

1. Introductions

The Honourable Constance Hunt was introduced by the Honourable Mr. Justice Bokhary, who was welcomed by Dean Michael Hor, naming him “the conscience of the court” and describing him as both talkative and having a sense of humour. In his introduction, Bokhary focused on her high attainments and qualities. As the facts and the law in a case are not always clear and simple, he compared the art of judging, seeing justice being done and making his or her reasons intelligible, to building one more brick to the temple of common law.

Hunt began her lecture by mentioning that a lot of people in the legal profession do not know a lot about the judicial life as it usually takes place behind door. Her aim was to lift the blind and to provide us an insight into her life as a judge during twenty-three years in Alberta, the Northwest Territories and Nunavut. Her talk was divided into three parts: Her life before she became a judge and her early impressions of judicial life; her first and probably most important case as an appellate judge, *Vriend v the Government of Alberta*; and lastly, an overview of her conclusions from the *Vriend* case.

2. Early Beginnings

Hunt started by stating that she never expected to be a judge and that her career was in most parts an accident. “I started law school in the late 1960s with a vague idea that the social change our society needed would be better accomplished from within the system than from without.” She was one of the only female students at law school and all her professors were male. At first, law seemed inaccessible and boring to her, but at the end of her studies she had fallen madly in love with it. As the profession was unwelcoming to women, she took an unconventional path and worked for a legal aid office that did defence work in three isolated aboriginal villages in northern Saskatchewan. After seeing the appalling economic and social conditions in the aboriginal communities, she decided to accept a job with the national Inuit organization head-quartered in Ottawa. The Canadian Supreme Court had just recognized the possibility of aboriginal rights arising from un-extinguished titles and thus her time at this organization was very exciting.

When she was Dean at the University of Calgary’s law school years later, the Chief Justice of the superior court asked her to consider applying for a judicial appointment, as they were looking for women. As she was still relatively young and had little practical legal experience, she was very surprised when she was nominated. Questioning if it was a good choice to give up a stimulating career in the academic world, she nevertheless took the job. The life of a judge surprised her, first of all the collegiality. She was instantly accepted by her colleagues and offered in-depth, sometimes even wonderful, advice on the problems she encountered in the courtroom. She soon realized that judges do not know everything and that thinking otherwise would be naive. One of her colleagues reminded her of this fact and told her that a central part of the lawyer’s role is to assist the judge. Thus, as she had little litigation experience, she never hesitated to ask the lawyer’s for help and to admit that she did not know something. This willingness to ask questions was sometimes unexpected to others. Despite the these negative feedbacks, “I continued to rely on lawyers to educate me and never hesitated to expose my lack of knowledge, which was a small price to pay for getting to a better answer.”

She noted that probably every new job takes you out of your comfort zone, but as a judge this is especially true as so much is at stake. Especially when it comes to judicial independence, she had to find her comfort level. For example, she mentioned the problems of how to talk to a lawyer in a grocery store on a Saturday morning or how to socialize with members of the bar. She once had a case where the lawyer of one side had heard that she was talking to the victim in the corridor before the courtroom. Both of the lawyer's went to see her and asked if this was true. Even though they were uncomfortable with the situation, it was their duty to confront her and she was able to set the situation aright. From this experience, she learned that judges are always very visible and have an obligation to be careful, especially during a trial.

2. The Vriend Case

After around three years on trial court, she was appointed to the Court of Appeal. Her first case there was *Vriend v Alberta*. In hindsight, her this case would turn out to be probably the most important one out of the many hundred cases she heard. Delwin Vriend was a young lab instructor who was hired by a private religious college. Two years into his employment, he was inquired about his sexual orientation and said that he was homosexual. He was terminated a year later for non-compliance with the College's policy against homosexual practices. The Alberta Human Rights Commission rejected his complaint because the Alberta Individual Rights Protection Act (IRPA) did not list sexual orientation as a prohibited ground of discrimination. He sought a declaration that certain provisions in the IRPA breached s. 15(1) of the Charter because they did not proscribe discrimination based on sexual orientation.

In the first instance, the judge accepted Vriend's argument and stated that s. 15(1) IPRA also prohibited discrimination on the grounds of sexual orientation. This decision was appealed by the government of Alberta and heard by Justices John McClung, Willis O'Leary and her. While the two former allowed the appeal in two separate opinions, she dissented. In a very scholarly opinion, Justice O'Leary concluded that the legislation did not create a distinction based on sexual orientation and legislative silence on this topic did not constitute discrimination. He stated that the discrimination arose from outside forces and that the legislation was not responsible for some individuals being worse off than others. With very colourful language, Justice McClung's judgment emphasized the primacy of legislative sovereignty and judicial restraint. The legislative silence on sexual orientation should not be seen as law and thus cannot attract Charter scrutiny. In his opinion, the judicial independence would suffer if judges "pitchfork their courts into the uncertain waters of political debate".

Before she turned to her dissent and the Supreme Courts decision afterwards, she briefly explored the history of human rights and the pre-Vriend context of sexual orientation issues in Alberta. She noted that there is a long history of social, political and legal inequalities there, which some say are the product of circumstances unique to the people and its region. Discrimination against minorities and women was deeply rooted in social attitudes and state policy. Change began with the election of the Progressive Conservative government in 1971 which enacted the Alberta Bill of Rights and the Individual Rights Protection Act, established the Human Rights Commission, and abolished some of the offending legislation. However, sexual orientation was still a contentious issue and the government had rejected the Human Rights Commission's recommendation to amend the legislation by adding sexual orientation. As late as 1989,

a cabinet minister declared that the province would never ban such discrimination if it meant homosexuals could teach in schools, while another declared that "two homosexuals do not constitute a family". Evidence in *Vriend* showed that proposals to amend the human rights legislation had been made, but never adopted. A 1985 speech by the Minister responsible for the Act explained that the IRPA could not give homosexuals the kind of security they sought, as the Act could not "put together a healthy relationship in the worksite if it has been destroyed through personality conflict" and attitudes could not be changed through statute. It was apparent that the government had made a deliberate policy choice not to offer protection on the basis of sexual orientation.

Working on her dissent, she found that the concept of equality and s. 15 were both very elusive and lacked precision. During the oral arguments, the Supreme Court issued the trilogy cases of *Egan*, *Miron* and *Thibeault*. *Egan* effectively took off the table two issues: whether the Court could take judicial notice of discrimination against homosexuals and whether homosexuals were a discrete and insular minority entitled to s. 15 protection. For her, the dichotomy between government and private actor raised in the case had an obvious answer. As *Vriend* did not contest being fired but rather that there was no protection, she was very confused why they even brought the argument regarding private actors. The important question therefore was: can legislative silence constitute the drawing of a distinction for the purposes of s. 15? She rejected the argument that there was no distinction drawn between heterosexuals and homosexuals and held that the neutrality of the IRPA was illusory. Even though she considered the argument that the courts should defer to legislative choice, she concluded that it is the courts' obligation to assess whether there were Charter breaches, even in difficult s. 15 cases. Her conclusion was that the government's failure to protect from discrimination based on sexual orientation breached the Charter.

After the judgment, there was huge flurry of media attention. An article in the magazine *the Alberta Report* said: "for over a decade, homosexuals, feminists, criminals and a plethora of other cause-pleaders have held sway in the courts...[using] the Charter of Rights and Freedoms to advance a stridently liberal agenda." It noted that this tide of judicial activism may have been halted by "veteran" Justices McClung and O'Leary, who between them had 70 years of legal experience. They described McClung as respected and said that O'Leary had equally impeccable credentials, underscoring that he had studied at Harvard Law School. But in contrast, they said that Justice Hunt had worked in academia for the bulk of her career and did not mention her LLM from Harvard. The article also quoted then University of Calgary political science professor Ted Morton who reportedly described her and the judge who heard the case before as "Charter yuppies and clones or wannabes of the activist wing of the Supreme Court of Canada."

When the case went to the Supreme Court, there were more than seventeen interveners. The case was unanimously decided in favour of *Vriend*, while there was a dissent on the reparations. The Court held that legislative silence can be part of judicial scrutiny and upheld substantial equality over formal equality. Again, there was a medial uproar in Alberta about the fact that judges and not elected politicians decided on such an issue.

3. Lessons from *Vriend*

„One of the first things I learned from the Vriend case was how much work is required of an appellate judge. When I recently reread the Vriend decisions, I was reminded how intellectually gruelling the exercise had been. Being an appellate judge is plain hard work, and the work never ends. There are no short-cuts if you want to do a proper job.“ Secondly, the case, for her, underscored the importance of judicial independence. She decided to ignore the medial controversies, admitting that this is not the only solution but rather the one that worked best for her. Thirdly, she learned a lot about the dynamics in an appellate court. Even if one does not agree on a case, one has to put it behind and keep on working together. She and McClung were colleagues for many more years and she respected him for his service and did not let the differences affect their relationship. In addition, the case taught the art of writing an appellate judgment, a task that in her view differs from writing a trial decision, as it also has precedential value and thus every word has to be crafted with care. She noted that lawyers will inevitably try to use your words in ways you never intended. Her approach was to become more and more narrow over time. She stressed that each judge has to find his or her own comfort zone and that all types of writing can make a lasting contribution to the development of law as long as the judgment is clear.

She also mentioned that the role of an intermediate appeal court can sometimes be difficult, as one knows that the Supreme Court could possibly overthrow all the hard work. Nevertheless, she believes that every judge plays an important role and there is a better result if more minds work on an issue. This also made her realize that as a judge she had to be true to herself. She does not see her dissent as bravery but rather as ignorance: for her it never occurred to decide differently. „I knew there was something wrong with Delwin Vriend's treatment. Of course, many people are treated unjustly and the law does not always provide a remedy. But in this case I felt it could and it must, and ultimately the law did not disappoint me.“

Recently, she was asked if her gender had influenced her thinking during the case Vriend and she struggled with an answer. She admitted that undoubtedly her own life experiences had affected the lens through which she sees cases and that this is true for all judges. As a young lawyer, she had experienced both subtle and unsubtle gender discrimination and thus understood how it felt to be part of the “other” group. She underlined that many of her male colleagues were just as sensitive to and open-minded about differences. In this regard, she recalled a conversation with an older male colleague that taught her everything about such issues. He told her bluntly that she should never feel silenced now that she was a judge, pointing out that many others of society have to be careful about what they say, but not judges. It is the freedom of a judge to say what they think and this is the most precious thing one can have. This brief but unforgettable conversation coined everything she did thereafter as a judge.

“Being a judge is not easy. At the same time, it is one of the best jobs in the world. Few others go to work every day and learn new things in a stimulating environment. I was immensely privileged to spend more than two decades of my life doing this.”

4. Questions and Answers

- “Could you go into more details about the subtle and unsubtle discrimination you faced as a young lawyer?”

One of the first things she noticed in law school was that there was a very small minority of women. Once, a classmate noted to her that he just could not figure out what women are planning to do after law their studies . After law school, while applying to work for a law firm before the bar exam, she noticed that while her male colleagues easily found a job with the biggest law firms, she, as a top student, had a hard time. She acknowledged that this was a difficult experience and hard to cope with as she started questioning if it was because of her gender or if there was something wrong with her personally. She stated that her gender prevented her from breaking into this world. In hindsight she knows that there was nothing wrong with her, but at that time it was a very difficult situation. Later, working as a lawyer, she was called “dear” by one of her male colleagues. When she asked him to stop, he was quite taken aback. She also recalled that, being the only woman of the board of Petroleum Lawyers Association, the letters addressed to them would always begin with “Gentlemen”. Concluding, she stated that event though some things have changed, many have not and that she hears from many former female students that they have difficulties coping with both family and career.

- “Are there any personality traits that are unsuitable for a judge to have?”

She answered the question in a positive form and said that there are not really personality traits but rather personal qualities that a judge must possess. For her the ultimate quality in this regard is open-mindedness. She stated that you can never tell what might come out from a case and believes that even if a judge does not start as being open-minded, the vast majority of judges she worked with became open-minded. Another quality is patience, which for her became more difficult over time. As the years went by, she had the tendency to become shaded and feel as if she heard it all before, for example the arguments of the lawyers, which is inevitable.

- “In the case of the US Supreme Court, a lot of people say that the outcome of the cases are predictable once one knows which judges are sitting on it. Did you perceive it similar in Canada?”

She finds that fact fascinating about the American Supreme Court and admitted that she has to be careful as she is a Canadian and might think that her own system is better. Regarding the Canadian Supreme Court, she does not think that it is predictable how a judge will decide. Of course, there are judges that are more pro defense in criminal cases or have a more liberal approach to the Charter. In conclusion, by and large, she does not feel like there is predictability when it comes to the Canadian courts.

She noted that some time ago, she heard a speech were someone talked about this issue in the States and predicted the outcome of the next big decisions of the US Supreme Court. She afterwards asked him how this is possible and he answered that as the court is so politicized he feels comfortable to make such predictions. In addition, she mentioned that she has read that the judges sometimes become less predictable over time, which accords to what she thinks is right about being a judge. For her, an interesting way to describe the art of being a judge is that one has to mentally go down from the bench and sit on both sides while leaving your own views on the bench.

- “How is the decision made on who sits on a case?”

For the Supreme Court of Canada, the cases are most typically heard with nine people and seldom with seven. Thus usually everyone is on a case. Generally speaking, there is no stacking the deck by the Chief Justice in the intermediate appellate courts. During her

time as a judge, there was a list of cases each week for every judge and she experienced it as very evenhanded.

- “How is the judicial receptivity towards training in regard to religious and sexual discrimination?”

“I believe, and others have said so, our system in Canada is great.” She explained that the National Judicial Institute’s courses are all taught by judges and, for quite some time now, social context training has been made part of each program. From her experience, there was some resistance at the beginning but not anymore. In the contrary, people are very open to such education. It is not mandatory, but very encouraged. However, she admitted that judges in Canada are of course not perfect in this regard. Some time ago, there was a discussion with a group of women, some of them judges, on the national radio about domestic violence. Some gave a shocking description of experience in the courtroom and she was taken aback on how this can still be in 2016. She summarized that there is both a very strong educational program and sensitivity, but nevertheless still a lot of work to be done.

- “In your view, do judges make or merely interpret the law? How did you personally see your work as a judge?”

For her, this is not a terribly useful distinction as a judge’s oath of office is to apply the law fairly and equally. It is inevitable as well as the nature of the law that cases are novel and pose questions that have not been answered. Therefore, there is no other way to describe the job of a judge as making law. In Canada, the Charter has undoubtedly changed the role of judges and some say that judges have become more activist. This accusation has always troubled her and she disagrees. As the government brought the Charter in effect, the judges did not seek this role – many did not want this role – and the responsibility was posed upon them. Given this responsibility, they have to exercise it. Therefore, the Charter has had a bigger influence on the art of being a judge than the Constitution itself. This is the mystery and beauty of legal development: things never go the way one predicts.

- “Ones own value system might conflict with the law. Have you experienced that a judge’s own religious belief clashes with the law?”

She started off by noting that there have been several developing issues on religion, for example if Muslim women may testify with their face covered. In her time, she never had the impression that religion played a major role in a judge’s decision.