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Shirish Chotalia: Anti-interventionist stance is more prevalent.

Alta. C.A. splits 2-1 over gay rights issue

By Brad Daisley

EDMONTON—In a complex and contentious decision on gay rights, the Alberta Court of Appeal has ruled that legislative silence cannot be equated with discrimination.

In three separate and profoundly divergent opinions, the Court of Appeal ruled two-to-one that the Alberta government's failure to include sexual orientation as a ground of discrimination in the *Individual Rights Protection Act* did not violate the anti-discrimination provisions in s. 15 of the Charter.

The three judges on the panel were Mr. Justice John W. McClung, who concurred in the result with Mr. Justice Willis E. O'Leary, and Madam Justice Constance D. Hunt, who issued a separate dissent in which she held that the provincial legislation did offend the Charter.

Mr. Justice McClung based his decision on Charter s. 32(1) which says the Charter applies to "all matters within the authority of the legislature of each province."

He said the omission of sexual orientation from the IRPA "does not amount to governmental action."

Mr. Justice O'Leary, on the other hand, said the issue was Charter s. 15 and not s. 32.

However, he held that the provincial legislation did not create any discrimination, directly or by adverse effect, between individuals contrary to the Charter.

The dissenting judge, Madam Justice Hunt, said that while the IRPA was "facially neutral," it resulted in homosexuals being treated differently and was therefore contrary to the Charter.

Madam Justice Hunt also provided a detailed academic analysis of the manner in which each member of the Supreme Court of Canada has interpreted Charter s. 15 (see story on p. 22).

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The only point the three judges agreed on is that the judiciary should not engage in law-making by reading new words into legislation to correct perceived Charter breaches.

The most controversial of the three opinions, however, is that of Mr. Justice McClung, who issued a 42-page essay castigating judges for using the Charter as an excuse for imposing their opinions on the will of provincial legislatures.

The case was brought by Delwin Vriend, who argued the omission of sexual orientation in the IRPA violated Charter s. 15.

Mr. Vriend was fired from his job as a laboratory co-ordinator with King's College in Edmonton in January 1991 after the college learned he was a homosexual. Mr. Vriend's work at the college had been quite satisfactory.

The college, however, holds strong religious views against homosexuality and homosexual practices. Mr. Vriend protested his firing to the Alberta Human Rights Commission.

The commission, however, rejected his complaint on the ground that sexual orientation was not a prohibited ground of discrimination under the listed objectives of the *Individual Rights Protection Act*.

The case went to the Queen's Bench where Madam Justice Anne H. Russell held that the IRPA protection against discrimination on the basis of gender was the same as if it protected on the basis of sex.

She held that discrimination on the basis of sexual orientation was "directly associated" with discrimination on the basis of sex.

Madam Justice Russell then said that while there was no obligation on the province to prohibit sexual discrimination, when it does so, it must provide even-handed protection.

Passing a law that protected against sex discrimination without including prohibiting discrimination based on sexual orientation was, therefore, contrary to Charter s. 15, the judge said.

The appropriate remedy was to re-write the *IRPA* by reading the words "sexual orientation" into the existing legislation.

Some time later, the Supreme Court of Canada handed down *Egan v. Canada*, [1995] 2 S.C.R. which recognized "sexual orientation" as an analogous ground within Charter s. 15.

Counsel for Mr. Vriend, Sheila Greckol of Chivers Greckol in Edmonton, described Mr. Justice McClung's anti-interventionist stance as "rhetoric about the issue of gay rights clothed in some discussion about deference to judicial decision making."

She noted Mr. Justice McClung's decision did not refer to *Haig v. Canada* (1992), 94 D.L.R. (4th), in which the Ontario Court of Appeal ruled that sexual orientation should be read into the legislation.

"I would say that for the purpose of advancing or considering the legal issues associated with a s. 15 Charter case, the decision is of minimal value," Ms. Greckol said. She observed that the Supreme Court of Canada has said courts should not interfere with a provincial government's policy decision.

"But in our view, this is not one of those cases. This is a case in which there was no consideration at all [by the provincial government] of competing issues which are at stake, but rather a very clear decision by the government that it would not extend human rights protection to what has now been found to be a discrete and insular minority.

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