative) against a 'reading-in' remedy:[29]

> The exclusion of "sexual orientation" in the *IRPA* is not a mere oversight. ... Rightly or wrongly, the electors of the Province of Alberta, speaking through their parliamentary representatives, have declared that homosexuality (I assume that the term "sexual orientation" defends nothing more) is not to be included in the protected categories of the *IRPA*. By reading-up Russell J., unquestionably in good conscience, tried to repair what was to her an ailing *IRPA* because she found that it fell short of section 15(1) of the *Charter*. But in doing so she overrode the expressed and sovereign will of the Alberta Legislature, where it had passed on a matter within its competence under the Constitution Act of Canada. ... Yet it is clear that the current state of Alberta's *IRPA*, where "sexual orientation" is not found, is hardly the product of any law-making slip or error. The evidence undeniably shows that over the last decade the addition of "sexual orientation" to the *IRPA* has been repeatedly

considered, and repeatedly declined, by the law-makers of Alberta.

It is no answer to say, as Justice McClung does (supported by the *Globe and Mail*[30]), that "[t]he *IRPA* in its silence simply deputes an issue of private conduct to private, not governmental, resolution."[31] *Blainey* has already established that such a stance can still be subject to *Charter* scrutiny; where the state has involved itself, its regulation of the private sphere is subject to *Charter* review. Even though through silence, the legislature of Alberta has made a very deliberate choice. Whether that choice should ultimately be respected is fundamentally a question on the merits, not a matter to be disposed of as a threshold at section 32.

The legislature of Alberta has legislated on the matter of human rights, deliberately omitting sexual orientation protection. Justice McClung fails to acknowledge the difference between complete and selective silence:[32]

> Clearly the *Charter*, the supreme law of Canada, must monitor Alberta's legislative products but only after they are proclaimed to be in force. Legislative inactivity is hardly law; statutes become law only when they are proclaimed, not before.

This misses the point that Vriend is indeed challenging an already proclaimed statute, the *Individual Rights Protection Act*. Once the legislature chooses to occupy the field, its legislation becomes vulnerable. As both Justice O'Leary and Justice Hunt concluded, the *IRPA*, both in what it says and what it declines to say, should easily pass the section 32 threshold. Justice McClung's apparent fear, in the words of Paul Simon, that "silence like a cancer grows,"[33] can be met by the fact that the legislature has opened the door by legislating in part. Moreover, section 32 is only a threshold question. This conclusion does not mean that partial legislative silence is automatically susceptible to a fatal *Charter* challenge. The more telling question is, as it should be, on the merits of the challenge. More specifically, in equality claims, does legislative silence sound an alarm at the section 15 stage? Before turing to the implications of silence for equality, it is necessary to briefly comment on the section 32 aspects of *Eldridge*.

ELDRIDGE: SECTION 32

In *Eldridge* there were claims against two statutes: the *Medical and Health Care Services Act*[34] and the *Hospital Insurance Act*.[35] The challenges were brought after a request to the Ministry of Health for funding of sign language interpretation for deaf patients was turned down by the Executive Committee of the Ministry. The essence of the claim was a denial of equal benefit of the law. Whereas hearing patients were able to fully communicate with their doctors as an automatic aspect of state-funded health care, deaf patients were not afforded the means of adequate communication that would provide them with comparable state funded health care.

No one in the British Columbia Court of Appeal thought there was a section 32 problem with respect to the *Medical and Health Care Services Act* challenge. Even though there was a challenge to the *Act*'s silence in respect of funding for sign language interpretation, all assumed section 32 was satisfied by the existence of a piece of legislation. This was less of an issue than in *Vriend* perhaps because there was no issue in *Eldridge* of complete exclusion. The issue was not the *existence* but the *extent* of statutory coverage for deaf patients. Here legislative silence was identified as a section 15 issue rather than a section 32 issue.

However, the *Hospital Insurance Act* claim was treated differently as regards section 32 on the basis that hospitals are not governmental actors to which the *Charter* applies:[36]

> The fact that the translators are not provided by hospitals does not result from the legislation but rather from the individual decisions of each hospital not to receive part of its global grant received pursuant to section 10(1) of the *Act* on these services.

This mode of analysis completely decontextualizes the claim. The claim was not against the hospitals, so the non-applicability of the *Charter* to hospitals should be of no consequence. The claim was against *government* funding practices evidenced by the negative response from the Executive Committee of the Ministry of Health which prompted the litigation. In other words, the claim was against the breadth of discretion given by the legislation to the hospitals. So framed, it should be obvious that the *Charter* applies at the section 32 stage.

The Court's treatment of a claim respecting disability is quite telling. It would be inconceivable

that the legislation would be understood as giving the hospitals discretion to afford superior treatment to white patients, but it is readily concluded not only that there is discretion to provide inferior treatment to deaf patients, but even that grant of discretion is totally immune from *Charter* scrutiny. Yet, in the end, the section 32 issue in *Eldridge* is secondary to the fact that, even where the *Charter* is held to apply, as it does in respect of the *Medical and Health Care Services Act*, the majority's section 15 analysis of legislative silence stops the claim in any event.

ELDRIDGE AND *VRIEND*: SECTION 15 AND LEGISLATIVE SILENCE

The prospect of using the *Charter* to challenge a *failure to act* raises the point noted earlier of whether the *Charter* gives rise to positive obligations on governments to act.[37] Although there are specific *Charter* provisions, such as minority language education rights in section 23, that expressly impose positive obligations on governments, the same could not easily be said about the *Charter* in general.[38] In the equality context, however, the issue is more complex than a dichotomy between positive and negative rights. The fact that equality is by definition a comparative concept[39] means that governmental obligations may arise because the government itself has chosen to occupy the field, but in a less than even-handed way.

The *Eldridge* case has been characterized by the *Globe and Mail* as involving an issue of whether it is "the court's business to create new spending programs".[40] Framed in such terms, which is how the majority of the British Columbia Court of Appeal viewed the case, a negative answer seems obvious. But that is not the basis on which the claim was made. Rather the argument was that, given that the state itself has decided to publicly fund health care, it cannot do so in a way that provides substandard care for the deaf. The "positive obligation" claimed here is not absolute. Rather the claim is that the deaf have a right to equal benefit of the law *relative to hearing persons*.

I have elsewhere argued that the majority of the British Columbia Court of Appeal has gutted adverse effects discrimination in saying that the obligation of the deaf to pay for their interpreters is not something attributable to the legislation,[41] and I do not wish to repeat that analysis. What is of particular relevance here is that the "equal benefit of the law" issue happens to arise in a context where equality requires taking account of difference. As part of a universal program, the law withholds something, funded sign language interpretation, which has significance only for the deaf. While in form it is a failure to act, the substantive result is health care with a disparately inferior quality for the deaf. The claim is not for special treatment, but for equal treatment.

Eldridge is parallel to *McKinney* in the sense that the legislature has provided a tangible benefit to some but not all. In *McKinney*, all members of the Supreme Court of Canada found a *prima facie* violation of section 15 arising from the failure (legislative silence) of the human rights legislation to cover age discrimination for those over 65. In the words of Justice L'Heureux-Dubé:[42]

> [W]here, as in the present case, the legislation prohibits discrimination on the basis of age, and then defines "age" in a manner that denies this protection to a significant segment of the population, then the *Charter* should apply. Thus, if the province chooses to grant a right, it must grant that right in conformity with the *Charter*.

Similarly, in *Eldridge* the province provided funding for health care in such a way as to cover conversations between hearing patients and their doctors (which could be provided at no extra cost) while not covering conversations between deaf patients and their doctors.

The parallel between *McKinney* and *Vriend* is, however, less direct. Just prior to the above quoted passage in *McKinney*, Justice L'Heureux-Dubé (speaking only for herself) made a point of saying that the *Charter* should *not* apply where human rights legislation has omitted a ground entirely,[43] precisely the issue in *Vriend* (and also in *Haig*). Justice L'Heureux-Dubé made this commentary only in passing, without elaboration.[44] When subject to closer examination, the issue is whether or where there is a dividing line between the legislature partially acting, in which case there is clear precedent for the *Charter* applying and a "law" to which a section 15 claim can attach, versus legislative abstention, where there is an absence of "law" for section 15 purposes even if there is a statute for section 32 purposes.

In my previous discussion of *Haig*,[45] referred to by Justice Hunt dissenting in *Vriend*,[46] I argued that Justice Wilson, concurred in by Justice L'Heureux-

Dubé, offered an alternate approach that does not depend, in the context of human rights legislation, solely on distinguishing between partial protection and omission of a ground of discrimination. In *Lavigne* v. *Public Service Employees Union*[47] Wilson J. addressed the issue of when the *Charter* applies (either at the section 32 stage or the section 15 "law" stage) to *permissive* legislation. She drew a distinction between government acquiescence, where the *Charter* should not be engaged, and government support or approval, where the *Charter* should be engaged. This is a more substantive analysis than the purely formal criterion of whether a ground is included or not.

The clearly deliberate nature of the choice of the Alberta legislature in refusing protection based on sexual orientation, which forms the basis for the majority conclusion that Vriend's claim passed the section 32 threshold, should also make it clear that the Alberta legislature had moved beyond acquiescence. Legislative silence should therefore constitute "law" for section 15 purposes.

But there are further ramifications for section 15 arising from legislative silence, which brings the discussion to the basis for Justice O'Leary's conclusion in *Vriend*. Given that the *IRPA* says nothing at all about sexual orientation, is it possible to identify a "distinction" from that legislative silence that can be the basis for a finding of "discrimination" in section 15?[48]

> The question here is whether, in its complete silence respecting sexual orientation, the *IRPA* "distinguishes" between individuals on a prohibited basis .... In the present case, the *IRPA* makes no distinction whatsoever between heterosexuals and homosexuals or, indeed, between any individuals or groups on the basis of sexual orientation. It is silent on the issue. To be comparable to the legislation in issue in *Andrews*, the *IRPA* would have to extend some benefit or protection to heterosexuals which it denies to homosexuals. ... The respondent's argument posits a distinction between grounds that are included in the *IRPA* and grounds which are not. That argument does not say that the *IRPA* distinguishes (even by adverse effect) between individuals on the basis of their sexual orientation. Rather, it says that the *IRPA* distinguishes between,
>
> (1) individuals who suffer discrimination and can utilize the machinery of the *IRPA* for protection from or redress for such discrimination (for example, members of minority racial groups suffering racial discrimination), and
>
> (2) individuals who are discriminated against on the basis of their sexual orientation, who cannot access the *IRPA*'s mechanisms for protection from or redress for such discrimination.
>
> It cannot be asserted that this is a law which discriminates on the basis of sexual orientation; at most all that the *IRPA* does is distinguish between the specified prohibited grounds of discrimination and the various potential grounds (including sexual orientation) which could be included but are not.

Justice Hunt's dissent, in finding a section 15 violation in *Vriend*, accepts Justice O'Leary's premise that the argument is based on a comparison *between* grounds of discrimination:[49]

> In this case, the *IRPA* is facially neutral. But Vriend's situation highlights the fact that the *IRPA* is not, in reality, neutral. Vriend cannot gain access to the process of human rights enforcement for one reason: the employment discrimination he alleges results from his personal characteristic (homosexuality) and his membership in that group. It is apparent that he is being treated differently than others who claim discrimination on one of the protected grounds listed in the *IRPA*, that is, others who do not share his immutable personal characteristic of homosexuality. He is receiving treatment that is "identical", but which causes inequality because of his personal characteristic and situation.

As I have argued previously in commenting on *Haig*,[50] I do not think the relevant distinction in *Vriend* is *between* grounds. The ultimate focus in *Vriend* should not be on race versus sexual orientation, but on the comparative positions of homosexuals versus heterosexuals. *Vriend* is not a situation of some individuals being able to claim protection under the *Act* whereas others cannot. Take race discrimination as the counterpoint. The starting proposition, admittedly a purely formal equality analysis, is that *everyone* can complain about race discrimination while *no one* can complain about sexual orientation discrimination. Justice O'Leary never moves beyond this formal equality analysis, and on that basis finds no discrimination *within* the ground of sexual orientation.

I would contend that there is indeed discrimination *within* the ground of sexual orientation if one looks more closely at the effects of legislative silence. The *formal equality*, of offering no protection to anyone as regards sexual orientation, becomes the *substantive inequality* of making only gays and lesbians vulnerable to state-condoned sexual orientation discrimination.

Consider the decision of the United States Supreme Court in *Romer* v. *Evans*.[51] That case involved a Colorado constitutional amendment, approved by the electors of the state, which prohibited legislative, executive or judicial action which outlawed discrimination on the basis of sexual orientation. The majority of the Supreme Court of the United States found this amendment unconstitutional as violating the Equal Protection Clause. Kennedy J., speaking for the Court, said of the protections withheld by the amendment:[52]

> These are protections taken for granted by most people either *because they already have them or do not need them.*

What are the implications when race discrimination is covered by human rights legislation but sexual orientation discrimination is not? Both homosexuals and heterosexuals (whether they need it or not) already *have* protection against *race* discrimination; it is important to recognize that gays and lesbians come in all races such that protection against race discrimination is not generally irrelevant either to homosexuals or heterosexuals as a class. The impact of the selective inclusion/exclusion of grounds comes from the fact that heterosexuals (of whatever race) do not *need* protection against *sexual orientation* discrimination because, in our social climate, heterosexuals are not likely to face such discrimination. In contrast, gays and lesbians (of whatever race) have good reason, in our social climate, to fear sexual orientation discrimination. Thus legislative silence does produce a distinction. It makes homosexuals vulnerable to state condoned sexual orientation discrimination whereas heterosexuals are not comparably vulnerable. The relevant distinction is thus between homosexuals and heterosexuals, the distinction *within* grounds that Justice O'Leary seeks.

Thus legislative silence can not only meet the requirement of "law" in section 15, but also provide the basis for a "distinction" giving rise to discrimination. In both *Eldridge* and *Vriend* it can readily be said that the legislature has sufficiently occupied the field as to be subject to *Charter* scrutiny. The issue, in the end, is less a matter of "positive obligations" on the state and more a question of differential effects.

CONCLUSION

There is a superficial attractiveness to the notion that the *Charter* cannot be used to challenge legislative silence, just as there is a superficial attractiveness to the idea that silence is the absence of sound. Yet when one starts to look and listen closely, there is no sharp distinction between what the legislature says and what it declines to say. In other words, there really are sounds of silence. Where the legislature enters the fray, but holds back in one particular aspect, the impact of what is not dealt with can be quite significant to those affected. Although the majority of the respective Courts of Appeal held that legislative silence was a threshold bar to the claims in *Vriend* and *Eldridge*, these were both cases where silence spoke loudly and clearly. Accordingly, the sounds of silence should be listened to, as well as heard, by enabling the *Charter* challenge to proceed to the merits.❑

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Endnotes

1. Paul Simon, "The Sounds of Silence" (BMI, 1964), Simon and Garfunkle, *Wednesday Morning 3 a.m.* (Columbia, 1964); *The Sounds of Silence* (Columbia, 1965).
2. For example: Dale Gibson, "The Charter of Rights and the Private Sector" (1982-3) 12 Man. L.J. 213; Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms: (ss. 30, 31, 32)" in W. S. Tarnopolsky and G. A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) c.3; Anne McLellan and Bruce Elman, "To Whom Does the *Charter* Apply? Some Recent Cases on Section 32" (1986) 24 Alta. L. R. 361; Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 670-678; Donald Buckingham, "The *Canadian Charter of Rights and Freedoms* and Private Action: Applying the Purposive Approach" (1986) 51 Sask. L. Rev. 105; Didier Lluelles and Pierre Trudel, "L'application de la *Charte canadienne des droits et libertés* aux rapports de droit privé" (1984) 18 La revue juridique thémis 219.
3. [1986] 2 S.C.R. 573.
4. *Ibid.* at 598.
5. For example: Robin Elliot and Robert Grant, "The *Charter*'s Application in Private Litigation" (1989) 23 U.B.C. L. Rev. 459; Peter Hogg, "The *Dolphin Delivery* Case: The Application of the *Charter* to Private Action" (1987) 51 Sask. L. Rev. 274; Brian Etherington,

"Constitutional law — Charter of Rights and Freedoms, sections 2(b) and 1 — application of the Charter to the common law in private litigation — freedom of expression — picketing in labour disputes: *Retail, Wholesale and Dept. Store Union, Local 580* v. *Dolphin Delivery Ltd.*" (1987) 66 Can. Bar Rev. 818; Allan Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38 U. of T. L. J. 278; Brian Slattery, "The *Charter*'s Relevance to Private Litigation: Does Dolphin Deliver?" (1987) 32 McGill L.J. 905; Jean Denis Gagnon, "L'arrêt *Dolphin Delivery*: La porte est elle ouverte ou fermée?" (1987) 32 McGill L. J. 924; Robert Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988) 46 U. of T. Fac. L. Rev. 248; Ghislain Otis, "Judicial Immunity From Charter Review: Myth or Reality?" (1989) 30 Les Cahiers de Droit 673; John Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery*" (1987) 19 Ott. L. Rev. 413; Annalise Acorn, "Gender Discrimination in the Common Law of Domicile and the Application of the *Canadian Charter of Rights and Freedoms*" (1991) 29 Osgoode H. L. J. 419.

6. [1990] 3 S.C.R. 229.
7. Elliot and Grant, *supra* note 5; Manwaring, *supra* note 5 at 442-45.
8. *Ibid.*; Brian Slattery, "Charter of Rights and Freedoms — Does It Bind Private Persons" (1985) 63 Can. Bar Rev. 148; Robin Elliot, "Scope of the *Charter*'s Application" (1993) 15 Advocates' Quarterly 204 at 221.
9. (1996) 132 D.L.R. (4th) 595 (Alta. C.A.); application for leave to appeal to the Supreme Court of Canada filed April 22, 1996.
10. S.A. 1980, c. I-2.
11. The same issue had been raised in relation to the omission of sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3, in *Haig* v. *Canada (Minister of Justice)* (1992), 9 O.R. (3d) 495 (C.A.). The Courts managed to slide over the issue of a failure to act in *Haig*. For a critique of this see my discussion in "*Charter* Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1994) 19 Queen's L.J. 261 at 278-86.
12. (1995), 7 B.C.L.R. (3d) 156 (C.A.); leave to appeal to S.C.C. granted May 9, 1996.
13. Lambert J.A. in *Eldridge*, *ibid.*; Sopinka J. in *Egan* v. *Canada*, [1995] 2 S.C.R. 513.
14. *Schachter* v. *Canada*, [1992] 2 S.C.R. 679.
15. For a more comprehensive critique of *Eldridge*, see my comments in "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 N.J.C.L. 295 at 302-04, 333-43.
16. (1986), 14 O.A.C. 194, referred to with approval in *Dolphin Delivery*, *supra*, note 3 at 601-03.
17. S.O. 1981, c. 53, s. 19(2).
18. *Supra*, note 14 at 698.
19. *Supra*, note 6.
20. *Supra*, note 13.
21. [1995] 2 S.C.R. 418. For my critical comments on *Egan* and *Miron*, see "M'Aider, Mayday", *supra* note 15.
22. *Vriend*, *supra* note 9 at 623-24, per O'Leary J.A.; at 633, per Hunt J.A. I made the same assumption in my discussion of the same issue in the *Haig* case in "*Charter* Challenges to Underinclusive Legislation", *supra* note 11 at 279.
23. *Grigby* v. *Oakes* (1801), 2 Bos. & Pul. 526, 126 E.R. 1420, cited by McClung J.A. at 608 of *Vriend*, *ibid.*
24. *Supra* note 1.
25. *Vriend*, *supra* note 9 at 606-07, per McClung J.A. (emphasis addded).
26. *Ibid.* at 608, per McClung J.A.
27. *Mahé et al.* v. *R. in Right of Alta.*, [1990] 1 S.C.R. 342
28. *Vriend*, *supra* note 9 at 606, per McClung J.A.
29. *Ibid.* at 611-12 & 617, per McClung J.A.
30. Editorial, *Globe and Mail* (9 March 1996) D6.
31. *Vriend*, *supra* note 9 at 602, per McClung J.A.
32. *Ibid.* at 607, per McClung J.A.
33. *Supra* note 1.
34. S.B.C. 1992, c. 76.
35. R.S.B.C. 1979, c. 180.
36. *Eldridge*, *supra* note 12 at 169.
37. Robin Elliot, "Scope of the *Charter*'s Application", *supra* note 8 at 214, 221.
38. *Ibid.*
39. *Symes* v. *Canada*, [1994] 4 S.C.R. 695 at 771.
40. *Supra* note 30.
41. "M'Aider, Mayday", *supra* note 15.
42. *McKinney*, *supra* note 6 at 436.
43. *Ibid.*
44. It is interesting to note that McLellan and Elman, *supra* note 2 at 368-69, in an equally passing comment, give plausibility to the *success* of a s. 15 claim against an omitted ground. That is especially noteworthy given that their general approach is adopted by McIntyre J. In *Dolphin Delivery*. See also Howse, *supra* note 5 at 257, who likewise suggests with minimal elaboration that such a claim should succeed.
45. "*Charter* Challenges to Underinclusive Legislation", *supra* note 11 at 282-83.
46. *Supra* note 9 at 643, per Hunt J.A.
47. [1991] 2 S.C.R. 211 at 247-48.
48. *Vriend*, *supra* note 9 at 626-27, per O'Leary J.
49. *Ibid.* at 648-9, per Hunt J.A.
50. "*Charter* Challenges to Underinclusive Legislation", *supra* note 11 at 204-06.
51. 116 S. Ct. 1620 (1996).
52. *Ibid.* at 1627 (emphasis added).

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

F.L. Morton

"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.

VRIEND, RIGHTS AND DEMOCRACY

William Black

INTRODUCTION

The issue of sexual orientation has become a notable focus of debate about human rights in the 1980s and 1990s. A growing consensus has developed, within both legislative and judicial bodies, that discrimination based on sexual orientation should be prohibited in the same way as discrimination on grounds such as race, sex and disability. The federal Parliament and seven of the ten provincial legislatures, plus the Yukon Territory, have included it in human rights legislation. The Ontario Court of Appeal and the Newfoundland Supreme Court have held that it is a violation of the *Charter of Rights and Freedoms* to exclude sexual orientation from the protection of human rights statutes.[1] The Supreme Court of Canada recognized that it is analogous to the grounds set out in the *Charter*, though the Court rejected a claim to spousal pension benefits by the narrowest of margins in the *Egan* case.[2] That is not to say that sexual orientation is no longer controversial, as the recent legislative debates in Parliament attest. But the trend to provide legal protection against discrimination based on sexual orientation seems unmistakable.

The majority judgments in the Alberta Court of Appeal in the *Vriend* case are notable exceptions to this trend.[3] Moreover, both judgments adopt arguments that would place more general limits on the *Charter*. Justice McClung, in sometimes disturbing language, rejects the arguments of the claimant and attacks the *Charter* as a threat to provinces and legislatures as well as an addictive source of power for judges. Justice O'Leary sets out what seems by comparison to be a narrower line of reasoning, but this reasoning would put a very substantial hole in the protection afforded by the equality rights provisions of the *Charter*. The dissenting judgment of Hunt J.A. is more consistent with other cases considering sexual orientation and with the definition of equality that has been developed by the Supreme Court of Canada. On the issue of remedies, however, she adopts what in my view is an overly-cautious approach.

I will discuss first the points raised by McClung J.A. about the role of the *Charter* and the relationship between the legislature and the judiciary. I will then discuss the interpretation of section 15 adopted by the majority. I will do so rather briefly, since Professor Pothier has covered many of the most important points.[4] Finally, I will look at the question of remedies.

FEDERALISM, DEMOCRACY AND THE *CHARTER*

Justice McClung's judgment trumpets his concern that the *Charter* is an aberration in our legal system. It violates principles of federalism by forcing provincial legislatures to "specifically perform some federal mandate on the subject."[5] The remedy sought in this case infringes on parliamentary supremacy by "dictating provincial legislation." The claimant's argument also encourages judges to usurp the powers of the legislature. Acceptance of such arguments would give undue power to "the rights-euphoric, cost-scoffing left."[6] His citations of 19th century English cases as a model for judicial application of the *Charter* seem to reflect a yearning for a simpler time.

Justice McClung's fears that the *Charter* favours the federal government seem misplaced. The *Charter* undeniably restricts the options available to all levels of government. But it is part of the national Constitution and limits the federal government in the same way that it limits the provinces. Challenges to federal laws and activity have been a very prominent part of *Charter* adjudication. For example, the first

successful challenge to a human rights statute under the *Charter* concerned the federal *Human Rights Act*.[7]

Justice McClung says that the *Charter* itself represents the imposition of a federal agenda. It is true that much of the initiative for the *Constitution Act, 1982* came from the federal government of the day. But in the end, the Act was adopted by nine of ten provinces and represents the collective will of all governments but Quebec. While the impetus for parts of the *Charter* came mainly from the federal government, the impetus for other parts came from elsewhere. In particular, the federal government originally proposed wording for the equality rights sections considerably narrower than the final wording.[8] Certainly, the glacial pace of different federal governments over the last ten years in considering the issue of sexual orientation refutes the conclusion that the protection of lesbians, gay men and bisexuals was part of any federal agenda. Justice McClung's argument, therefore, rests on a faulty premise.

His discussion of the respective roles of the legislature and the judiciary in our constitutional system calls for more detailed analysis. While McClung J.A. seems generally uneasy about the role of judges in interpreting the *Charter*, he considers the claims in this case as unusually egregious for a number of reasons. One is that the law is challenged because of the failure to include a ground of discrimination rather than because the *Individual Rights Protection Act* (IRPA) intrudes too far. Also, the exclusion of sexual orientation was not an oversight but a conscious choice of the legislature, a choice which he thinks the judiciary must respect. A related concern is that the proposed remedy – extension of the law to cover sexual orientation – is, in his view, a greater interference with the legislative process than striking down a law.

The central theme of McClung J.A. is that the *Charter* is inconsistent with the principle of representative democracy, which is at the heart of our governmental system. Whenever we allow appointed judges to overturn decisions of elected legislatures, we undermine democracy, according to this point of view. Therefore, courts must always take account of this cost in applying the *Charter*, and they should intervene only where the error is so serious as to justify this limitation on democracy.

Reconciling judicial review under the *Charter* with democratic principles is an important concern and a source of ongoing debate. Different justifications for judicial review lead to dramatically different conclusions about the appropriate scope of review and about the techniques that should be used to interpret the Constitution.

Some justifications are based on the proposition that democracy, while fundamental, is not the only value on which our governmental system is based. Indeed, we adopt constitutions precisely to limit what democratically elected governments can do. As applied to *Charter* rights, many of the justifications for broad judicial review rest on the proposition that the one can identify a set of underlying principles that can serve as a foundation for interpreting these rights even when a section of the *Charter* is phrased in quite general terms. These principles serve as points of constancy that protect us against the danger of *ad hoc* decision making. At the same time, they provide the means to adapt the *Charter* to deal with issues unforeseen at the time of its enactment and to take account of changes in society over time. Some theories of this type attempt to identify overarching principles that apply to the Constitution as a whole, while others develop principles for the interpretation of specific rights.[9] What they have in common is the proposition that some legislative choices are impermissible even if made democratically because they are inconsistent with the principles on which the constitutional language is based.

The purposive approach used by the Supreme Court of Canada to interpret the *Charter* incorporates elements of this kind of approach. The Court has said that one must take account of the larger purposes of the *Charter*, as well as the purposes of the particular section under examination, allowing for growth and development over time.[10]

Though I subscribe to a purposive approach and elsewhere have used such an approach in interpreting section 15,[11] I will not try to develop this line of argument in detail for two reasons. First, McClung J.A. rejects the premises on which a purposive approach is based. He thinks that a purposive approach gives far too much leeway to judges and that "principles" cited by courts are really judicial inventions. The living tree of the Supreme Court of Canada and the Privy Council is to him a weed out of control. Therefore, the full description of a purposive approach to section 15 would not meet his objections. He would likely see it as another elaborate intellectual conceit without any legal foundation. My second reason is that judicial review in the *Vriend* case can

be defended on the basis of a narrower justification for judicial review that accepts the centrality of democracy to our constitutional system. Using this approach, I contend that this case is within the core of proper constitutional scrutiny under section 15. Therefore, it is unnecessary to evaluate broader justifications for judicial review or to identify the outer bounds of section 15.

I do not think that the facts of the *Vriend* case force the courts to choose between acceptance of a democratic decision and enforcement of equality rights because there is evidence that the process by which the decision was made to exclude sexual orientation from the IRPA was itself inconsistent with democratic principles. Therefore, concerns about protecting our democratic system, such as those set out by McClung J., are not apposite. I also will argue that the protection of minority groups from such democratic malfunctions is a central feature of equality rights, and perhaps of the *Charter* more generally.[12] This argument relies on a theory of judicial review developed by John Hart Ely in the United States and Patrick Monahan in Canada.[13]

Ely and Monahan accept the proposition that the courts generally should not intervene to overturn substantive decisions made democratically by legislatures about the content of laws. They agree with critics of judicial review that purposes or principles do not provide adequate protection against ad hoc decisions about substantive choices. But they do think it is the proper role of judges to ensure that the legislative process reflects democratic principles and to intervene when there is reason to believe that that process is itself systematically malfunctioning. They reject the idea that a decision of a legislature must automatically be considered democratic.

Since legislators get reelected by appealing to the majority, there is a natural tendency to discount the interests of minorities. In the give and take of politics, all citizens will sometimes find themselves in the minority on some issues and the majority on others. That is fine if the long term result is to treat the interests of all citizens as equally deserving of consideration. But if the system operates to persistently discount the interests of certain individuals or groups, those people are effectively disenfranchised. Democracy requires "that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those their decisions affect."[14] Therefore, there is no conflict between judicial review and democracy if judges intervene when there are indications that a decision was not reached in accordance with democratic principles. Democracy requires that all citizens be allowed to participate in the democratic process, either directly or through equal consideration by their representatives. Parliamentary sovereignty is a means to this end, not an end in itself.

This theory is consistent with the language of section 15 and of other sections of the *Charter*. Section 15 sets out certain grounds of discrimination – grounds associated with groups that have often been denied their proportionate share of political power. In addition, the multicultural and language rights provisions of the *Charter* demonstrate that the protection of minorities and the valuing of difference is a part of our constitutional system. Therefore, the idea that democracy is different from majority rule and that section 15 protects the rights of all, including minorities, to participate meaningfully in the political process helps to reconcile the principle of democracy with the scheme of our Constitution.

Ely and Monahan develop their theory quite extensively, and it is impossible to describe all its permutations here. But it seems unnecessary to go into the finer details to see that *Vriend* is a strong case in terms of this theory. Certainly, gays and lesbians have historically experienced the effects of stereotype and prejudice, both in society at large and within legislatures.[15] That fact is the primary reason why the Supreme Court of Canada determined in *Egan* that sexual orientation is an analogous ground protected by section 15. It would be surprising if the Alberta legislative process were entirely immune to these forces. Moreover, there are more direct indications that the exclusion of sexual orientation from the IRPA constitutes a democratic malfunction.

All of the judges in *Vriend* agreed that the exclusion of sexual orientation was a conscious legislative choice made on several successive occasions. Justice McClung sees this fact as a reason for the courts to refuse to intervene. From the point of view of Ely and Monahan, the deliberate nature of the decision may point in the other direction. It raises the possibility of an unwillingness to give equal consideration to the interests of the group, whether due to attitudes within the legislature or to perceptions that a majority of voters have pejorative attitudes about lesbians and gay men and that legislators would be punished at the polls for supporting an amendment.

There is further evidence as well. In dissent, Hunt J.A. cites statements in *Hansard* to the effect that codification of "marginal grounds" raises objections from larger constituencies and that the protection against other grounds of discrimination might be undercut by "more controversial grounds." She concludes:[16]

> [T]here is, in some sectors of Alberta society, a hostility toward homosexuals for reasons that have nothing to do with their individual characteristics as human beings, and everything to do with presumed characteristics ascribed to them by those members of society based only upon their membership in a group that has suffered historical disadvantage. Given this context and these facts, the purpose of the Legislature's refusal to act in this situation is to reinforce stereotypical attitudes about homosexuals and their individual worth and dignity.

If these conclusions are correct, and they tend to be confirmed by passages in the judgment of McClung J.A. about the process, there would seem to be considerable evidence that the rejection of sexual orientation as a prohibited ground reflects an ongoing refusal to consider lesbians and gays to be equally deserving of legislative consideration. If so, there has been a systematic malfunction of the democratic process. Judicial intervention can be justified, therefore, as a correction of that malfunction rather than as the overturning of a truly democratic choice.

This theory might be thought to require the courts to inquire into the motivations of legislators, an inquiry that might be both uncomfortable for judges and difficult to carry out. The solution, I think, is to rely upon more objective and easily ascertainable indicators. One such indicator is whether the group is allowed to participate in the democratic process, a criterion that supports the protection of non-citizens. Another is whether the group is proportionally represented in legislative bodies. For example, women have equal voting rights but are not proportionately represented.[17]

Perhaps the most important indicator of all is whether the affected group is vulnerable to prejudice and stereotyping in society generally. If it is, it makes sense to conclude that if the law creates disadvantage for the group, the possibility of a democratic malfunction is high enough to support a finding that section 15 has been violated and to call on the government to provide an alternative legitimate justification under section 1. That is what Hunt J.A. essentially did in her dissenting judgment. It also has echoes in the judgment of Linden J.A. in the *Schachtschneider* case.[18]

McClung J.A. might see this suggestion as consistent with his claim that the *Charter* has been conscripted by "special-interest constituencies" and serves only the interests of minorities.[19] This suggestion is refuted by the wide range of interests that have used different sections of the *Charter*. The tobacco companies who recently used the *Charter* would be surprised to be included in "the rights-euphoric, cost scoffing left."[20] But as applied specifically to section 15, Mr. Justice McClung is right in one sense. If a purpose of section 15 is to protect those who are denied equal care and concern in our legislatures and other governmental institutions, then groups vulnerable to prejudice will be prominent in equality litigation in the same way that property owners are prominent in nuisance cases and people who are ill "conscript" hospitals. Just as those of us who are healthy may need a hospital in the future, groups that now dominate the political process may some day find themselves in need of equality protection.[21] As long as section 15 is sufficiently flexible to take account of such changes, we need not apologize for the fact that some groups use it more than others at a particular time.

My argument here assumes that people who are gay, lesbian or bisexual deserve equal care and concern by legislative bodies. I recognize that not everyone would agree. An argument based on the proposition that one's sexual orientation defines one's moral worth seems inconsistent, however, with the recognition by the Supreme Court of Canada that sexual orientation is analogous to grounds such as race, sex and disability. It also would mean that the majority of legislatures that have added sexual orientation as a prohibited ground of discrimination were wrong to do so. While there are passages in the judgment of McClung J.A. that suggest he has doubts about whether people are of equal moral worth regardless of their sexual orientation, that is not the reasoning on which he ultimately bases his judgment.

EQUALITY RIGHTS AND UNDERINCLUSIVE LEGISLATION

Much of the judgment of McClung J.A. seems to reflect a general unease with judicial review under

the *Charter*. But both he and O'Leary J.A. place considerable emphasis on the fact that the alleged flaw in the *Individual Rights Protection Act* is that it fails to protect against a ground of discrimination. This "inaction" is said by both judges not to violate section 15 of the *Charter*.

Equal Protection and Benefit of the Law

I agree with Dianne Pothier that this portion of the analysis of the majority judges misconceives the issue. If the *Individual Rights Protection Act* had never been enacted, one might accurately speak of inaction.[22] But the Act does exist, and it protects many groups subject to discrimination and stereotypes while denying protection based on sexual orientation. Moreover, the exclusion was deliberate, and this conscious rejection creates harm that goes even beyond the harm caused by the lack of statutory protection. This is not, in my view, an example of "neutral silence."[23]

The reasoning of the majority makes the right to equal protection and benefit of the law largely meaningless. As the Supreme Court of Canada has noted, "underinclusive" legislation, which provides advantages to some and not others, is a form of discrimination.[24] If section 15 permits statutes to protect some groups covered by section 15 while denying protection to other such groups that are equally in need of protection, the right to equal protection of the law is severely restricted, as well as the right to equal benefit of the law. It would be ironic indeed if parts of section 15 were interpreted out of existence by the courts in the guise of avoiding judicial activism.

One might distinguish this case from other cases of underinclusive legislation such as *Blainey* on the basis that *Blainey* considered an explicit statutory exclusion of sex discrimination in athletic facilities whereas the IRPA does not mention sexual orientation at all.[25] Surely, however, the scope of section 15 does not turn on the style in which the legislation is drafted.

There are many ways to word underinclusive legislation. Exclusions can take the form of a specific defence, as in the *Blainey* case, an express limit on a ground, as in *Tétreault-Gadoury*,[26] the restrictive interpretation of a word, as in *Miron*,[27] or a limited list, as in *Vriend*. All of these forms of exclusion are capable of causing comparable harm, and all may result from the failure to give equal consideration to the interests of the excluded group. Therefore, the way the exclusion is worded should not determine the outcome, and it is irrelevant that the IRPA sets out a limited list of grounds rather than saying: "No employer shall discriminate on the basis of personal characteristics other than sexual orientation."

Both majority judgments state that there is no inequality because gays and lesbians can complain of discrimination on other grounds such as race or religion. This seems to me an unconvincing attempt to avoid the issue of sexual orientation. One possible refutation of this line of reasoning is that presented by Professor Pothier.[28] In addition, if the purpose of a statute is to protect against discrimination historically associated with certain groups in our society, the law must cover the type of discrimination associated with the group in order to provide equal protection to the group. The fact that some members of the group may coincidentally receive other statutory protection that has nothing to do with the excluded ground does not correct the error. For example, people subject to discrimination because of religion get protection based on religion plus all the other grounds such as race, sex and disability. Lesbians and gays get protection only on grounds that are unrelated to their sexual orientation. That is not equal protection or benefit, in my opinion.

Many of the precedents cited by the majority judges in *Vriend* in considering section 15 have been undermined by recent developments. Justice O'Leary relies fairly heavily on the decisions of the B.C. Court of Appeal in *Eldridge* and of the Ontario Court of appeal in *Adler*.[29] *Adler* was heard by the Supreme Court of Canada in January, 1996, but the Court has not yet released its decision, while leave to appeal in *Eldridge* was granted in May, 1996. Justice McClung cites the U.S. case of *Bowers v. Hardwick* in holding that the legislature can refuse to take the step of protecting homosexual relations — to hold otherwise would be "rebutting a millennia [sic] of moral teaching."[30] The *Bowers* case, which upheld a criminal statute prohibiting sodomy, must now be read together with *Romer v. Evans*, in with the U.S. Supreme Court struck down an amendment to the Colorado state constitution which prohibited the legislature and government from affording protection against discrimination based on sexual orientation.[31] The Court held that by denying state institutions the power to protect against such discrimination, the constitutional amendment denied the equal protection of the law. Both cases are distinguishable from the

facts of *Vriend*, but of the two, *Romer v. Evans* seems to be the closer analogy. In any event, it rebuts any suggestion that gays and lesbians are not deemed to be groups deserving of protection under the U.S. Constitution.

MUST HUMAN RIGHTS STATUTES "MIRROR" THE *CHARTER*?

Both of the majority judgments state that the result of accepting the arguments of the challenger in the *Vriend* case would be that human rights legislation would have to "mirror" the *Charter*. If the suggestion is that the non-governmental sector would be regulated under human rights legislation exactly as the governmental sector is regulated under the *Charter*, it is incorrect.

Human rights legislation does not touch many areas of the conduct of individuals. Generally, it covers public accommodation, services and facilities, the sale and rental of housing and discrimination by employers and trade unions, all of which have a public aspect to them. I do not think that the *Charter* dictates the areas of non-governmental conduct that must be covered; the scope of the legislation is left to legislative choice. In addition, all human rights statutes contain various limitations and exemptions, even within the areas of activity covered. For example, the prohibition of employment discrimination is generally subject to a *bona fide* occupational requirement defence, and there are various exemptions regarding non-profit organizations, pensions, and so forth. Again, there are no obvious *Charter* impediments to these limits. Even limitations associated with a particular ground, such as limits on the prohibition of gender discrimination in the interests of privacy, would be consistent with the *Charter* as long as they passed the section 1 test.

Thus, acceptance of the claim in *Vriend* does not preclude legislatures from taking account of the fact that human rights legislation applies to areas not subject to the *Charter*. What it does preclude is the exclusion of a ground because of prejudice against a protected group or the belief that the interests of members of the group are less worthy of consideration than the interests of other citizens. It also means that a restriction on protection that is related to a particular ground of discrimination covered by section 15 must meet the section 1 standard of justification if it results in discrimination.[32]

REMEDIES

In the *Haig* case, the Ontario Court of Appeal ordered that the *Canadian Human Rights Act* be extended to cover the ground of sexual orientation.[33] The Newfoundland Supreme Court, Trial Division granted a similar remedy extending the Newfoundland Human Rights Code.[34] In contrast, all three judges in *Vriend* concluded that the remedy of extension (or reading in) would be inappropriate.

Justice McClung's criticisms of the remedy of extension merge with his more general concerns about judicial review under the *Charter*. He views the extension of a law as an especially serious intrusion of the courts into the legislative process. He would have declared the legislation invalid but suspended this declaration if he had found a *Charter* violation. Justice Hunt finds that there are many reasons for reading the ground sexual orientation into the IRPA, including the fact that the result would be consistent with *Charter* values, that the group to be added is small in relation to those already covered, and that the financial cost to the government would be small. However, she declines to do so because, in her view, there is a need to define further the term "sexual orientation" and to consider whether it would be subject to certain exclusions in the IRPA. Therefore, she agrees that the legislation should be declared invalid but that the declaration should be suspended to allow for legislative reconsideration. Justice O'Leary generally agrees with Hunt J.A. on this point.

When a law is found to violate the *Charter*, the choice of remedies undeniably involves careful consideration of the appropriate role of the judiciary in relation to the legislature. In *Schachter*, the Supreme Court of Canada said that *Charter* remedies include extension of a law, but the Court listed a number of factors that must be considered in deciding whether to afford this remedy.[35] I will not attempt to discuss these factors in detail, but I do want to mention some misapprehensions about the choice of the remedy of extension that I think are reflected in *Vriend*.

If a court finds that a law violates the *Charter*, any remedy will thwart the legislative intent to some extent. The Alberta legislature has decided to prohibit discrimination on certain grounds but not to include sexual orientation on the list of prohibited grounds. An order invalidating the law would thwart the intent to prohibit discrimination on the grounds that are now

included. An order extending the law would thwart the intent to exclude the ground of sexual orientation. Also, as the Supreme Court of Canada noted in *Schachter*, the remedy that declares a law to be invalid but suspends the effect of the declaration does not provide an escape. Chief Justice Lamer says:[36]

> By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

Justice McClung says that extension should never be ordered if, as here, the legislature has considered the matter and made a deliberate choice. He is right that extension in these circumstances is contrary to the legislative intent to exclude the ground of sexual orientation. He forgets, however, that invalidating the IRPA also interferes with legislative intent. The closest a court can come to giving effect to legislative intent in this situation is to determine what a legislature would most likely have done if it had known that its preferred option was unconstitutional. It is not obvious, I would hope, that the Alberta legislature would decide to become the only jurisdiction in Canada without a human rights statute if put to this choice.

Justice McClung states that if a statute is unconstitutional, "the preferred consequence should be its return to the sponsoring legislature for representative, constitutional overhaul."[37] He seems to assume that striking a law is the only way to achieve this result. But in a sense, both striking and extending are interim remedies that only determine the result until the legislature chooses to reconsider the matter. If the court strikes a law, it can be reenacted with such modifications as are needed to make it constitutional. If it extends an underinclusive law, the legislature generally has the option to repeal the law.[38] In either case, the legislature has the final say.

One of the criteria used in *Schachter* for deciding the appropriate remedy is the need for remedial precision. A court should not extend a statute if it must choose between a variety of plausible options for curing the constitutional defect. This was an important consideration for Hunt J.A. I think that she may have given insufficient weight to the fact that legislatures in other Canadian jurisdictions have uniformly chosen to use the term "sexual orientation" and have not found it necessary to define the term or to subject the ground to special statutory exemptions or limitations. For example, the recent amendments to the *Canadian Human Rights Act* parallel the remedy of extension granted in the *Haig* case. In the *Egan* case, the four judges of the Supreme Court of Canada who found a violation of the *Charter* would have granted a remedy significantly more complex than that granted by the trial judge in *Vriend.*

CONCLUSION

Long before the *Charter*, some of the prouder moments in our legal history have been attempts to protect the interests of unpopular minorities from the biases of the majority. The judgments of Rand and Abbott JJ. in the 1950s and 1960s come to mind. I think that such protection is at the core of section 15 of the *Charter*. Using the theory developed by Ely and Monahan, I have tried to show that in the context of the *Vriend* case, this objective does not force courts to balance the rights of minorities against democratic principles but instead calls on the courts to remedy flaws in the democratic process. I have argued elsewhere that Section 15 has broader objectives as well, but it at least does this much. Therefore, if the majority judges in *Vriend* meant to call attention to *Charter* excesses, I think they picked the wrong case in which to do so.❑

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Endnotes

1. *Haig v. Canada* (1995) 9 O.R. (3d) 323 (C.A.); *Newfoundland and Labrador (Human Rights Commission) v. Newfoundland and Labrador (Minister of Employment and Labour Relations)* (1995) 127 D.L.R. (4th) 694.

2. *Egan* v. *Canada* [1995] 2 S.C.R. 513 (hereinafter "*Egan*").

3. *Vriend v. Alberta* (1996) 132 D.L.R. (4th) 595 (Alta. C.A.) (hereinafter "*Vriend*").

4. Dianne Pothier, "The Sounds of Silence: *Charter* Application When the Legislature Declines to Speak" (1996) 7 Constitutional Forum 113.

5. *Vriend, supra* note 3 at 607.

6. *Ibid.*

7. *Haig* v. *Canada, supra* note 1.

8. See R. Elliot, "Interpreting the Charter – Use of the Earlier Versions as an Aid" (1982) Charter ed. U.B.C. L. Rev. 11 at 13-16, 37-39.

9. Ronald Dworkin is a prominent advocate of this kind of principled position. See, for example, R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 81-130.

10. *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145 at 155-56; *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 at 334.

11. Lynn Smith and I describe such an approach to section 15 in W. Black and L. Smith, "The Equality Rights" in G. Beaudoin and E. Mendes, eds., "*The Canadian Charter of Rights and Freedoms*, 3d ed. (Montreal: Wilson & Lafleur, 1996) ch. 15.

12. Though I argue below that the remedy of extension is appropriate here, I think it important to consider whether the *Charter* is violated before thinking about what is the appropriate remedy. As the dissenting judgment of Hunt J.A. demonstrates, it is quite possible to conclude that the IRPA violates the *Charter* but that extension is not an appropriate remedy. Thus, criticisms of the remedy of extension are irrelevant to the question whether section 15 is violated, and McClung J.A. is wrong to merge the two issues.

13. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); P. Mohahan, "A Theory of Judicial Review Under the Charter" in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 97-136. Monahan states that community is also a fundamental basis for *Charter* interpretation, but he also argues that Ely's theories are, if anything, more consistent with the Canadian *Charter* than the U.S. Constitution.

14. Ely, *ibid.* at 100.

15. *Egan, supra* note 2 at 566-67, 600-02.

16. *Vriend, supra* note 3 at 648.

17. The same is likely true of lesbians and gays, though exact data is not available.

18. *Schachtschneider v. Canada* (1993), 105 D.L.R. (4th 162 at 188 (F.C.A., concurring opinion). The need to consider the subjective thought process of legislators can also be avoided by adopting a broader definition of equality rights based on adverse effects, but my purpose here is to show that even a narrower definition tied to the democratic process fully supports intervention in this case.

19. *Vriend, supra* note 3 at 606-07.

20. *Ibid.*

21. For example, age discrimination may affect all of us at some stage of our lives. Also, though seniors are prominent in age discrimination cases today, younger adults may find that their interests are not taken seriously at some future time because the baby boomers have themselves become seniors and can use their numbers to control the political process to the disadvantage of younger people.

22. The effect of the repeal of a statute may be more arguable. See Pothier, *supra* note 4 at 115-16.

23. *Vriend, supra*, note 3 at 603.

24. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at 1239-40. This is a decision under the *Manitoba Human Rights Code* rather than the *Charter*, but the court has made clear that the nature of discrimination is the same in the two contexts.

25. *Blainey* v. *Ontario Hockey Association* (1986), 14 O.A.C. 194.

26. *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

27. *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

28. *Supra* note 4 at 118-19.

29. *Eldridge v. British Columbia* (1995) 125 D.L.R. (4th) 323 (B.C.C.A.); *Adler v. Ontario* (1994) 19 O.R. (3d) 1 (C.A.)

30. *Vriend, supra*, note 3 at 609 citing *Bowers v. Hardwick* 92 L. Ed. 2d. 140 at 150 (1986). It is noteworthy that the *Vriend* case did not concern homosexual relations but rather employment relations.

31. 116 S. Ct. 1620 (1996).

32. Cf. *Weatherall v. Canada*, [1993] 2 S.C.R. 872 for an example of a case in which a differentiation based on an enumerated ground did not have a discriminatory effect.

33. *Haig v. Canada, supra* note 1.

34. *Newfoundland and Labrador (Human Rights Commission) v. Newfoundland and Labrador (Minister of Employment and Labour Relations)*, *supra* note 1.

35. *Schachter v. Canada* (1992), 93 D.L.R. (4th) 1 (S.C.C.).

36. *Ibid.* at 26-27.

37. *Vriend, supra*, note 3 at 619.

38. Admittedly, the quasi-constitutional status of human rights legislation might raise arguments against this option that do not apply to ordinary legislation.