# THE SOUNDS OF SILENCE: *CHARTER* APPLICATION WHEN THE LEGISLATURE DECLINES TO SPEAK

Dianne Pothier

On first impression, the title of the Simon and Garfunkle classic hit "The Sounds of Silence"[1] may seem like an oxymoron. But it does not take too much reflection to realize that silence can indeed be very expressive and therefore quite telling. While that can be true in any number of contexts, for the specific purposes of this article, I will examine only one: legislative silence. What is the legal significance of the legislature declining to speak on one particular aspect of a legal issue otherwise addressed in legislation? More specifically, can the *Charter* be engaged to challenge what the legislature has not said?

Early in the life of the *Charter* it was recognized that a very basic question involved the scope of the *Charter*'s application. Academics tended to pose the conceptual questions in terms of whether the *Charter* applied in the private sphere.[2] When the Supreme Court of Canada entered the fray, it too framed the debate is such terms. In *Retail, Wholesale and Dept. Store Union, Local 580, et al.* v. *Dolphin Delivery*[3] the Supreme Court of Canada held that the *Charter* did not apply to a common law cause of action involving only private litigants. Justice McIntyre, speaking on this point for all seven judges sitting on the case, concluded:[4]

> It is my view that section 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government.

This approach, though much criticized,[5] was re-affirmed by the Supreme Court of Canada in *McKinney et al.* v. *University of Guelph et al.*[6] The framing of the issue as a matter of identifying actors subject to the *Charter* rather than laws subject to the *Charter*[7] has deflected attention away from the nature of the law-making process. A few commentators did, however, recognize at an early stage that the focus on actors obscured two important and interrelated issues — the complex questions of how to handle a *failure to act* or to deal with law that is *permissive* rather than coercive.[8] Where the basis for a challenge is legislative silence, the issue is not the identity of the actor but rather the fact that the actor is not acting. While this was not foreshadowed as an issue in *Dolphin Delivery*, the case-by-case approach by which our law unfolds meant the issue would eventually have to be addressed. The time has finally come.

The question of the *Charter*'s application in the context of legislative silence has recently arisen in the decisions of two Courts of Appeal dealing with section 15 equality challenges. In *Vriend* v. *Alberta*,[9] the majority of the Alberta Court of Appeal found that the *Charter* could not be used to challenge the failure of Alberta's human rights legislation, the *Individual Rights Protection Act*,[10] to include sexual orientation as a prohibited ground of discrimination.[11] In *Eldridge* v. *British Columbia (Attorney General)*,[12] the British Columbia Court of Appeal held that the *Charter* could not be used to challenge the failure of the British Columbia government to fund sign language interpretation for deaf patients as part of state-funded medical care. In both *Vriend* and *Eldridge* the plaintiff(s)' arguments did not get off the ground for the majority of the respective Courts because of the 'failure to act' issue.

Legislative silence can be used as a bar to a claim in several ways, all of which were used in some fashion or other in *Vriend* and *Eldridge*. The *Charter* can be held not to apply at all on the basis of section 32. Assuming the section 32 hurdle can itself be surmounted, arguments parallel to those relating to *Charter* application can be used as threshold section

15 arguments; legislative silence can be the basis of finding no "law" within the meaning of section 15, or the non-action can give rise to a conclusion of no "distinction" within the meaning of the section 15 jurisprudence. Even if a *prima facie* violation of section 15 can be found, failure to act can be used as the basis for a section 1 argument of deference to legislative incrementalism.[13] Finally, failure to act, as a matter of underinclusiveness, can be relevant to the appropriate remedy.[14] This article will, however, look only at the threshold questions of whether a claim against legislative silence can get off the ground at all, namely the section 32 hurdle and section 15 "law" and "distinction" issues.[15] I want to ask, in other words, does legislative silence make a *Charter* claim dead in the water?

The *Dolphin Delivery* case, in saying that the *Charter* did not apply to the common law in the absence of a governmental actor, made it clear that there could not be a wholesale challenge to a legislature's complete failure to intervene. One of the ways of characterizing the issue in *Dolphin Delivery* is to say that the *Charter* application issue arose because of the federal Parliament's failure to legislate about picketing in the labour context. But *Dolphin Delivery* left open the possibility of a more focussed challenge against a more selective 'failure to intervene.' Indeed, one of the cases expressly relied on in *Dolphin Delivery*, *Blainey* v. *Ontario Hockey Association*,[16] although not so analysed either by the Ontario Court of Appeal or the Supreme Court of Canada, can be looked at as an example of a failure to intervene. *Blainey* involved a challenge to the provision of the Ontario *Human Rights Code, 1981*[17] which provided an exemption for sports activities from the general prohibition against sex discrimination. *Blainey* concerned a failure to act in the sense that it was permissive legislation. People subject to the act were not *required* by section 19(2) to practice sex discrimination in sports activities; they were only told that it was permissible to do so on the basis that this was beyond the scope of what the legislature had decided to regulate. That is the legislative determination which was held to have violated section 15 in *Blainey*. It was not exactly a case of legislative silence, because the non-regulation was accomplished by an express exclusion, but the ultimate result is that a decision not to regulate a small part of an activity generally subject to legislative dictate was cited by the Supreme Court of Canada as the paradigm example of the kind of case to which the *Charter* applies. Whether a decision not to regulate is accomplished by an express exclusion or by legislative silence should not be the determining factor, a point reinforced by the Supreme Court of Canada's insistence in *Schachter* that form should not be allowed to prevail over substance.[18] The substantive issue is the determination of when a decision not to regulate can be vulnerable to challenge.

Underinclusive legislation can typically be characterized as a failure to intervene, but that has not been the basis of the analysis in cases such as *McKinney*,[19] *Egan*,[20] or *Miron* v. *Trudel*.[21] *McKinney* involved the failure of human rights legislation to extend protection against age discrimination to those over 65; *Egan* involved the failure to extend spousal benefits to same sex couples; *Miron* involved the failure of insurance legislation to extend spousal coverage to heterosexual common law couples. In all three cases there was, in form as well as substance, a failure to act that was accomplished by legislative silence; those over 65 in *McKinney*, same sex couples in *Egan*, and common law couples in *Miron* were excluded simply by omission. Although in both *McKinney* and *Egan* the claims ultimately failed in the view of the majority of the Supreme Court of Canada, it was not on any threshold determination that the *Charter* could not be engaged. In none of the cases of *Blainey*, *McKinney*, *Egan*, or *Miron* was this even identified as a serious issue. Although all of these cases could be described as a failure to intervene, they were all so clearly cases of deliberate legislative choices as to make a suggestion of no governmental action or law a counter-intuitive conclusion. In this context, where do *Vriend* and *Eldridge* fit?

## *VRIEND*: SECTION 32

The three-judge panel split three ways in *Vriend*. Justice McClung, as part of the majority, found that the *Charter* did not apply at all because legislative silence — the omission of sexual orientation from the *Individual Rights Protection Act* — meant there was no governmental actor within the meaning of section 32 of the *Charter*. Justice O'Leary, the other member of the majority, assumed that there was no section 32 problem, but held that legislative silence in respect of sexual orientation meant there was no "distinction" that could give rise to discrimination within the meaning of section 15. Justice Hunt, in dissent, found not only that the *Charter* applied but also that there was a section 15 violation that was not saved by section 1; she would have ordered a suspended remedy of invalidation.

For both Justices O'Leary and Hunt, it was obvious that the *Charter* applied within the meaning of section 32 because the claim challenged a piece of legislation.[22] For Justice McClung, however, the fact that the claim related to what the legislation did not say was decisive against the *Charter*'s application.

In part, Justice McClung's conclusion seems to reflect a distaste for the *Charter* in general. His (inaccurate) repeated references to it as a "federal" charter is obviously said with derision. The fact that his reliance on *Oakes*[23] is a reference to an 1801 English case is an indication that Justice McClung longs for an era of Parliamentary supremacy, (recalling the words of Paul Simon, "in restless dreams I walked alone"[24]). Some of Justice McClung's comments seem more appropriate to a 1981 constitutional conference, with only grudging acknowledgement that the argument against a *Charter* was lost:[25]

> If provincial legislation does not go far enough, instead of too far, for the *Charter of Rights*, surely the provincial legislature should not be ordered to specifically perform some later federal mandate on the subject. Must it pass and proclaim as a consequence of not legislating to begin with? Surely not. *Such a new judicial mandamus, lordly directed to autonomous, co-equal branches of government (legislatures), as if they were some inferior tribunal, releases fresh and limitless concepts which undermine the compartmental theorems that support present Canadian constitutional practice.*
>
> The Order Paper of the Alberta Legislature is not to be dictated, even incidentally, by federally-appointed judges brandishing the *Charter*. While any legislative product touching governmental activity is, of course, now subject to *Charter* scrutiny under its ss. 32 and 52, the practice of judicially upgrading that product should be strictly disciplined.

The issue of legislative silence does, however, mean there is more at issue than simple disdain for the *Charter*. Justice McClung relies on the fact that "Alberta has simply not exercised its 'authority' (in the way one group of citizens demands), with respect to a 'matter'..."[26] The technical answer to that, it seems to me, is that section 32 does not require a legislature to "exercise" authority; it applies to the legislature "*in respect of* all matters within the authority of the legislature" [emphasis added]. Section 32 is worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority, as in respect of minority language education rights in section 23.[27] That still begs the question of whether there is any positive obligation in section 15, a point to which I will return below.

At the section 32 stage, the issue is whether the legislature is involved at all. Justice McClung tries to make the case that it is not, by posing a question clearly calling for a negative answer:[28]

> Is it constitutionally inexcusable for the Alberta government to decline to choose between the platforms of the divinely-driven right and the rights-euphoric, cost-scoffing left, by refusing to order people of either sexual base to listen to government as to when they must forget that sexuality and contract together?

Quite apart from the fact that Justice McClung's own language is quite partial here, can it honestly be said that the Alberta legislature has "decline[d] to choose"? The reality is that the Alberta legislature has very deliberately chosen to ignore the lobbying efforts by and on behalf of gays and lesbians, a point that McClung J.A. himself goes out of his way to make elsewhere in his judgment, notably when arguing (in the alternative) against a 'reading-in' remedy:[29]

> The exclusion of "sexual orientation" in the *IRPA* is not a mere oversight. ... Rightly or wrongly, the electors of the Province of Alberta, speaking through their parliamentary representatives, have declared that homosexuality (I assume that the term "sexual orientation" defends nothing more) is not to be included in the protected categories of the *IRPA*. By reading-up Russell J., unquestionably in good conscience, tried to repair what was to her an ailing *IRPA* because she found that it fell short of section 15(1) of the *Charter*. But in doing so she overrode the expressed and sovereign will of the Alberta Legislature, where it had passed on a matter within its competence under the Constitution Act of Canada. ... Yet it is clear that the current state of Alberta's *IRPA*, where "sexual orientation" is not found, is hardly the product of any law-making slip or error. The evidence undeniably shows that over the last decade the addition of "sexual orientation" to the *IRPA* has been repeatedly

considered, and repeatedly declined, by the law-makers of Alberta.

It is no answer to say, as Justice McClung does (supported by the *Globe and Mail*[30]), that "[t]he *IRPA* in its silence simply deputes an issue of private conduct to private, not governmental, resolution."[31] *Blainey* has already established that such a stance can still be subject to *Charter* scrutiny; where the state has involved itself, its regulation of the private sphere is subject to *Charter* review. Even though through silence, the legislature of Alberta has made a very deliberate choice. Whether that choice should ultimately be respected is fundamentally a question on the merits, not a matter to be disposed of as a threshold at section 32.

The legislature of Alberta has legislated on the matter of human rights, deliberately omitting sexual orientation protection. Justice McClung fails to acknowledge the difference between complete and selective silence:[32]

> Clearly the *Charter*, the supreme law of Canada, must monitor Alberta's legislative products but only after they are proclaimed to be in force. Legislative inactivity is hardly law; statutes become law only when they are proclaimed, not before.

This misses the point that Vriend is indeed challenging an already proclaimed statute, the *Individual Rights Protection Act*. Once the legislature chooses to occupy the field, its legislation becomes vulnerable. As both Justice O'Leary and Justice Hunt concluded, the *IRPA*, both in what it says and what it declines to say, should easily pass the section 32 threshold. Justice McClung's apparent fear, in the words of Paul Simon, that "silence like a cancer grows,"[33] can be met by the fact that the legislature has opened the door by legislating in part. Moreover, section 32 is only a threshold question. This conclusion does not mean that partial legislative silence is automatically susceptible to a fatal *Charter* challenge. The more telling question is, as it should be, on the merits of the challenge. More specifically, in equality claims, does legislative silence sound an alarm at the section 15 stage? Before turing to the implications of silence for equality, it is necessary to briefly comment on the section 32 aspects of *Eldridge*.

## *ELDRIDGE*: SECTION 32

In *Eldridge* there were claims against two statutes: the *Medical and Health Care Services Act*[34] and the *Hospital Insurance Act*.[35] The challenges were brought after a request to the Ministry of Health for funding of sign language interpretation for deaf patients was turned down by the Executive Committee of the Ministry. The essence of the claim was a denial of equal benefit of the law. Whereas hearing patients were able to fully communicate with their doctors as an automatic aspect of state-funded health care, deaf patients were not afforded the means of adequate communication that would provide them with comparable state funded health care.

No one in the British Columbia Court of Appeal thought there was a section 32 problem with respect to the *Medical and Health Care Services Act* challenge. Even though there was a challenge to the *Act*'s silence in respect of funding for sign language interpretation, all assumed section 32 was satisfied by the existence of a piece of legislation. This was less of an issue than in *Vriend* perhaps because there was no issue in *Eldridge* of complete exclusion. The issue was not the *existence* but the *extent* of statutory coverage for deaf patients. Here legislative silence was identified as a section 15 issue rather than a section 32 issue.

However, the *Hospital Insurance Act* claim was treated differently as regards section 32 on the basis that hospitals are not governmental actors to which the *Charter* applies:[36]

> The fact that the translators are not provided by hospitals does not result from the legislation but rather from the individual decisions of each hospital not to receive part of its global grant received pursuant to section 10(1) of the *Act* on these services.

This mode of analysis completely decontextualizes the claim. The claim was not against the hospitals, so the non-applicability of the *Charter* to hospitals should be of no consequence. The claim was against *government* funding practices evidenced by the negative response from the Executive Committee of the Ministry of Health which prompted the litigation. In other words, the claim was against the breadth of discretion given by the legislation to the hospitals. So framed, it should be obvious that the *Charter* applies at the section 32 stage.

The Court's treatment of a claim respecting disability is quite telling. It would be inconceivable

that the legislation would be understood as giving the hospitals discretion to afford superior treatment to white patients, but it is readily concluded not only that there is discretion to provide inferior treatment to deaf patients, but even that grant of discretion is totally immune from *Charter* scrutiny. Yet, in the end, the section 32 issue in *Eldridge* is secondary to the fact that, even where the *Charter* is held to apply, as it does in respect of the *Medical and Health Care Services Act*, the majority's section 15 analysis of legislative silence stops the claim in any event.

## *ELDRIDGE* AND *VRIEND*: SECTION 15 AND LEGISLATIVE SILENCE

The prospect of using the *Charter* to challenge a *failure to act* raises the point noted earlier of whether the *Charter* gives rise to positive obligations on governments to act.[37] Although there are specific *Charter* provisions, such as minority language education rights in section 23, that expressly impose positive obligations on governments, the same could not easily be said about the *Charter* in general.[38] In the equality context, however, the issue is more complex than a dichotomy between positive and negative rights. The fact that equality is by definition a comparative concept[39] means that governmental obligations may arise because the government itself has chosen to occupy the field, but in a less than even-handed way.

The *Eldridge* case has been characterized by the *Globe and Mail* as involving an issue of whether it is "the court's business to create new spending programs".[40] Framed in such terms, which is how the majority of the British Columbia Court of Appeal viewed the case, a negative answer seems obvious. But that is not the basis on which the claim was made. Rather the argument was that, given that the state itself has decided to publicly fund health care, it cannot do so in a way that provides substandard care for the deaf. The "positive obligation" claimed here is not absolute. Rather the claim is that the deaf have a right to equal benefit of the law *relative to hearing persons*.

I have elsewhere argued that the majority of the British Columbia Court of Appeal has gutted adverse effects discrimination in saying that the obligation of the deaf to pay for their interpreters is not something attributable to the legislation,[41] and I do not wish to repeat that analysis. What is of particular relevance here is that the "equal benefit of the law" issue happens to arise in a context where equality requires taking account of difference. As part of a universal program, the law withholds something, funded sign language interpretation, which has significance only for the deaf. While in form it is a failure to act, the substantive result is health care with a disparately inferior quality for the deaf. The claim is not for special treatment, but for equal treatment.

*Eldridge* is parallel to *McKinney* in the sense that the legislature has provided a tangible benefit to some but not all. In *McKinney*, all members of the Supreme Court of Canada found a *prima facie* violation of section 15 arising from the failure (legislative silence) of the human rights legislation to cover age discrimination for those over 65. In the words of Justice L'Heureux-Dubé:[42]

> [W]here, as in the present case, the legislation prohibits discrimination on the basis of age, and then defines "age" in a manner that denies this protection to a significant segment of the population, then the *Charter* should apply. Thus, if the province chooses to grant a right, it must grant that right in conformity with the *Charter*.

Similarly, in *Eldridge* the province provided funding for health care in such a way as to cover conversations between hearing patients and their doctors (which could be provided at no extra cost) while not covering conversations between deaf patients and their doctors.

The parallel between *McKinney* and *Vriend* is, however, less direct. Just prior to the above quoted passage in *McKinney*, Justice L'Heureux-Dubé (speaking only for herself) made a point of saying that the *Charter* should *not* apply where human rights legislation has omitted a ground entirely,[43] precisely the issue in *Vriend* (and also in *Haig*). Justice L'Heureux-Dubé made this commentary only in passing, without elaboration.[44] When subject to closer examination, the issue is whether or where there is a dividing line between the legislature partially acting, in which case there is clear precedent for the *Charter* applying and a "law" to which a section 15 claim can attach, versus legislative abstention, where there is an absence of "law" for section 15 purposes even if there is a statute for section 32 purposes.

In my previous discussion of *Haig*,[45] referred to by Justice Hunt dissenting in *Vriend*,[46] I argued that Justice Wilson, concurred in by Justice L'Heureux-

Dubé, offered an alternate approach that does not depend, in the context of human rights legislation, solely on distinguishing between partial protection and omission of a ground of discrimination. In *Lavigne* v. *Public Service Employees Union*[47] Wilson J. addressed the issue of when the *Charter* applies (either at the section 32 stage or the section 15 "law" stage) to *permissive* legislation. She drew a distinction between government acquiescence, where the *Charter* should not be engaged, and government support or approval, where the *Charter* should be engaged. This is a more substantive analysis than the purely formal criterion of whether a ground is included or not.

The clearly deliberate nature of the choice of the Alberta legislature in refusing protection based on sexual orientation, which forms the basis for the majority conclusion that Vriend's claim passed the section 32 threshold, should also make it clear that the Alberta legislature had moved beyond acquiescence. Legislative silence should therefore constitute "law" for section 15 purposes.

But there are further ramifications for section 15 arising from legislative silence, which brings the discussion to the basis for Justice O'Leary's conclusion in *Vriend*. Given that the *IRPA* says nothing at all about sexual orientation, is it possible to identify a "distinction" from that legislative silence that can be the basis for a finding of "discrimination" in section 15?[48]

> The question here is whether, in its complete silence respecting sexual orientation, the *IRPA* "distinguishes" between individuals on a prohibited basis .... In the present case, the *IRPA* makes no distinction whatsoever between heterosexuals and homosexuals or, indeed, between any individuals or groups on the basis of sexual orientation. It is silent on the issue. To be comparable to the legislation in issue in *Andrews*, the *IRPA* would have to extend some benefit or protection to heterosexuals which it denies to homosexuals. ... The respondent's argument posits a distinction between grounds that are included in the *IRPA* and grounds which are not. That argument does not say that the *IRPA* distinguishes (even by adverse effect) between individuals on the basis of their sexual orientation. Rather, it says that the *IRPA* distinguishes between,
>
> (1) individuals who suffer discrimination and can utilize the machinery of the *IRPA* for protection from or redress for such discrimination (for example, members of minority racial groups suffering racial discrimination), and
>
> (2) individuals who are discriminated against on the basis of their sexual orientation, who cannot access the *IRPA*'s mechanisms for protection from or redress for such discrimination.
>
> It cannot be asserted that this is a law which discriminates on the basis of sexual orientation; at most all that the *IRPA* does is distinguish between the specified prohibited grounds of discrimination and the various potential grounds (including sexual orientation) which could be included but are not.

Justice Hunt's dissent, in finding a section 15 violation in *Vriend*, accepts Justice O'Leary's premise that the argument is based on a comparison *between* grounds of discrimination:[49]

> In this case, the *IRPA* is facially neutral. But Vriend's situation highlights the fact that the *IRPA* is not, in reality, neutral. Vriend cannot gain access to the process of human rights enforcement for one reason: the employment discrimination he alleges results from his personal characteristic (homosexuality) and his membership in that group. It is apparent that he is being treated differently than others who claim discrimination on one of the protected grounds listed in the *IRPA*, that is, others who do not share his immutable personal characteristic of homosexuality. He is receiving treatment that is "identical", but which causes inequality because of his personal characteristic and situation.

As I have argued previously in commenting on *Haig*,[50] I do not think the relevant distinction in *Vriend* is *between* grounds. The ultimate focus in *Vriend* should not be on race versus sexual orientation, but on the comparative positions of homosexuals versus heterosexuals. *Vriend* is not a situation of some individuals being able to claim protection under the *Act* whereas others cannot. Take race discrimination as the counterpoint. The starting proposition, admittedly a purely formal equality analysis, is that *everyone* can complain about race discrimination while *no one* can complain about sexual orientation discrimination. Justice O'Leary never moves beyond this formal equality analysis, and on that basis finds no discrimination *within* the ground of sexual orientation.

I would contend that there is indeed discrimination *within* the ground of sexual orientation if one looks more closely at the effects of legislative silence. The *formal equality*, of offering no protection to anyone as regards sexual orientation, becomes the *substantive inequality* of making only gays and lesbians vulnerable to state-condoned sexual orientation discrimination.

Consider the decision of the United States Supreme Court in *Romer* v. *Evans*.[51] That case involved a Colorado constitutional amendment, approved by the electors of the state, which prohibited legislative, executive or judicial action which outlawed discrimination on the basis of sexual orientation. The majority of the Supreme Court of the United States found this amendment unconstitutional as violating the Equal Protection Clause. Kennedy J., speaking for the Court, said of the protections withheld by the amendment:[52]

> These are protections taken for granted by most people either *because they already have them or do not need them.*

What are the implications when race discrimination is covered by human rights legislation but sexual orientation discrimination is not? Both homosexuals and heterosexuals (whether they need it or not) already *have* protection against *race* discrimination; it is important to recognize that gays and lesbians come in all races such that protection against race discrimination is not generally irrelevant either to homosexuals or heterosexuals as a class. The impact of the selective inclusion/exclusion of grounds comes from the fact that heterosexuals (of whatever race) do not *need* protection against *sexual orientation* discrimination because, in our social climate, heterosexuals are not likely to face such discrimination. In contrast, gays and lesbians (of whatever race) have good reason, in our social climate, to fear sexual orientation discrimination. Thus legislative silence does produce a distinction. It makes homosexuals vulnerable to state condoned sexual orientation discrimination whereas heterosexuals are not comparably vulnerable. The relevant distinction is thus between homosexuals and heterosexuals, the distinction *within* grounds that Justice O'Leary seeks.

Thus legislative silence can not only meet the requirement of "law" in section 15, but also provide the basis for a "distinction" giving rise to discrimination. In both *Eldridge* and *Vriend* it can readily be said that the legislature has sufficiently occupied the field as to be subject to *Charter* scrutiny. The issue, in the end, is less a matter of "positive obligations" on the state and more a question of differential effects.

## CONCLUSION

There is a superficial attractiveness to the notion that the *Charter* cannot be used to challenge legislative silence, just as there is a superficial attractiveness to the idea that silence is the absence of sound. Yet when one starts to look and listen closely, there is no sharp distinction between what the legislature says and what it declines to say. In other words, there really are sounds of silence. Where the legislature enters the fray, but holds back in one particular aspect, the impact of what is not dealt with can be quite significant to those affected. Although the majority of the respective Courts of Appeal held that legislative silence was a threshold bar to the claims in *Vriend* and *Eldridge*, these were both cases where silence spoke loudly and clearly. Accordingly, the sounds of silence should be listened to, as well as heard, by enabling the *Charter* challenge to proceed to the merits.❑

**Dianne Pothier**
Faculty of Law, Dalhousie University.

Endnotes

1. Paul Simon, "The Sounds of Silence" (BMI, 1964), Simon and Garfunkle, *Wednesday Morning 3 a.m.* (Columbia, 1964); *The Sounds of Silence* (Columbia, 1965).
2. For example: Dale Gibson, "The Charter of Rights and the Private Sector" (1982-3) 12 Man. L.J. 213; Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms: (ss. 30, 31, 32)" in W. S. Tarnopolsky and G. A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) c.3; Anne McLellan and Bruce Elman, "To Whom Does the *Charter* Apply? Some Recent Cases on Section 32" (1986) 24 Alta. L. R. 361; Peter Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 670-678; Donald Buckingham, "The *Canadian Charter of Rights and Freedoms* and Private Action: Applying the Purposive Approach" (1986) 51 Sask. L. Rev. 105; Didier Lluelles and Pierre Trudel, "L'application de la *Charte canadienne des droits et libertés* aux rapports de droit privé" (1984) 18 La revue juridique thémis 219.
3. [1986] 2 S.C.R. 573.
4. *Ibid.* at 598.
5. For example: Robin Elliot and Robert Grant, "The *Charter*'s Application in Private Litigation" (1989) 23 U.B.C. L. Rev. 459; Peter Hogg, "The *Dolphin Delivery* Case: The Application of the *Charter* to Private Action" (1987) 51 Sask. L. Rev. 274; Brian Etherington,

"Constitutional law — Charter of Rights and Freedoms, sections 2(b) and 1 — application of the Charter to the common law in private litigation — freedom of expression — picketing in labour disputes: *Retail, Wholesale and Dept. Store Union, Local 580* v. *Dolphin Delivery Ltd.*" (1987) 66 Can. Bar Rev. 818; Allan Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38 U. of T. L. J. 278; Brian Slattery, "The *Charter*'s Relevance to Private Litigation: Does Dolphin Deliver?" (1987) 32 McGill L.J. 905; Jean Denis Gagnon, "L'arrêt *Dolphin Delivery*: La porte est elle ouverte ou fermée?" (1987) 32 McGill L. J. 924; Robert Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988) 46 U. of T. Fac. L. Rev. 248; Ghislain Otis, "Judicial Immunity From Charter Review: Myth or Reality?" (1989) 30 Les Cahiers de Droit 673; John Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery*" (1987) 19 Ott. L. Rev. 413; Annalise Acorn, "Gender Discrimination in the Common Law of Domicile and the Application of the *Canadian Charter of Rights and Freedoms*" (1991) 29 Osgoode H. L. J. 419.

6. [1990] 3 S.C.R. 229.
7. Elliot and Grant, *supra* note 5; Manwaring, *supra* note 5 at 442-45.
8. *Ibid.*; Brian Slattery, "Charter of Rights and Freedoms — Does It Bind Private Persons" (1985) 63 Can. Bar Rev. 148; Robin Elliot, "Scope of the *Charter*'s Application" (1993) 15 Advocates' Quarterly 204 at 221.
9. (1996) 132 D.L.R. (4th) 595 (Alta. C.A.); application for leave to appeal to the Supreme Court of Canada filed April 22, 1996.
10. S.A. 1980, c. I-2.
11. The same issue had been raised in relation to the omission of sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3, in *Haig* v. *Canada (Minister of Justice)* (1992), 9 O.R. (3d) 495 (C.A.). The Courts managed to slide over the issue of a failure to act in *Haig*. For a critique of this see my discussion in "*Charter* Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1994) 19 Queen's L.J. 261 at 278-86.
12. (1995), 7 B.C.L.R. (3d) 156 (C.A.); leave to appeal to S.C.C. granted May 9, 1996.
13. Lambert J.A. in *Eldridge*, *ibid.*; Sopinka J. in *Egan* v. *Canada*, [1995] 2 S.C.R. 513.
14. *Schachter* v. *Canada*, [1992] 2 S.C.R. 679.
15. For a more comprehensive critique of *Eldridge*, see my comments in "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 N.J.C.L. 295 at 302-04, 333-43.
16. (1986), 14 O.A.C. 194, referred to with approval in *Dolphin Delivery*, *supra*, note 3 at 601-03.
17. S.O. 1981, c. 53, s. 19(2).
18. *Supra*, note 14 at 698.
19. *Supra*, note 6.
20. *Supra*, note 13.
21. [1995] 2 S.C.R. 418. For my critical comments on *Egan* and *Miron*, see "M'Aider, Mayday", *supra* note 15.
22. *Vriend*, *supra* note 9 at 623-24, per O'Leary J.A.; at 633, per Hunt J.A. I made the same assumption in my discussion of the same issue in the *Haig* case in "*Charter* Challenges to Underinclusive Legislation", *supra* note 11 at 279.
23. *Grigby* v. *Oakes* (1801), 2 Bos. & Pul. 526, 126 E.R. 1420, cited by McClung J.A. at 608 of *Vriend*, *ibid.*
24. *Supra* note 1.
25. *Vriend*, *supra* note 9 at 606-07, per McClung J.A. (emphasis addded).
26. *Ibid.* at 608, per McClung J.A.
27. *Mahé et al.* v. *R. in Right of Alta.*, [1990] 1 S.C.R. 342
28. *Vriend*, *supra* note 9 at 606, per McClung J.A.
29. *Ibid.* at 611-12 & 617, per McClung J.A.
30. Editorial, *Globe and Mail* (9 March 1996) D6.
31. *Vriend*, *supra* note 9 at 602, per McClung J.A.
32. *Ibid.* at 607, per McClung J.A.
33. *Supra* note 1.
34. S.B.C. 1992, c. 76.
35. R.S.B.C. 1979, c. 180.
36. *Eldridge*, *supra* note 12 at 169.
37. Robin Elliot, "Scope of the *Charter*'s Application", *supra* note 8 at 214, 221.
38. *Ibid.*
39. *Symes* v. *Canada*, [1994] 4 S.C.R. 695 at 771.
40. *Supra* note 30.
41. "M'Aider, Mayday", *supra* note 15.
42. *McKinney*, *supra* note 6 at 436.
43. *Ibid.*
44. It is interesting to note that McLellan and Elman, *supra* note 2 at 368-69, in an equally passing comment, give plausibility to the *success* of a s. 15 claim against an omitted ground. That is especially noteworthy given that their general approach is adopted by McIntyre J. In *Dolphin Delivery*. See also Howse, *supra* note 5 at 257, who likewise suggests with minimal elaboration that such a claim should succeed.
45. "*Charter* Challenges to Underinclusive Legislation", *supra* note 11 at 282-83.
46. *Supra* note 9 at 643, per Hunt J.A.
47. [1991] 2 S.C.R. 211 at 247-48.
48. *Vriend*, *supra* note 9 at 626-27, per O'Leary J.
49. *Ibid.* at 648-9, per Hunt J.A.
50. "*Charter* Challenges to Underinclusive Legislation", *supra* note 11 at 204-06.
51. 116 S. Ct. 1620 (1996).
52. *Ibid.* at 1627 (emphasis added).