Vriend Ten Years Later
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Vriend v. Alberta, [1998] 1 S.C.R. 493
http://scc.lexum.umontreal.ca/en/1998/1998rcs1-493/1998rcs1-493.html

April 2, 2008 marked the 10th anniversary of the release of the SCC decision in *Vriend v. Alberta.* This decision was remarkable in many ways. First, there were no less than 17 intervenors by the time the case reached the SCC. Our affiliated agency, the Alberta Civil Liberties Association, was one of those intervenors. The case was significant because of the remedy that was ordered by the SCC and because of the analysis that the SCC undertook in determining that sexual orientation should be included as a protected ground in Alberta's *Individual's Rights Protection Act* ("*IRPA*", now called the *Human Rights, Citizenship and Multiculturalism Act* ("*HRCMA*"), R.S.A. 2000, c. H-14). It is also interesting to examine what has happened in the area of sexual orientation and human rights since this noteworthy case.

The facts of the case are quite straight forward. Delwin Vriend was employed as a teacher in King's College, a private religious college. In response to an inquiry by the president of the college in 1990, Mr. Vriend disclosed that he was gay. Shortly thereafter, Vriend was asked to resign; the sole reason given was his non-compliance with the college's policy on homosexuality. Mr. Vriend then tried to complain to the Alberta Human Rights Commission, arguing that he was discriminated against in the area of employment on the ground of sexual orientation. The Commission advised Vriend that he could not make a complaint under the *IRPA*, as sexual orientation was not included as a protected ground. Vriend then filed a motion in the Alberta Court of Queen's Bench and was successful in obtaining a declaration that the omission of the protection on the basis of sexual orientation in the *IRPA* was an unjustified violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). Justice Russell granted the declaration and ordered that "sexual orientation" be read into various sections of the *IRPA* as a protected ground.

On appeal to the Alberta Court of Appeal, two justices – McClung J.A. and O'Leary J.A. — allowed the government's appeal. Hunt J.A. dissented. McClung J.A. held that the omission of "sexual orientation" from the *IRPA* did not amount to "governmental action" as required by s. 32 of the *Charter*. Thus, in his view, the court could not use the *Charter* to force the legislature to enact a provision dealing with a "divisive issue" if it had chosen not to. Both McClung and O'Leary JJ.A. held that *Charter* s. 15(1) was not violated by the *IRPA*, and thus any inequality that existed was because of the state of social affairs and not because of the operation of the *IRPA*. Hunt J.A. disagreed and held that *Charter* s. 15(1) was violated by the failure of the Alberta government to provide protection from discrimination on the basis of sexual orientation. Further, in her judgment, the violation of *Charter* s. 15(1) could not be saved by *Charter* s. 1.

Mr. Vriend then appealed to the SCC. All nine justices sitting on the SCC heard the matter, although Justice Sopinka did not take part in the judgment, as he passed away in November 1997. Justice Major wrote the sole dissenting judgment. The majority held that under-inclusive legislation could be subjected to *Charter* scrutiny and that the *Charter* did not merely apply to positive actions that encroached on rights or excessive exercise of authority. In addition, the

majority held that the omission of sexual orientation from the protected grounds under the *IRPA* created a distinction between gays and lesbians and other disadvantaged groups which were protected under the Act. Further, the omission of sexual orientation had a disproportionate effect on gays and lesbians. The *IRPA* thus denied formal and substantive equality to gays and lesbians. Finally, the omission could not be saved by *Charter* s. 1. The SCC ordered that "sexual orientation" be read in as a ground in several sections of Alberta's *IRPA*.

In addition to being a ground-breaking case for recognizing sexual orientation as a ground for protection from discrimination, the case is also distinctive because the court ordered that words be read in to existing legislation as a *Charter* remedy. After having succeeded in his case eight years after being denied the right to complain, Mr. Vriend never did proceed with his complaint to the Alberta Human Rights Commission.

A great deal has happened since *Vriend* was decided. First, the Alberta Human Rights and Citizenship Commission takes complaints regarding discrimination on the basis of sexual orientation and includes information about this on its website. However, although the Alberta Legislature has had numerous opportunities to amend the *HRCMA*, the words "sexual orientation" have never been added to it. Newcomers reading the legislation have wondered whether there is protection from discrimination on the basis of sexual orientation in Alberta. Presumably, one would have to be aware of the *Vriend* case or consult the Commission's website to find out.

Second, in the ten years since the judgment in *Vriend*, there have been a number of legal developments. Federal and Ontario legislation changed in 1999 after the case of *M. v. H*, [1999] 2 S.C.R. 3, concluded that it was discriminatory to exclude same-sex couples from benefits programs. In addition, in the following years, several provinces introduced legislation providing for recognition of same-sex relationships. The 2002 *Immigrant and Refugee Protection Act*, S.C. 2001, c. 27, recognized same-sex partners as common-law spouses who can enter Canada if they can establish a conjugal relationship. In 2004, the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, was amended to include "sexual orientation" as a ground for protection from hate crimes (see sections 318 and 319). Also in 2002, Marc Hall was successful in his court application to be allowed to attend the Prom at a Catholic school with his same-sex partner. On July 20, 2005, Canada became the fourth country in the world to enact legislation providing for same-sex marriage, after a 2004 Reference case to the SCC on the issue (see *Reference re Same-Sex Marriage*, 2004 SCC 79). In 2007, the SCC reiterated that same-sex partners are entitled to survivor benefits under the Canada Pension Plan (in the *Hislop* case, 2007 SCC 10). Also in 2007, the Ontario Court of Appeal exercised its *parens patriae* ("parent of the country") jurisdiction to recognize that in some cases, children in same-sex relationships can have more than two legally recognized parents (*A.A. v. B.B.*, 2007 ONCA 2).

There remain a number of outstanding legal issues faced by gays and lesbians in Canada. Adoption, vital statistics registration and custody/access of children from same-sex relationships continue to be litigated. Homophobia and Transphobia in schools and in society at large are still issues. In particular, trans-gendered and trans-sexual persons continue to seek legal protection from discrimination and violence.