VRIEND, RIGHTS AND DEMOCRACY

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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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Thanks to barbara findlay, Douglas Sanders and Stephen Wexler for helpful comments.

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.