Court has diverged in conceptual approach to s. 15

Vriend case outlines S.C.C. split on equality analysis

By Brad Daisley

EDMONTON—Madam Justice Constance Hunt's decision in the *Vriend* case includes a detailed analysis of the approach each member of the Supreme Court of Canada takes when deciding cases involving equality rights under s. 15 of the Charter.

Although the top court's nine judges always purport to follow their landmark ruling in *Andrews v. Law Society of B.C.*, [1989] 2 W.W.R. 289 when deciding a s. 15(1) case, Madam Justice Hunt noted that in the recent trilogy of decisions—*Miron v. Trudel* (1995), 181 N.R. 253; *Egan v. Canada* (1995), 182 N.R. 161; *Thibaudeau v. Minister of National Revenue* (1995), 182 N.R. 1—"the current members of the court have diverged...in their conceptual approach to s. 15."

In *Miron*, the issue was whether the definition of "spouse" in provincial insurance legislation violated s. 15 because it excluded unmarried partners.

Madam Justice Beverley McLachlin, on behalf of John Sopinka, Peter deC. Cory and Frank Iacobucci, concluded s. 15(1) had been breached.

Madam Justice Claire L'Heureux-Dubé agreed with the result, but for reasons outlined in *Egan*.

Mr. Justice Charles D. Gonthier, with Justice Antonio Lamer, Gerard V. La Forest and Jack Major concurring, dissented and held that there was no violation of s. 15(1).

Egan concerned the definition of "spouse" in the *Old Age Security Act*. The plaintiff claimed the definition discriminated against homosexuals.

Mr. Justice La Forest (with Justices Lamer, Major and Gonthier concurring) drew upon Mr. Justice Gonthier's analysis in *Miron* and concluded there had been no breach.

Mr. Justice Cory, with Mr. Justice Iacobucci agreeing, concluded there had been a breach.

Mr. Justice Sopinka and Madam Justice McLachlin concurred with this analysis which was similar to the approach taken by Madam Justice McLachlin in *Miron*.

Once again Madam Justice L'Heureux-Dubé took her own approach, although she agreed substantially with Mr. Justice Cory.

The third case, *Thibaudeau*, involved the validity of a provision in the federal *Income Tax Act* which required custodial parents to pay income tax on child support payments.

Mr. Justice Gonthier (with Justices Sopinka and La Forest agreeing) applied the same approach as he had in *Miron* and ruled there was no breach.

Justices Cory and Iacobucci also ruled there was no breach but based on the analysis they had adopted in *Miron* and *Egan*.

Madam Justice McLachlin followed basically the same approach, but decided the legislation had breached the Charter.

Madam Justice L'Heureux-Dubé concurred with Madam Justice McLachlin in the result, but for reasons she had adopted in the other two decisions.

Based on these results, Madam Justice Hunt said the Supreme Court of Canada judges had shown three basic approaches to interpreting s. 15(1).

Justices Cory, Iacobucci and McLachlin were in one group while Justices Lamer, Gonthier, Major and La Forest were in another.

Madam Justice L'Heureux-Dubé stood alone.

Mr. Justice Sopinka seemed to be following the McLachlin camp, but it was difficult to tell, Madam Justice Hunt noted.

As a result, she found that there was no true majority approach to interpreting s. 15.

The McLachlin, Cory, Iacobucci (and probably Sopinka) approach—This is a two-step approach:

1. Has there been a denial of one of the four equality rights, due to a distinction created by the law? Has the challenged law drawn a distinction between the claimant and others, based on personal characteristics?

2. Does the distinction constitute discrimination? To show discrimination, the claimant must show that the denial of equality rests upon one of the enumerated grounds in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group of personal characteristics.

The Gonthier, La Forest, Major and Lamer approach—This is a three-step approach:

1. Has the law drawn a distinction between the claimant and others?

2. Does the distinction result in a disadvantage? To decide this, the direct or indirect impact of the law must be examined.

3. Is the distinction based upon irrelevant personal characteristics that are enumerated in (or analogous to) s. 15(1)? To decide this, the judge must first determine the personal characteristics of the particular group and then whether the personal characteristic is relevant to the "functional values" underlying the legislation.

The L'Heureux-Dubé approach—In *Egan*, Madam Justice L'Heureux-Dubé stated that "independent content" should be given to the term "discrimination" in order to develop s. 15(1).

She said the purpose of the equality rights was to recognize "each person's equal worth as a human being, regardless of individual differences."

Under her approach, a claimant must show that there is a legislative distinction, that results in a denial of one of the four equality rights, and that this distinction is discriminatory.

She said a distinction is discriminatory if it promotes or perpetuates the view that a person "is less capable or less worthy of recognition or value as a human being or as a member of Canadian society."

Madam Justice Hunt said the key difference in the two main interpretations of s. 15 was in the approach to what constitutes discrimination.

The Gonthier group contends that if a distinction between groups of people in a statute is relevant to the statute's goals, there will be no discrimination unless those goals themselves offend the Charter.

According to Madam Justice McLachlin's approach, however, a distinction that is relevant to the statute's legislative goals may still be discriminatory if it impacts upon the claimant in a way that is contrary to the purpose of the s. 15(1).

Alta. C.A. split

—continued from page 22—

"Measured against the backdrop of s. 32(1)(b)...Alberta has simply not exercised its 'authority' (in the way one group of citizens demands), with respect to a 'matter,' (behaviour that is common to that group)."

He rejected the proposition supported by the trial judge that provincial human rights legislation must "mirror" the Charter by including all enumerated and any emerging analogous grounds contemplated by s. 15.

The judge said there was nothing in the IRPA that discriminated against homosexuals.

He also said the legislation gave equal protection to both heterosexuals and homosexuals against a number of specified grounds.

"The IRPA in its silence simply deputes an issue of private conduct to private, not governmental, resolution.

"This is no more constitutionally unacceptable, for example, than the current decision of the federal and most provincial governments, to decline any further legislative sorties into the legitimacy of pregnancy termination, relegating the issues surrounding it to private resolution."

McClung

Mr. Justice McClung noted that in the Supreme Court of Canada case *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, Madam Justice Claire L'Heureux-Dubé, whom he described as an "internationally credited human rights jurist," had urged judicial restraint when considering the constitutionality of provincial human rights laws.

He agreed that if the Alberta government had granted only "token or abridged rights" to homosexuals (for example limiting the IRPA's application to same-sex couples only if they had cohabited for more than two years), then the Charter would apply.

In this case, however, he said the provincial legislature could not be condemned for taking "a silent, disengaged and isolationist stance" on the issue of including sexual orientation in the IRPA.

"When they chose silence, provincial legislatures need not march to the Charter drum," Mr. Justice McClung wrote in his decision.

"In a constitutional sense they need not march at all.

"That is hardly to say that the governments of the day will not have to answer later to the voters for such a stance. That is as it should be."

Mr. Justice McClung added that there is nothing requiring provincial or federal governments to resolve every social controversy by legislation.

He noted the Alberta legislature has remained silent on a number of "especially contentious and morally laden issues" such as euthanasia, abortion, genetic engineering and the right to work.

He said allowing judges to dictate the legislation a provincial government should enact would create a "new type of 'judicial mandamus'" that would undermine the present constitution.

Turning to the question of whether a judge should read words into a statute to correct a perceived Charter breach, Mr. Justice McClung said this was totally wrong.

"To amend and extend [the IRPA] by reading up to include 'sexual orientation' was a sizable judicial intervention into the affairs of the community and, at a minimum, an undesirable arrogation of legislative power by the court...."

Moreover, Mr. Justice McClung said there was no way of knowing how far judges would go if given a free hand to re-write legislation with which they disagreed.

He added that if judges "continue to push the constitutional envelope," judicial independence will suffer.

"There will be renewed calls for a supplementary process wherein their judges' performance, even the continuance of their employment (as it will be characterized) can be periodically reviewed.

"Those forces are already gathering," he warned.

Mr. Justice O'Leary—Like Mr. Justice McClung, Mr. Justice O'Leary agreed the *Individual Rights Protection Act* did not create a distinction based on sexual orientation.

He also agreed the Alberta government's appeal should be dismissed.

However, he based his analysis on the Charter's equality rights provisions set out in s. 15(1) and not on s. 32(1).

Starting with the Supreme Court of Canada's landmark decision in *Andrews v. Law Society of B.C.* (1989), 91 N.R. 255, Mr. Justice O'Leary said s. 15(1) was "limited to discrimination caused by the application or operation of the law."

He also noted that this strict approach to the interpretation of s. 15(1) had been approved by the top court in the recent trilogy of human rights cases: *Miron v. Trudel* (1995), 181 N.R. 253; *Egan v. Canada*; and *Thibaudeau v. Minister of National Revenue* (1995), 182 N.R. 1.

"Where legislation is attacked as being contrary to s. 15(1), it must be shown that there are one or more provisions in the legislation which create, expressly or by 'adverse effect,' a distinction between individuals contrary to s. 15(1)," Mr. Justice O'Leary explained.

O'Leary

Moreover, he expressly rejected the trial judge's finding that the IRPA's protection against gender discrimination was "directly associated" with sexual orientation.

"Here there is no evidentiary base for a finding that sexual orientation is 'directly associated' with sex or gender, permitting the conclusion that the IRPA discriminates by providing only incomplete or under-inclusive protection against gender discrimination.

"In my view, it is clear that the IRPA contains no specific provision according partial but inadequate protection against discrimination on the basis of sexual orientation."

The judge said the real issue was whether the legislation in question distinguishes between individuals on a prohibited basis.

Applying the Supreme Court of Canada's decision in *McKinney v. University of Guelph* (1990), 76 D.L.R. (4th) 545, Mr. Justice O'Leary said the IRPA would only violate s. 15(1) if it extended some benefit or protection to heterosexuals but denied it to homosexuals.

And where provincial legislation is silent on a particular issue, there is no discrimination, he said.

Madam Justice Hunt—The lone dissenter, Madam Justice Hunt said there were four possible ways to look at the issue of whether legislative silence can constitute discrimination.

The first is Mr. Justice O'Leary's approach which holds that Charter s. 15(1) does not require governments to offer aid to all victims of discrimination.

The second approach is to rule that once a government decides to offer protection to some victims of discrimination, it must offer protection to other victims as well.

Thirdly, the court could rule that a failure to legislate can attract Charter scrutiny, but whether the legislation violates the Charter will depend upon its "context" and the legislature's "purpose" in failing to act.

Hunt

A fourth approach is to rule that a government's failure to act will amount to discrimination if the "effect" of the omission is discrimination against certain groups.

Madam Justice Hunt said the best route to take was the third approach. Although the issue has not been decided by the Supreme Court of Canada, she said *obiter dicta* in a number of cases including *McKinney* and *Lavigne v. Ontario Public Service Employees Union* (1991), 81 D.L.R. (4th) 545, supported the "purpose and context" approach.

She said the first approach was too narrow while the second was too broad.

"It is clear that governments cannot avoid the impact of the Charter through using one legislative technique rather than another.

"In my opinion, nor should they necessarily be able to avoid the Charter in all cases by refusing to act or by choosing to ignore legitimate problems that are presented to them."

Looking at the context of the IRPA and the purpose of the omission of sexual orientation, Madam Justice Hunt said "the failure to extend protection to homosexuals under the IRPA can be seen as a form of government action that is tantamount to approving ongoing discrimination against homosexuals."

Reviewing the Act's legislative history, the judge said the government was obviously aware that homosexuals were the victims of discrimination when the legislation was enacted.

"Given the 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."

In this case, Madam Justice Hunt said there were a number of arguments in favour of reading words into the *IRPA* to correct the Charter breach.

"Reading-in is required in order to relieve the disadvantaged group, homosexuals.

"The group to be added is considerably smaller than the group that would be affected were the legislation struck down in its entirety."

The judge, however, had concerns over whether reading-in could be accomplished with adequate precision.

She noted there might be problems with the definition of "sexual orientation" or with the impact any amendments might have on other portions of the IRPA.

In this case, the judge said the only remedy available was to strike down the legislation. However, doing that would wipe out all human rights protection in the province without granting any relief to homosexuals.

Madam Justice Hunt ruled the offending legislation was of no force and effect, but suspended the declaration of invalidity for one year to allow the provincial government to bring the IRPA in line with the Charter.

(Reasons in *Vriend v. Alberta*, **1545-001**, 119 pp., are available from FULL TEXT.)