Landmark Case

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SEXUAL ORIENTATION AND THE *CHARTER*
VRIEND v. *ALBERTA*

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Vriend v. Alberta (1998)

Delwin Vriend was employed as a laboratory coordinator at a Christian college in Edmonton, Alberta. He had received positive evaluations, salary increases and promotions for his work performance. In January 1991, Mr. Vriend was fired by the college. The only reason given by the college was that he did not comply with its policy on homosexual practice: Mr. Vriend was fired because the college had become aware that he was a gay man.

In June 1991, Mr. Vriend filed a complaint with the Alberta Human Rights Commission on the basis that his employer had discriminated against him because of his **sexual orientation**. In July 1991, the Commission told Mr. Vriend that he could not make a complaint under the *Individual's Rights Protection Act* (*IRPA*) of Alberta because sexual orientation was not included in the **list of protected grounds** in section 7(1) of the *IRPA*.

Individual's Rights Protection Act

The *IRPA* was a statute passed by the Legislative Assembly of Alberta. Section 7(1) of the *IRPA* stated:

> **7(1)** No employer or person acting on behalf of an employer shall
>
> (a) refuse to employ or refuse to continue to employ any person, or
>
> (b) discriminate against any person with regard to employment or any term or condition of employment,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person.

If Mr. Vriend had been fired because of his race, for example, he would have been allowed to file a complaint against the college with the Human Rights Commission. However, because sexual orientation was omitted from the list in section 7(1), the Human Rights Commission could not help him.

Mr. Vriend and several groups that advocated for gay and lesbian rights applied to the Court of Queen's Bench of Alberta for a declaration that the *IRPA* violated the equality guarantee contained in s. 15(1) of the *Charter of Rights and Freedoms* due to the omission.

Canadian Charter of Rights and Freedoms, 1982

The *Charter* is a part of the Constitution of Canada. Section 15(1) of the *Charter* states:

> **15(1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination …

After hearing the arguments of the **applicants** (Mr. Vriend and the advocacy groups) and the **respondent** (the Attorney General of Alberta, representing the provincial government), Judge Russell decided that s. 7(1) and several other similar sections of the *IRPA* were **unconstitutional**. These sections were unconstitutional because they violated the *Charter*. Specifically, they violated the equality provision of the *Charter* (s. 15) and that these violations were not justified as reasonable limits permitted under s. 1 of the *Charter*. Therefore, on April 12, 1994, Judge Russell ordered that s. 7(1) and the other sections of the *IRPA* "be interpreted, applied and administered as though they contained the words 'sexual orientation'." This remedy is known as **"reading in"**: the court effectively added the words "sexual orientation" into the *IRPA*. From that day onwards, the Alberta Human Rights Commission would be required to offer protection to those who suffered discrimination on the basis of sexual orientation, such as Mr. Vriend.

Appeal to the Alberta Court of Appeal

The government of Alberta disagreed with this judgment and **appealed** to the Alberta Court of Appeal. The panel of three judges who heard the appeal were divided as to the outcome. Justices McClung and O'Leary ruled that the *IRPA* did not violate the *Charter*. However, Justice Hunt agreed with the lower court's decision. By a margin of two-to-one, the Court of Appeal reversed the decision of the lower court.

Appeal to the Supreme Court of Canada

Mr. Vriend was not satisfied with this result and applied for permission to have his case heard by the Supreme Court of Canada, the highest appellate court in the country. The Supreme Court hears only the most important appeals from all the provinces and territories, and its decisions are final: they cannot be appealed to any other court. Mr. Vriend's case was heard by the Supreme Court on November 4, 1997, and the written decision was released on April 2, 1998.

The majority of the Supreme Court held that the provisions of the *IRPA* were unconstitutional, reversing the decision of the Court of Appeal. Justices Cory and Iacobucci, who wrote the majority decision, described equality rights as "fundamental to Canada" and stated that they "reflect the fondest dreams, the highest hopes and the finest aspirations of Canadian society." In order to achieve "the magnificent goal of equal dignity for all … the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of that person."

The Supreme Court decided that the provisions of the *IRPA* breached the equality provisions of the *Charter* because the omission of "sexual orientation" from the list of protected grounds created a distinction that had the effect of discrimination, which is prohibited by s. 15(1).

The Attorney General of Alberta argued that the *IRPA* treated homosexuals and heterosexuals equally. To understand this argument, consider this hypothetical example: a homosexual person is fired because of his or her race, and a heterosexual person is also fired because of his or her race. Because "race" is listed in s. 7(1) of the *IRPA*, both the homosexual person

and the heterosexual person are protected. They can both file a complaint with the Alberta Human Rights Commission, so both the homosexual person and the heterosexual person are treated equally. On the other hand, if a homosexual person and a heterosexual person are both fired because of their sexual orientation, neither person is protected, because "sexual orientation" is not listed in s. 7(1) of the *IRPA*. According to this argument, both the homosexual person and the heterosexual person are being treated equally as well, because neither one can file a complaint with the Commission.

The Supreme Court rejected this argument because it only addressed the issue of **formal equality**. Instead, it stated that the *Charter* guaranteed **substantive equality**. The concept of substantive equality requires judges to look beneath the surface and consider the underlying social context. How does the law actually affect Mr. Vriend and people like him? If there are social circumstances that may not be obvious from just looking at the words of the *IRPA*, then those must be considered as well.

In this case, it was important to consider the social reality of discrimination against gays and lesbians. In our society, if a person is discriminated against on the basis of sexual orientation, most of the time it will be because that person is homosexual, not because that person is heterosexual. Although it is possible that a heterosexual person could be discriminated against because of his or her sexual orientation, this is far less likely to occur than discrimination against a homosexual person on that same basis. Thus, the omission of "sexual orientation" from the *IRPA* was far more likely to have a negative impact on homosexual persons than on heterosexual persons. For that reason, gays and lesbians were denied "the right to the equal protection and equal benefit of the law" as guaranteed by s. 15(1).

Furthermore, the Supreme Court held that this breach of s. 15(1) was not justified as a reasonable limit to guaranteed rights as permitted by s. 1 of the *Charter*. In conclusion, the Supreme Court held that the sections of the *IRPA* were unconstitutional and that "sexual orientation" should be read into the *IRPA* as a protected ground.

Classroom Discussion Questions

1. Who were the applicants in this case? Who was the respondent?

2. a) What is the name of Alberta's main trial court, where most civil or non-criminal cases begin?

   b) If a decision of that court is appealed, which court will hear the appeal?

   c) What is Canada's final court of appeal, which hears cases from all the provinces and territories, and from the Federal Court?

3. a) Which level of government passed the *Individual's Rights Protection Act?*

   b) What is the purpose of s. 7(1) of the *IRPA*?

4. What is the purpose of s. 15 of the *Charter*?

5. In your own words, explain the difference between formal equality and substantive equality.

6. Do you think the Supreme Court of Canada's decision was fair? Explain with reference to its use of the substantive equality argument.

7. Does the following argument reflect formal equality or substantive equality? "In my view, a man should only be allowed to marry a woman. This is not discrimination because what I am saying is that both homosexual and heterosexual men can marry, as long as they marry someone of the opposite sex. Thus, both homosexuals and heterosexuals are treated equally."

Vriend v. Alberta : Worksheet 1

Constitutional Law vs. Statutory Law vs. Common Law

Canada is a bijural country: two different legal systems exist within one country. The province of Quebec uses the civil law system in its private law (which governs relations between individuals), whereas all the other provinces use the common law system for both their private *and* public law (which governs relations between individuals and the state). It follows that the common law system is the one system used throughout Canada but just for public law. This worksheet will introduce you to the common law system.

In the common law system, laws can be classified into three main categories: constitutional law, statutory law and the common law. The courts in the *Vriend* case applied the first two types of law.

Constitutional Law

Constitution Act, 1982

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52(1) of the *Constitution Act, 1982* makes the Constitution of Canada the supreme law of Canada. This means that if any laws in the other two categories (statutory law or common law) violate the Constitution, those laws cannot be applied. The Constitution of Canada includes several written documents (such as the *Constitution Act, 1867* and the *Charter of Rights and Freedoms*) as well as unwritten principles or conventions.

In *Vriend*, the courts considered section 15(1) of the *Charter*, which guarantees equality rights.

Statutory Law

Statutes are laws enacted by the Parliament of Canada or by the provincial or territorial legislative assemblies. One example is the *Individual's Rights Protection Act*, which was passed by the Legislative Assembly of Alberta.

When a statute conflicts with the Constitution, the statute cannot be applied, because the Constitution is supreme. In *Vriend*, the Supreme Court held that section 7(1) of the *IRPA* was in violation of the *Charter*. Thus, section 7(1) had to be changed to comply with the equality guarantee in section 15(1) of the *Charter*.

Common Law

When a judge is faced with a legal problem, and neither the Constitution nor the statutes deal with the problem, the judge will have to make a decision based on what he or she thinks is fair and just. The judge will almost certainly be guided by how other judges have dealt with similar legal problems in the past. The entire collection of all of these decisions made by judges through the years is the common law.

Activity

If you were a judge, how would you decide the following cases?

Case #1

After you conduct some legal research, you find that a part of the Constitution says one thing, but a statute enacted by the Parliament of Canada says the opposite. Which law do you apply?

Case #2

You find that other judges in old cases have decided one way, but a statute recently enacted by the Legislative Assembly of Ontario says the opposite. Do you apply the statute or do you follow what other judges did in the old cases?

Case #3

Pretend that the legislature passes a statute, which says that everyone is allowed to borrow books from public libraries for free, except those of a certain racial background. Using your knowledge of section 15(1) of the *Charter*, do you apply this statute?

Vriend v. Alberta : Worksheet 2

Analogous Grounds

Section 15(1) of the *Charter* reads:

> **15(1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Is sexual orientation included in this list of protected grounds?

This list of protected grounds ("race, national or ethnic origin, colour, religion, sex, age or mental or physical disability") is known as the **enumerated grounds** because they are the specific ones that have been *enumerated* (or explicitly listed) in section 15(1). What is common among the enumerated grounds? Each ground is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs." For example, the fact that someone was born in Canada, Jamaica, India or Hungary is not something that he or she can change. Can you think of another "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" that is not already in the list?

The key to understanding why Mr. Vriend was successful is to realize that section 15(1) protects against more than just discrimination based on the enumerated grounds. Section 15(1) protects against all types of discrimination. Because of the words "in particular", it is clear that the list is only meant to provide some examples and that discrimination based on other similar grounds is also unconstitutional. These other similar grounds are known as the **analogous grounds** because they are *analogous* (or similar) to the enumerated grounds. Mr. Vriend's case was successful because sexual orientation is now accepted as an analogous ground.

Questions

1. In your opinion, is sexual orientation "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs"? How did you form this opinion?

2. If one says, "I like sports and, in particular, I like hockey and basketball," does it mean that:
   a. he or she also likes football?
   b. he or she does not like football?
   c. he or she may like football?

3. Explain why the framers of the Charter of Rights and Freedoms chose to use the term "in particular" in completing s. 15 (1). Do you think it was wise of them to use this term?

Vriend v. Alberta : Worksheet 3

Section 1

Section 1 of the *Charter* reads as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Statute Reading Exercise

What does a particular statutory or constitutional provision mean? To answer that question, you must look closely at the words that the drafters chose to use. It is helpful to break up a long, complex sentence like s. 1 into smaller chunks. Once you do that, then you can focus on these smaller portions to learn the significance of each one.

1. Section 1 can be divided into two parts. The first part sets out what the *Charter* does: it guarantees rights and freedoms. The second part sets out how that these guaranteed rights and freedoms can be limited. Where does the first part end and the second part begin? Draw a line between the two parts of s. 1.

2. **Key Term: "guarantees"** In the first part of s. 1, the drafters chose to use the word "guarantees". What other words could they have chosen?

3. The *Canadian Bill of Rights*, enacted by Parliament in 1960, uses the words "recognize" or "declare" instead of the word "guarantee". What different connotations or shades of meaning do these words have? What message do you think the drafters of the *Charter* were trying to send by choosing the word "guarantee"?

4. **Key Term: "reasonable limits"** Section 1 states that the guaranteed rights and freedoms are subject to "reasonable limits". How does someone determine what is "reasonable"? Is it easy to judge whether or not a limit is "reasonable"?

5. **Key Term: "demonstrably justified"** The only allowable limits are those that "can be demonstrably justified". What does "demonstrably" mean? Why did the drafters add the word "demonstrably" to qualify the word "justified"?

6. How can the government demonstrate that a limit is justified? For example, the random stopping of cars to screen for drunk drivers may violate the right not to be arbitrarily detained. Can the government "demonstrate" that a limit is justified by putting forth social science research evidence to show that the problem of drunk driving is very serious, that

there is a direct relationship between drunk driving and car accidents, and that the most effective deterrent is the possibility of getting caught?

7. Do you think it is necessary in every case to put forth social science research evidence? What if there is no such evidence available? Does s. 1 allow the government to rely on simple common sense or logic?

8. **Key Term: "a free and democratic society"** The Supreme Court of Canada first considered the meaning of s. 1 in the 1986 case of *Oakes*. In it, Chief Justice Brian Dickson wrote that "the values and principles essential to a free and democratic society … embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." Do you agree that these are basic values and principles of a free and democratic society? Can you think of other concepts that could be added to that list?

9. In the passage quoted above, the Chief Justice used the phrase "to name but a few". Was he saying that the concepts that he named (human dignity, equality, etc.) were the only ones that were essential to a free and democratic society? Or was he only listing several of them, while recognizing that there might be others as well? Does the phrase "to name but a few" remind you of a term used in s. 15 of the *Charter*?

Vriend v. Alberta : Worksheet 4

The "Notwithstanding Clause"

The "notwithstanding clause" is contained in section 33(1) of the *Charter*:

> 33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

This provision allows the Parliament of Canada or a provincial legislature to state that, even though a statute (such as the *Individual's Rights Protection Act*) breaches rights and freedoms protected by the *Charter*, courts must still apply that statute as if it did not violate the Constitution.

Section 33 contains two important features. First, the "notwithstanding clause" can only be used if Parliament or the legislature "**expressly declares**" it. That means that Parliament or the legislature must enact a statute explicitly stating that it is invoking the "notwithstanding clause". Second, each use of the "notwithstanding clause" can only last for a maximum of five years, but can be renewed after that. Since an election must be held at least every five years, this ensures that there will be an election before the use of the "notwithstanding clause" can be renewed.

The "notwithstanding clause" has rarely been used. The most well-known use was by the Quebec government in 1988 to override the right to freedom of expression. In 1988, the Supreme Court of Canada in a case called *Ford* struck down a Quebec law requiring public signs to be in French only, because it violated the *Charter* right to freedom of expression. The Quebec government then used the "notwithstanding clause" in a new law to ban the use of languages other than French in outdoor signs again. Five years later, when the Quebec government had to decide whether or not to renew the law that used the "notwithstanding clause", it decided to enact a different law instead. The new law did not ban the use of languages other than French; it only required that French be more prominent than other languages. This new law did not need to invoke the "notwithstanding clause" because it did not violate the right to freedom of expression.

After the Supreme Court of Canada's decision in the *Vriend* case, the Alberta government could have used the "notwithstanding clause" to re-enact the *IRPA*. However, after a week of public debate, Alberta Premier Ralph Klein announced that his government would not invoke section 33 of the *Charter* to override the Supreme Court's decision.

Questions

1. Do you think the Legislative Assembly of Alberta should have invoked the "notwithstanding clause" to override the Supreme Court's decision in *Vriend*? Why or why not?

2. When do you think it is appropriate to use the "notwithstanding clause"? What is a government saying when it decides to use the "notwithstanding clause"?

3. Why do you think the people who wrote the *Charter* included the "notwithstanding clause"?

4. Why do you think the "notwithstanding clause" is so rarely used?

5. Why do you think each use of the "notwithstanding clause" can only last for a maximum of five years?

6. Which branch of government has the final word in our constitutional structure with regard to the protection of rights and freedoms: the judiciary, or Parliament?

Vriend v. Alberta : Worksheet 5

Remedies

When a judge finds that a statute enacted by Parliament or a provincial legislature violates the Constitution, he or she must decide how to fix the situation. In other words, the judge must decide on the appropriate remedy. In *Vriend*, once Judge Russell found that the provision in the *IRPA* violated s. 15 of the *Charter*, what options did she have?

1. The judge could have invalidated, or struck down, the provision altogether. Section 7 of the *IRPA* prohibited discrimination in the workplace. What would have been the effect of invalidating s. 7?

2. Judge Russell decided instead to use the legal remedy of "reading in". The Supreme Court of Canada agreed with Judge Russell's decision to use the remedy of "reading in". What is meant by "reading in"? What was "read in" by Judge Russell in the *Vriend* case?

3. Do you think "reading in" was the appropriate remedy, or do you think the courts should have invalidated s. 7 of the *IRPA*? Why?

4. Some critics believe that "reading in" is a form of inappropriate judicial activism, because Judge Russell "rewrote" the statute. Do you feel that the courts should be activist in protecting constitutional rights, or should it be left up to the elected representatives to make legislative choices?

In *Vriend*, the Supreme Court noted that the *Charter* has given rise to a "dynamic interaction" between the courts and the other branches of government. Some have called this a "dialogue" between Parliament and the judiciary. For example, when the courts strike down a statute because it violates the *Charter*, Parliament can respond by enacting a new statute aimed at solving the same problem but in a different way, in a way that conforms with the *Charter*. Furthermore, Parliament can use the notwithstanding clause to overturn an unfavourable court decision. Do you think "dialogue" is an appropriate description for the interaction between the courts and the other branches of government?