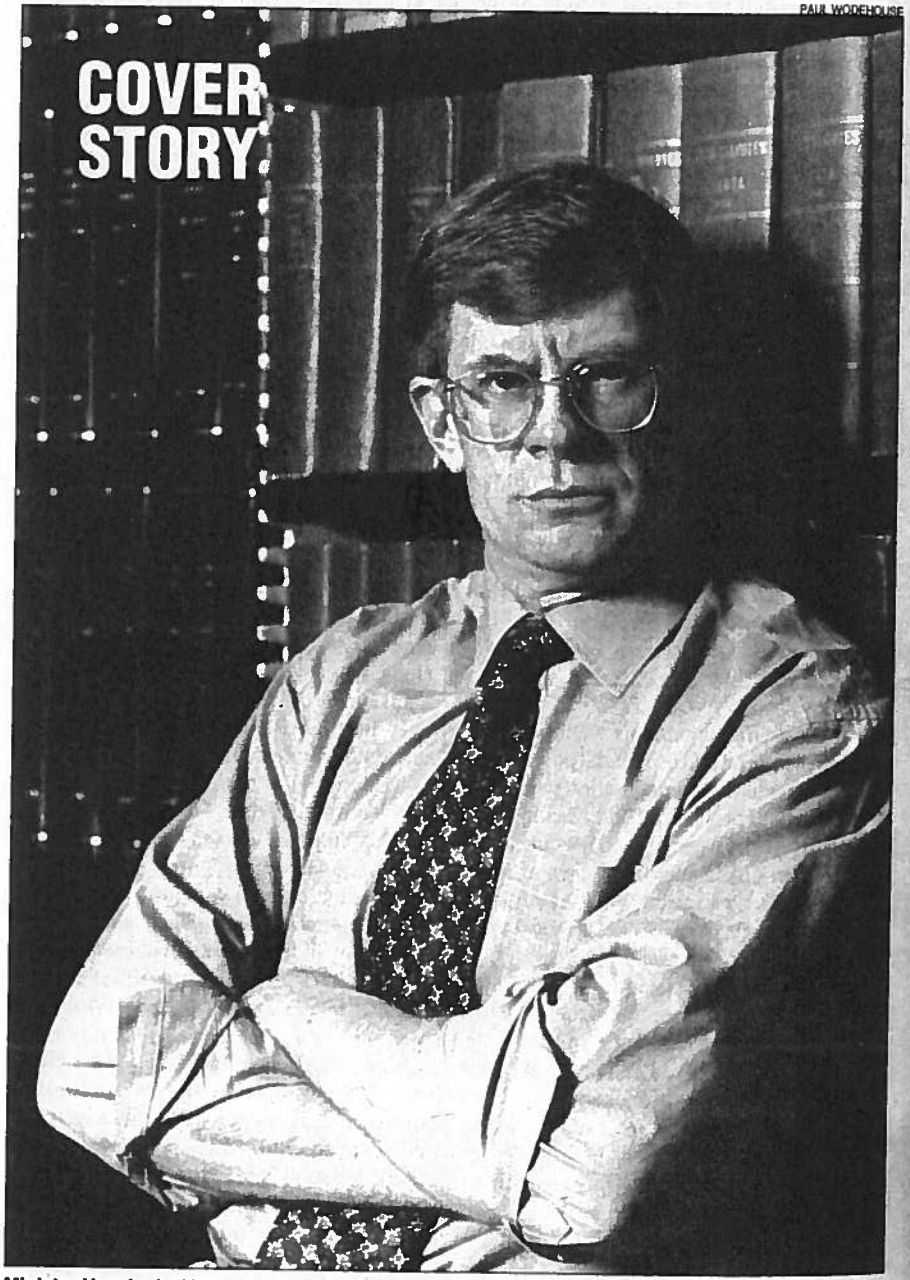
Rumblings of a counter-revolution

Alberta's justice minister blames politicians for the rising tide of judicial activism

The Governor General appointed Toronto lawyer Ian Binnie to the Supreme Court of Canada last week. The vast majority of Canadians know nothing about him, and probably never will. As usual, the selection was made by a group of back-room Liberal MPs and policy bureaucrats, who weighed their interests and recommended a candidate who could best satisfy them. Twenty years ago, such appointments went mainly to party stalwarts to reward past service; yet the system worked, because judges simply applied the law—as written—to particular cases. Since the 1982 adoption of the Charter of Rights and Freedoms, however, Canada's judges have moved boldly into the public policy arena, shaping laws to fit their own peculiar biases and ideologies. In effect, Canada's top judges have become the supreme rulers of the land, and that has turned the selection process into a back-room brawl between competing interests.

Since the death of Supreme Court Justice John Sopinka last November, an array of feminist, aboriginal, Jewish, gay and criminal-rights activists have lobbied the Prime Minister's Office, pitching their preferred candidates, all for the sake of policy-to-come. "So long as our judges were simply adjudicating particular cases, they had a real claim to judicial independence," observes University of Calgary political scientist Rainer Knopff. "But now they are setting all kinds of public policy from the bench. And they still want to hold on to all the accouterments of judicial independence, so in effect, they can't be held accountable for their policy-making. They want to have their cake and eat it."

The first political resistance to this judicial usurpation of power may finally be brewing in Alberta. On October 19, provincial Justice Minister Jon Havelock provoked howls from the legal profession when he suggested that the public is losing confidence in the justice system. Undaunted, Mr. Havelock addressed the issue again at a November 12 fundraising speech. The courts generally work with "great expertise and commitment," he said, but public confidence is being undermined by "the seeming preoccupation with the rights of the accused, and the incursion of judicial policy [making] into the preserve of duly-elected representatives." Then, in early December, the justice minister announced the formation of a task force to review the appointment process for Provincial Court judges.



PAUL WOODHOUSE

Minister Havelock: *He has the remedy. Does Premier Klein have the courage?*

The task force, chaired by Chief Judge Ed Wachowich and Calgary Conservative MLA Marlene Graham, is charged with "identifying alternative mechanisms" for the appointment of Provincial Court judges, including non-renewable, fixed-term appointments. The Alberta government has no say over appointments to the federal courts (Queen's Bench, Court of Appeal and Supreme Court), but Mr. Havelock hopes his province's example proves contagious. "Judicial reform has to start somewhere," he says. "And 90% to 95% of Criminal Code violations are tried in the Provincial Courts."

The need for reform can no longer be ignored, argues Mr. Havelock. "We politicians have no one to blame but ourselves,"

he says. "It's politicians who brought judges into the public policy arena, with the Charter of Rights and Freedoms. It's politicians who [invoke or fail to invoke] the opt-out clause of the charter. And it's politicians who control the judicial appointment process." Court appointments are already highly politicized, he observes, and they will likely remain politicized, so long as judges insist on legislating from the bench. "But public involvement or at least oversight of the appointment process could *de*-politicize the issue."

There is no doubt that today's judges rule the country from their aloof positions behind the bench, observes University of Calgary constitutional expert Ted Morton. "Canadians are just beginning to discover just how much of our public life is now dictated by unelected judges," he says. "But given the trust most of us still place in the courts and the charter, the educational process is too slow."

An article written by Professor Morton, entitled "The Policy Impact of the Charter of Rights," is now being printed in the latest edition of the political science textbook, *Crosscurrents: Contemporary Political Issues*. In the article, Prof. Morton details the Supreme Court's policy-making tendencies in criminal law, bilingual education, aboriginal interests, electoral law and social issues. His findings include:

• In criminal law, major studies have demonstrated that criminal suspects in Canada now enjoy more rights than their American counterparts. In particular, the court has adopted the "exclusionary rule" with a vengeance, throwing out evidence and thus overturning convictions on the thinnest of pretexts. In last year's *Feeney* decision, for example, the court released a confessed murderer. The police had entered the suspect's residence, and discovered him splattered with the blood of his 85-year-old victim. He then admitted his crime, but the court decided that police should require a special warrant prior to entering a suspect's residence; so Mr. Feeney walked.

• In the 1990 *Askov* ruling, the court declared that a delay-of-trial of more than "six to eight months" constituted "exquisite agony" for accused persons—despite the fact that such delays are most often the result of motions by the accused. As a result, between October 1990 and March 1991, crown attorneys had to dismiss 28,216 charges against suspected murderers, extortionists, rapists and other, lesser felons and suspects.

• As a result of the 1990 *Mahe v. Alberta* ruling, the federal courts have become involved in the design and management of francophone education programs in Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia.

• In the 1990 *Sparrow* ruling, the court took it upon itself to resurrect long-extinguished aboriginal rights, contrary to the expressed wording of the charter itself. A lower court then ruled (1996) that Indians cannot be fined for fishing without a licence, and in December, the Supreme Court surrendered a large swath of British Columbia to tribal control.

• In the 1985 *Singh* ruling, the court forced mandatory oral hearings for refugee applicants, regardless of whether their claims had any evident possibility of merit. The court thus caused a backlog of 124,000 refugee claimants, released 15,000 existing claimants into society without a hearing, and forced changes to the Immigration and Refugee Board costing some $60 million per year. Yet, prior to *Singh*, the UN had held up Canada's refugee policies as a model of fairness.

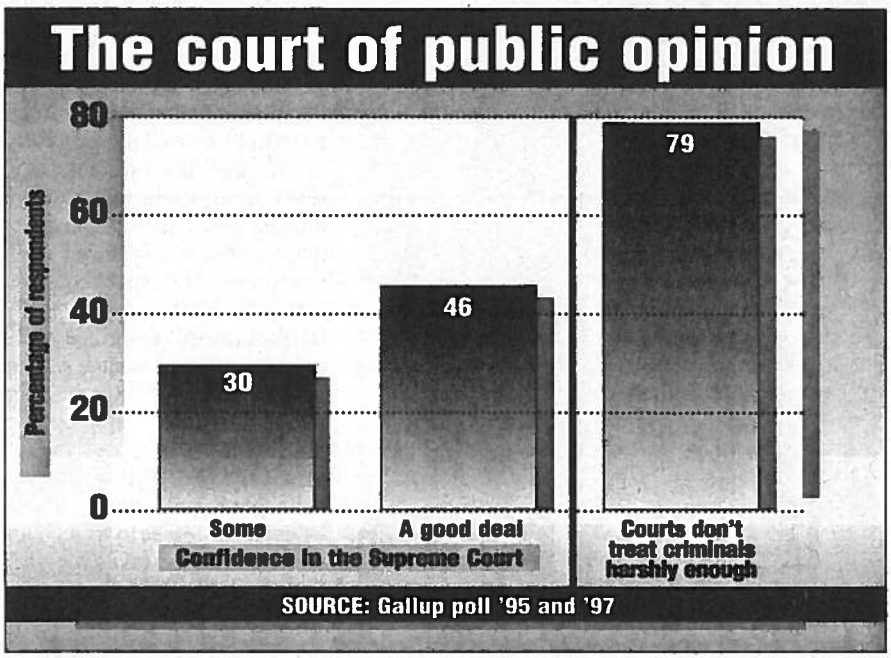
• In *Big M Drug Mart* (1985), the court decided that Alberta's Lord's Day Act violated the religious freedom of a retail outlet, and defined Canada as a "secular society," despite the fact that the charter declares this a country "under God." The *Zylberburg* decision later prohibited voluntary school prayer, in the name of religious freedom.

• As a result of over-interpreting the charter's voting rights in *Carter* (1991), the federal courts have been redrawing electoral boundary maps in Saskatchewan, Alberta, British Columbia and P.E.I. The court also struck down long-standing policies denying prison inmates the right to vote; and when parliament tried to amend its law, by denying the right to vote only to prisoners serving sentences of two or more years, the court struck down that law.

• The top court has been obsequious toward feminist claims. It ruled in 1993, for example, that female university students may take complaints about their grades to their provincial human rights tribunals. But its major service has been in the context of abortion. In the 1988 *Morgentaler* decision, the court struck down Canada's abortion law, making this the only country in the world without some sort of legislation protecting the unborn, at least marginally. It has since refused to consider arguments regarding the humanity of the fetus. A statistical study has shown that feminists win 70% of their courtroom challenges.

• In the 1996 *Egan* case, the court decided unanimously that "sexual orientation" was a ground of discrimination akin to "race." While the court agreed parliament could still deny Old Age Security benefits to homosexual "spouses," its decision to enshrine the gay lifestyle in the charter has encouraged lower courts to reshape dozens of laws on adoption, prison conjugal visits, income tax provisions, pension plans and insurance provisions.

• Even the criminally insane enjoy a new



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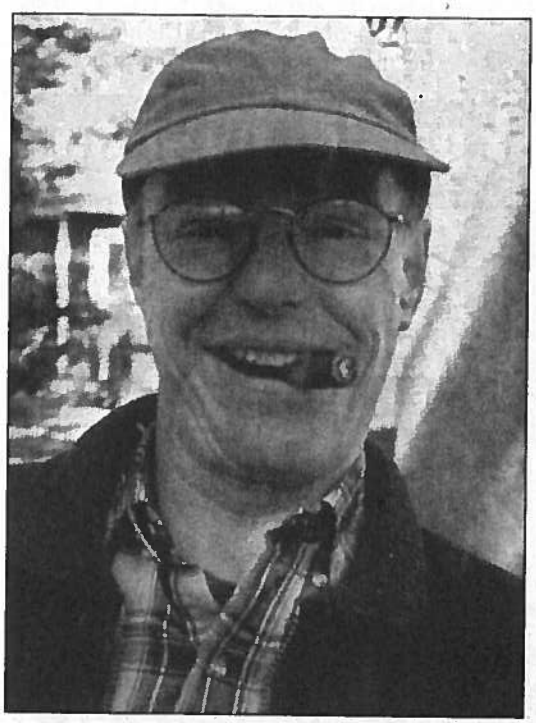
In the 1989 *Andrews* decision, the Supreme Court ruled that only "discrete and insular minorities" may appeal to the charter's equality guarantee. So in *Schachtschneider* (1993), a federal court acknowledged that married couples are taxed more than common-law couples and thus suffer religious discrimination; but the court denied them relief, since traditional families are not "historically disadvantaged."

freedom. Prior to 1991, someone found "not guilty" of a crime "by reason of insanity" could be held over in a mental institution on the grounds that he might still be dangerous. But in *Swain*, Chief Justice Antonio Lamer of the Supreme Court demanded that such perpetrators be "protected from arbitrary detention," and that they be released from protective custody or referred to a public review panel.



Calgary's Knopff: *Judges want to have their cake and eat it.*

And according to Prof. Morton, the trend toward judicial intervention is getting worse. "Until recently," he says, "the court pretty well stuck to the notion that 'rights' meant limiting the actions of the government, so they stuck pretty much to telling the government what it couldn't do. But there's been a dangerous new trend, over the last few years, where they've begun telling the governments what they must do. And so far, governments have done what they've been told."

Examples of unelected judges dictating to society abound. In the 1994 *Vriend* case, then-Alberta Court of Queen's Bench justice Anne Russell (since promoted to the Court of Appeal) ordered the provincial government to add sexual orientation to its human rights code. She declared that Alberta's refusal to enshrine gay rights was a violation of the charter's equality guarantee. Then, in September 1997, an Ontario trial judge forbade that province's Conservatives from scrapping part of the feminist "pay-equity" program, instituted by the previous NDP government; that decision cost Ontario taxpayers $416 million. And most recently, in *Eldridge*, the Supreme Court ruled that a provincial hospital is obliged to provide sign-language interpreters for deaf patients. While interpreters are expected to cost just $150,000 yearly per hospital, the principle enshrined by the court forces governments to accommodate every disability in every public program. Simply treating the disabled or supposedly disadvantaged like everybody else will no longer be permitted.

Given the degree to which judicial activism has taken root, Mr. Havelock admits that injecting some accountability into the appointment process is just a beginning. "Nothing is more frustrating than having to enforce a criminal code [or civil rights law] that's [interpreted] at odds with the philosophy and mandate of this government," he says. "Somebody must defend the prerogative of legislatures to make the laws."

The Klein government's apparent willingness to challenge judicial law-making will receive its first big test later this year when the Supreme Court hands down its decision in *Vriend v. Alberta*. Edmonton homosexual Delwin Vriend went to the Supreme Court last November, after the Alberta Court of Appeal overturned the ruling that sexual orientation be "read into" the provincial human rights code. If the Supreme Court rules in favour of Mr. Vriend, gays will be protected from discrimination in virtually all private relations, right down to the renting of a basement suite. During the hearing, the sitting judges gave every indication that they will indeed force Alberta to enshrine homosexuality in its laws.

"This remains a political problem," Mr. Havelock insists. "And we have the means to resolve it." He is referring to Section 33 of the charter, the so-called "opt-out" or "notwithstanding clause." When the charter was being debated in the early 1980s, the provinces insisted on the inclusion of a provision that would allow legislatures to opt out of judicial distortions of charter sections governing personal rights. However, in 15 years, only the governments of Quebec and Saskatchewan have had the courage to use it. "Section 33 is a normal part of the charter," says Mr. Havelock. "Opting-out of a ruling isn't going head-to-head with the judiciary. It's simply correcting what the legislature sees as a [judicial] misinterpretation of its own legislation."

However, Mr. Havelock quickly adds, any decision to invoke Section 33 will be made by the government caucus. And if the Supreme Court rules against the province in *Vriend*, Premier Ralph Klein has already vowed that his government will probably "respect" the court's decree to grant special status to homosexuals. Still, the issue is bound to produce an interesting showdown in caucus.

University of Western Ontario Law professor Ian Hunter thinks that Mr. Havelock's initiative to reform the judicial appointment process is "a very, very good thing," both because the provincial courts are closest to most people's immediate concerns, and because it may show the public the enormous importance of the courts. However, Prof. Hunter notes that even the best provincial judges are helpless under the legal concoctions of their activist federal counterparts. And a public appointment process, he warns, is a two-edged sword. "We've had a public appointment process in Ontario, for 12 years now, and it's intensified the search for disabled, black lesbian judges," says Prof. Hunter. "Whether it has been the Liberals, NDP or Conservatives in power, the tendency has been to get more activist judges, rather than less." Still, Prof. Hunter believes a public process that resists pressure from the intelligentsia and media pundits could nevertheless advance good and impartial candidates.

Repairing the legal ravages of the Supreme Court is another matter. "I really think that Section 33 is the way to go," Prof. Hunter advises. "This myth has grown up, that any government that wants to opt-out of a

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Terrence Burlingham was suspected of the rape-slaying of 16-year-old Denean Worms. But police offered him a second-degree conviction if he would tell them where he had hidden the murder weapon before his lawyer arrived. He did. In 1993, the Supreme Court overturned his conviction, however, since evidence obtained through such "trickery" would "detract from the integrity of the trial."

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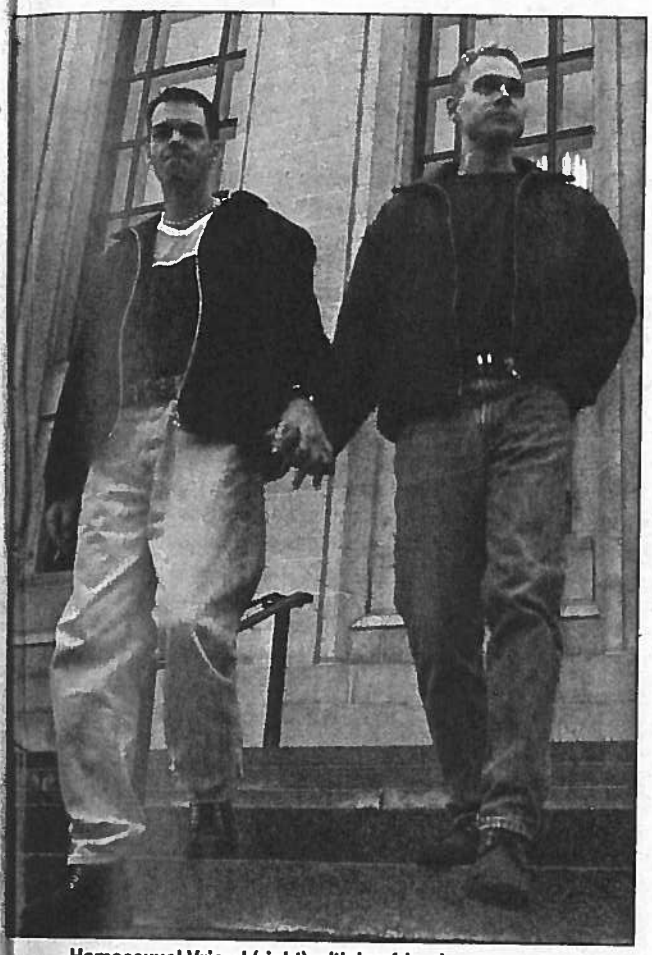
In the 1994 *Prosper* decision, the Supreme Court overthrew a drunk-driving conviction because the P.E.I. provincial government had not installed a 24-hour 1-800 legal aid hotline. Governments that do not adequately respect the rights of the accused must "suffer and endure the consequences," said Chief Justice Antonio Lamer.



Homosexual Vriend (right) with boyfriend: *Wants his lifestyle protected by law.*

charter ruling must be Nazi or something, but it's just not true." Section 33 is a perfectly normal part of the charter, he insists, and eventually the politicians will be forced to use it. "At some point, the court will do something really stupid, and provoke a crisis of legitimacy," he predicts. "At that point, the provinces will have to find the courage to correct them. Once two or three of them opt out of stupid judgements, the use of the notwithstanding clause will cease to be a big issue."

Patrick Brode, a constitutional lawyer in Windsor, Ont., and author of the new book, *Why Canada Died*, believes elected legislatures must confront the charter directly. "The problem is the charter itself," he says. "The issue is always, who has the authority to make the laws? The charter constituted a wholesale transfer of power to the judges." Mr. Brode believes the adoption of the charter was "an unacknowledged revolution, and another revolution will be required to reverse it." The problem is that the charter remains Canada's sixth most-respected national symbol, ranking higher than bilingualism, biculturalism and the CBC; so politicians are afraid to challenge it. "But that can't last," he says. "The charter doesn't do anything for 99% of normal Canadians."

Scott Newark, executive director of the Canadian Police Association, agrees that the charter has to be tackled, but he thinks the public vetting of candidates for the bench is also necessary. "Anything effective in law enforcement will inevitably be forbidden under the charter," he says. "As we always say, the charter helps only murderers, pedophiles and judges; this year, the Supreme Court decreed, on the authority of the charter, that the provinces must give their judges pay raises." But problems like lenient sentencing are not charter issues, he advises. The more fundamental problem is that judges now put their own, self-invented rules ahead of public safety, even where guilt is abundantly obvious.

"What we have now in Canada is a supposedly enlightened despotism—rule by people who think they know so much better than everybody else," continues Mr. Newark, a former crown prosecutor. "Well, no thanks. I'm in favour of anything that brings these guys back under the rule of law—public reviews of candidates, public petitions to force performance reviews of sitting judges, and Section 33—every time they do something crazy." The Canadian public still has a broad but shallow trust in the charter, he admits. "But five years ago, if you'd asked people if they trust the parole board, they'd have said, yes. They don't say that today. At some point, the court will let one too many killers walk, and the public will wake up."

Chief Justice Lamer granted an audience to the *Ottawa Citizen* last April to declare: "Thank God for the charter." He admitted that the charter has given the court an enormous power, but then shrugged, "That's [parliament's] doing, not ours. [It] might be, well, that the elected [representatives] really didn't know what they were doing."

The two most recent appointees to the Supreme Court have so far shown greater humility and caution than the chief justice, perhaps because, unlike Justice Lamer, they are unused to exercising unilateral power. Justice Michel Bastarache, who was appointed last October, delivered a speech on January 6 in defence of the court's activism; but he also warned that judges should not see themselves as "philosopher kings." And he reminded his audience that the elected representatives themselves have the final say over the meaning of the charter, through the use of the notwithstanding clause. Then on January 9, Mr. Binnie said that he would not have minded being publicly scrutinized by a parliamentary committee. "Supreme Court justices are accountable just like anybody else for their opinions," he said. "They certainly wield a lot of authority." Nevertheless, the court's newest member gave a

Jurist Lamer: *'Thank God for the charter.'*

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In the 1994 *Borden* ruling, the Supreme Court overturned a rapist's conviction on a second charge because police had not warned him that the blood sample, taken during the investigation of the first rape, might be used in the DNA testing of semen found in the second rape victim.

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In the 1995 *Rosenberg* decision, a federal court ruled that the age of consent for sodomy must be reduced to 14 years from 18, since anal sex is "a basic form of expression for gay men."

curt "no," when asked whether his colleagues have gone too far in their judicial legislating.

The court will surrender its power only if it is taken back by the legislators, and the latter have been too timid to act, notes Calgary Reform MP Jason Kenney. "The way the system works these days, there's a perverse incentive for elected representatives to turn controversial issues over to the judges," he explains. "That way, they can say to their constituents, 'The judges made me do it'. The only solution is to elect politicians with the courage to confront the issues and defend the prerogatives of the democratically-elected legislatures."

Mr. Kenney thinks that the upcoming *Vriend* decision could prove a historical moment in resisting the "virus" of judicial activism. "If the court rules to enforce gay rights, and the Alberta government rolls over, they will clearly be implicated in the decision," he says. "If, on the other hand, they have the courage to invoke Section 33, to use the one remedy in the charter, they will have begun the recovery of democracy. This will test the metal of Alberta's representatives."

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Reform's Kenney: *'Politicians love being able to say the judges made us do it.'*

Justice Minister Havelock says he is concerned about the upcoming *Vriend* decision. He will not say publicly whether he thinks the government should invoke Section 33; but he worries about what may happen, if they do not. "We politicians are ultimately accountable for the actions of the judges," he agrees. "And if we don't take the responsibility, eventually, the public is going to hold us responsible."

—Joe Woodard

GUEST COLUMN—RONALD CANTLIE

If Vriend beats Alberta, freedom of religion dies

One of the most perplexing aspects of the Vriend case now before the Supreme Court of Canada is the basis upon which it has been argued. It began with Delwin Vriend's dismissal from employment at King's University College in Edmonton, a private Christian liberal arts educational institution. The ground of dismissal was that he was engaging in homosexual activities which, in the view of the college, contravene Christian doctrine. Its president is quoted as saying, "We believe that, as a Christian institution, we have a right to employ individuals who share our values, in terms of Christian behaviour." Whether or not he is doctrinally correct about homosexual behaviour, the dispute is on a point of theology, not of law, and it is beyond the competence of any court of law, or any human rights commission, to decide it.

It is perfectly lawful in Canada to establish an educational institution for adults which is explicitly linked to a particular religion. When Mr. Vriend made a complaint to the Human Rights Commission about his dismissal, they refused to entertain it, giving as the reason that the provincial human rights statue did not include sexual orientation as a prohibited ground of discrimination. He then sued the commission, and the province, claiming that the Charter of Rights and Freedoms requires sexual orientation to be "read into" that statute as a prohibited ground. The Alberta Court of Queen's Bench not only upheld that claim but also awarded Mr. Vriend $25,000 damages as a recompense for the commission's failure to act.

However, Section 2 of the charter enacts that:

"Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion."

This guarantee binds the Alberta Legislature, the commission and the courts. The college is an explicitly religious institution and it took the action complained of for an explicitly religious reason. Is it not protected by this guarantee?

If it is, then even if sexual orientation had been included in the provincial statute, the commission would still have had to dismiss Mr. Vriend's complaint, and there can therefore be no ground for the award of damages. Indeed, there can be no ground for the courts to intervene at all. If freedom of religion protected the college, the commission was right to dismiss the complaint.

Consequently, a decision by the Supreme Court in Mr. Vriend's favour will mean not only that sexual orientation must be "read into" Alberta's human rights statue, but also that *the charter guarantee of freedom of religion provides no defence to the college.* Surely the latter is the more important issue. Yet, according to all reports I have seen, it has not been mentioned by any of the many counsel taking part. Indeed the college is not a party to the action, so that its rights are being decided in its absence.

If the Supreme Court allows the appeal, consider the consequences. First, there is the case in B.C. concerning the requirement by Trinity Western University that its students abstain from sexual activity outside marriage. Since same-sex marriages are not possible, that can be said to discriminate against homosexuals. So how could this requirement now be justified even though it is an explicitly Christian college?

This is only the beginning. Reading sexual orientation into a human rights act only puts it on a par with the prohibited grounds of discrimination already listed in the act, and whatever applies to it must apply also to them. "Marital status" is a prohibited ground in most of these acts. The Roman Catholic Church refuses to accept married men as priests; this is clear discrimination on the ground of marital status, which human rights commissions will have to correct.

Furthermore, churches which allow clergy to marry still forbid them to live common-law. Such a ban has also been held to be discrimination on the ground of marital status, so it will now be illegal and sexual licence for clergy will become the law of the land. And of course refusal, by any religion, to admit women to the priesthood will now be out since that is discrimination on the ground of sex.

Thus it would seem that a victory for Mr. Vriend in the Supreme Court must result in a takeover by the state of control of all organized religion in the country. If any readers can detect errors in the reasoning which has led me to this conclusion, will they please point them out, for I find this prospect frightening.

—Ronald Cantlie practised law in England until 1954, when he emigrated to Manitoba and was called to the bar there. He was appointed Queen's Council in 1977 and made a Master of Manitoba Court of Queen's Bench in 1980. He retired in 1987 and now lives in Calgary.