LIFE UNDER THE LIVING TREE: FROM MARGINALIZATION TO PERSONHOOD

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In December 2000, the Metropolitan Community Church of Toronto issued a marriage licence to us under the authority of publication of banns. In accordance with the laws of Ontario, our marriage was solemnized in a double ceremony with a lesbian couple on January 14, 2001. Just hours after our marriage, the government of Ontario refused to register it, citing federal statutes which defined marriage as "one man and one woman to the exclusion of all others." On January 19, 2001 our church announced that it would challenge the restrictions on marriage under sections 2 and 15 of the *Charter*.[1]

Until we became involved with a *Charter* challenge, our relationship with the Canadian constitution was a paradoxical mix of distance and familiarity. Like the majority of Canadians, we were proud of our nation's constitution, yet we were unaware of many of its specifics. With our marriage in the balance, we set out to better understand our Charter, the measure by which justice would be served. We found four cases that told a story about the Charter's influence on the expansion of human rights for gays and lesbians in Canadian society.

In the late 1980s, Brian Mossop took a day off from work to attend the funeral of his same-sex partner's father. Mossop believed he was entitled to this bereavement day under the collective bargaining agreement that his union had with his employer, the Canadian Treasury Department. The government disagreed and Mossop eventually went to the Supreme Court of Canada. In a 6-3 decision,[2] the court ruled that Mossop was not the victim of discrimination; however the Court noted that the case did not raise 'any *Charter* issues', indicating more likely success in that direction.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[2] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

This suggested linkage was crystallized in *Egan v. Canada*,[3] involving pension benefits and the rights of same-sex partners. The Supreme Court ruled that the government was justified in denying pension benefits to same-sex couples, but they also stated that it was contrary to the spirit of the *Charter* and of the equality provisions of section 15:

> Sexual orientation is analogous to the grounds of discrimination enumerated in s. 15(1)...just as the *Charter* protects religious beliefs and religious practices as aspects of religious freedom, so too should it be recognized that sexual orientation encompasses aspects of "status" and "conduct" and that both should receive protection.[4]

Despite a majority of the court finding that it was discriminatory to exclude gays and lesbians from the protections of the *Old Age Security Act*,[5] one of the justices who found the legislation discriminatory also believed that discrimination was justified under section 1 of the *Charter*. Although Egan didn't get the remedy he sought, the gay and lesbian community celebrated the judgment as a significant victory. For the first time, sexual orientation had been declared as a prohibited category for discrimination.

The first uncompromised victory for gays and lesbians came in 1998 when Alberta teacher Delwin Vriend sued the province because the human rights legislation did not include protections based on sexual orientation. Vriend had been fired from his job and sued the government, not to get his job back, but to protest the fact that under the legislation, he did not even have the right to complain about losing his job. Vriend argued that the omission of sexual orientation from the Human Rights legislation was in itself discriminatory and the Supreme Court of Canada unanimously agreed.[6] The court rejected Alberta's argument that the political will of its citizens should dictate the rights of minorities. Such a principle would subject citizen's rights to "the tyranny of the will of the majority",[7] in essence reducing human rights to a political popularity poll. The Supreme Court ordered that the Alberta Human Rights legislation be read as though it included gays and lesbians as

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[3] [1995] 2 S.C.R. 513 [*Egan*].

[4] *Ibid.* at 514.

[5] R.S.C. 1985 c. O-9.

[6] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[7] *Ibid.* at para. 140.

a protected group. The analogous grounds that had been agreed to in principle by the court in *Egan* had finally been put into practice.

Vriend's victory for the rights of individuals was followed closely by a victory for gay and lesbian couples. In *M. v. H.*[8] the Supreme Court ruled the exclusion of gays and lesbians from the protections of family law and the *Charter* was unjustified discrimination. "Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence," the court said.[9] Gay and lesbian relationships went from legal marginalization to formal recognition as families in the space of six short years. The *Charter* transformed the judicial landscape.

As we studied these cases it was curious to note that at the heart of these important constitutional challenges lay rather everyday, common-place matters. These were people who were only trying to conduct their daily lives in the same manner as anyone else. The facts of the cases differed, but the underlying question was the same: "In Canadian society, am I a person with equal rights and obligations under the law?"

Same-sex marriage is testing the will of Canada to live up to the principles of equality that it espouses internationally. The issue has become political because leaders have made it so. The law is quite clear. "You couldn't have had a stronger indication than in *M. v. H.* that the court wants the law to be equally applied," said Justice Blair when he heard our case in Ontario court.[10]

We regard our *Charter* as an embodiment of ourselves and our national identity. As citizens we are proud or ashamed of the rules of governance, because we feel a connection between the words or phrases and our lives. Without that connection our *Charter* would become a fossil, rather than the "living tree", as it has been called.

Madame Justice L'Heureux-Dubé highlighted the importance of maintaining this connection when she spoke at a dinner last year, marking her retirement from the Supreme Court of Canada. Her words underscored for us a simple truth that we have

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[8] [1999] 2 S.C.R. 3.

[9] *Ibid.* at 7.

[10] *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321.

found at the core of our *Charter* and our case. The *Charter* loses all abstraction when you lose your rights.

"Law is not for lawyers," she said. "Law is not for academics. It is for people and all people want from the law is justice."